Ineffective:

A CASE STUDY OF A PUBLIC DEFENSE SYSTEM IN CRISIS

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Executive Summary

IN 2020, THE OFFICE of Public Defense Services (OPDS)[1] asked the Oregon Justice Resource Center (OJRC) to audit the work of Jason Munn, a public defender with the 22nd Circuit Defenders consortium, after a complaint to the Oregon State Bar revealed that Mr. Munn had failed to request or review discovery in more than 96 appointed cases.

Over the course of three years, the FA:IR Law Project (FLP)—an OJRC program dedicated to addressing systemic failures that result in wrongful and unjust convictions and sentences—has reviewed these cases for relevant legal and factual issues that Mr. Munn should have identified, raised, and/or litigated. While our goal was to remediate harm through practical, efficient solutions that acknowledged the systemic failings at issue, this report illustrates the difficulties in achieving those solutions in a system that prioritizes finality over justice.

Without accessible systemic solutions, FLP worked directly with individual clients to understand their cases and develop opportunities for relief. These individual case reviews revealed significant issues with Mr. Munn's representation. FLP identified, for example, unlitigated suppression issues, mitigation evidence that could have been developed, restitution hearings that occurred without adequate notice to the client, and pleas without an appropriate factual basis. These reviews also revealed several overarching—and interrelated—patterns of

1 In 2023, SB 337 created the Oregon Public Defense Commission (OPDC) and removed the title of OPDS.

practice, beyond the failure to download discovery, that directly impacted Mr. Munn's ability to provide his clients with adequate representation. Mr. Munn failed, for example, to maintain a functioning legal office with appropriate administrative support and processes, to adequately communicate with clients, to engage in factual development, and to conduct the legal research necessary to develop reasonable litigation strategies.

Despite these issues, FLP was unable to take substantive remedial action in most cases. On a personal level, some clients found the investment or risk untenable. They noted, for example, the emotional toll of reopening a case and the possibility of reputational or financial harm that could come from a new investigation. On a systemic level, FLP encountered significant barriers to relief, including practical barriers to timely and consistent communication with Mr. Munn's clients; inefficiencies related to individual case reviews in a post-conviction posture without support from prosecutors willing to acknowledge systemic harm and engage in collaborative relief; and, importantly, the structural limitations and shortcomings that restrict access to—and the utility of—Oregon's current vehicles for relief. Thus, despite the identified issues, FLP ultimately filed three petitions for post-conviction relief, one motion for reconsideration under SB 819, and one motion to set aside the conviction. Expungement, litigation, and review are ongoing in seven cases.

In addition to documenting FLP's observations regarding Mr. Munn's practices, this report therefore illustrates the issues with individual case reviews in the face of systemic failure and the ways in which Oregon's lack of accessible remedies impedes access to justice. It also illustrates the ways in which Oregon's public defense system has failed its providers and their clients. As previous reports have noted, Oregon has not only created a complex bureaucracy that "hides a stunning lack of oversight"[2] but also disincentivized attorneys from providing effective assistance of counsel. As this review explores on an individual level, these structures and financial disincentives—that encourage the quick resolution of a high number of cases without appropriate investment in necessary overhead—have resulted in unchecked harm to vulnerable clients.

Structural reform is necessary. While Senate Bill 337, passed by the Oregon Legislature in 2023, takes steps towards rectifying many of the issues identified by outside organizations, it cannot alone ensure adequate representation for all indigent individuals. To ensure that SB 337 brings meaningful change, Oregon must first prioritize the prevention of harm. At a minimum, this means that OPDC must collect data that will allow it to evaluate attorney performance and identify problematic patterns of practice. It must improve oversight and training, and adequately compensate all attorneys and providers. It must eliminate financial disincentives and ensure that attorneys have the time and resources necessary to adequately represent their clients.

Lastly, Oregon must invest in meaningful remedies. This means recognizing the deep harm that systemic errors or patterns of misconduct can cause, and the ways in which our current remedies are unable to remediate this harm. It also means committing to either improving our current remedial vehicles or creating new ones. ■

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2 Sixth Amendment Center, *The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services* IV (2019).

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The Public Defense System

"[The right to counsel is] necessary to insure fundamental human rights of life and liberty.[1]"

DEFENSE ATTORNEYS ARE CRITICAL to a free and democratic society. Defense attorneys enforce constitutional rights, challenge illegal government practices and actions, investigate and expose mistakes and abuses, protect the innocent, and support people navigating an alienating and dehumanizing system. Public defenders, in particular, play a crucial role in protecting vulnerable communities by defending the rights of economically disadvantaged populations and challenging practices that target—and disproportionately incarcerate—Black, Indigenous, and Latinx communities.

1 *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (abrogated on other grounds).

In 2019, an independent report identified significant structural issues within Oregon's public defense system, noting a complex bureaucracy that "hides a stunning lack of oversight."

In Oregon, public defenders represent between 70 and 90% of all people charged with crimes.[2] In other words, public defenders make up the heart of the criminal and juvenile defense system. And that system is in crisis. In 2019, an independent report by the Sixth Amendment Center identified significant structural issues, noting a complex bureaucracy that "hides a stunning lack of oversight" and a compensation plan that disincentivizes attorneys from providing effective assistance of counsel.[3] In 2022, the American Bar Association released a report finding that Oregon had only one third of the attorneys needed for constitutionally adequate representation.[4] With an inadequate system and a shortage of public defenders, thousands of Oregonians waiting for trial—including many facing pretrial incarceration—have been deprived of counsel altogether.[5]

While the state legislature took meaningful steps towards addressing the structural issues plaguing Oregon's defense system in 2023, without significant funding and ongoing structural investment—prioritizing, for example, oversight, training, support, data collection, resource investment, and pay parity—Oregon will continue to fail its public defenders, their clients, and the residents of the state as a whole.

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2 *See* Aubrey Wieber, *Public Defenders Seek Reform of 'Unconstitutional' System*, Oregon Capital Insider, Mar. 27, 2019, https://www.oregoncapitalinsider.com/news/public-defenders-seek-reform-of-unconstitutional-system/article_014e88c3-9194-5ae7-911b-ba969b41252f.html (reporting estimate "that public defenders are used in 85 to 90% of all criminal cases"); Noelle Crombie, *Oregon's Chief Justice Sounds Alarm on Public Defense Crisis; Multnomah County DA Prosecuting Only 'Most Serious' Cases*, OregonLive, Apr. 08, 2022, https://www.oregonlive.com/portland/2022/04/oregons-chief-justice-sounds-alarm-on-public-defense-crisis-multnomah-county-da-prosecuting-only-most-serious-cases.html (reporting that, at the pretrial stage in 2021, 82% of defendants in felony cases were represented by a public defender and 70% of misdemeanor cases involved public defenders).

3 Sixth Amendment Center, The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services IV (2019) ("6A Report").

4 American Bar Association & Moss Adams, The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workloads Standards 5 (2022) ("ABA Oregon Report"). The report noted that while Oregon had the equivalent of almost 600 full-time public defenders, it would need nearly 1,300 more to meet the current case load. *Id.* In other words, with the current numbers, all public defense attorneys would need to work 26.6 hours per working day (defined as 249 days a year) to provide effective assistance of counsel. *Id.*

5 *See* Ken Sanchagrin & Bridget Budbill, Oregon Criminal Justice Commission, Senate Bill 337 (2023) Report Review of Oregon's Public Defense Unrepresented Persons Crisis Team Plans 13 (2023), https://www.oregon.gov/cjc/CJC%20Document%20Library/2023_09_30_CJC_SB337_CrisisPlansReport.pdf.

Case Study

IN 2020, THE OFFICE of Public Defense Services (OPDS) asked the Oregon Justice Resource Center (OJRC) to audit the work of a single public defender, Jason Munn, after a complaint to the Oregon State Bar revealed that Mr. Munn had failed to request or review discovery in more than 96 cases. Over the last three years, OJRC's FA:IR Law Project (FLP) has identified a number of additional issues with Mr. Munn's representation, including his failure to adequately communicate with clients, conduct investigations, and develop appropriate legal and factual issues. This review has also illustrated how the system's flaws not only failed to prevent poor representation through appropriate funding, support, and oversight, but disincentivized adequate representation altogether.

Mr. Munn's Work with the 22nd Circuit Defenders

The Consortium System

Since its establishment in 2001 and its operational launch in 2003,[6] OPDS[7] has procured trial-level representation of indigent defendants through contracts with various service providers, including non-profit public defense offices, law firms, individual attorneys, and, as relevant to this report, consortia.[8] A consortium is defined by OPDS as "a group of attorneys or law firms that is formed for the sole purpose of providing contract services to persons qualifying for court-appointed legal representation."[9] Consortia members maintain separate professional and business identities, work out of individual offices, and can retain private,

6 6A Report at 13-14.

7 OPDS administered the public defense system under the oversight and direction of the Public Defense Services Commission (PDSC), a state agency in the judicial branch of government. *Id*. In 2023, SB 337 changed the name of the PDSC to the Oregon Public Defense Commission (OPDC) and removed the title of OPDS. Staff of S. Comm. on Judiciary, 82nd Legis. Assemb., SB 337 A: Staff Measure Summary 1 (2023), https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureAnalysisDocument/78401. For the purposes of this report, FLP will continue refer to the administrative office as OPDS.

8 *See* 6A Report at 19. OPDS largely maintained the same "reliance on contracts with private law firms and consortia of lawyers in private practice" that existed before it was established. Paul Levy et al, Pub. Def. Servs. Comm'n and Office of Pub. Def. Servs., The Future of Public Defense in Oregon: The Discussion Continues 2 (2017).

9 6A Report at 25 n.153.

paying clients.[10] Indeed, consortium contractors are "expressly allowed to subcontract for or delegate any of the services required under [their] contract" without notice to or oversight by OPDS.[11]

In Crook and Jefferson counties, OPDS contracts with the 22nd Circuit Defenders consortium (22nd Defenders). In 2017, the 22nd Defenders began subcontracting with Mr. Munn for the representation of indigent clients in criminal, juvenile, and dependency cases.[12] An unsigned and undated contract between the 22nd Defenders and Mr. Munn, promising services through December 31, 2019, provided that Mr. Munn would handle an estimated 250 credits[13] per year, at a rate of $496.69 per credit,[14] for an estimated yearly compensation of $124,172.50. Out of this $124,172.50, Mr. Munn was responsible for all overhead expenses, including a physical law office, access to professional tools such as Westlaw or LexisNexis, professional liability insurance, a license to practice law, and "appropriate staffing."

The contract did not require that Mr. Munn hire administrative support. It did not require that he track or report his time or any actions taken in a case.[15] It did not require the use of case tracking or file management software. It did not offer any training, supervision, or support.

The Bar Complaints

On June 15, 2020, Jefferson County Chief Deputy District Attorney Brentley Foster filed a complaint against Mr. Munn with the Oregon State Bar (Bar). In this complaint, DDA Foster identified a number of issues related to Mr. Munn's representation of a client, C.S.[16] According to DDA Foster, C.S. was arrested in 2019. Around the time of C.S.'s arraignment, DDA Foster told Mr. Munn that she would not oppose a motion to determine fitness to proceed based on what she believed were apparent mental health issues. Despite C.S.'s pretrial detention, Mr. Munn did not file the required "boilerplate" motion until almost a month after C.S.'s first appearance.

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10 *Id.* at 25, 25 n.153.

11 *Id.* at 33 (internal quotation marks omitted, alteration in original). The 6A Report also noted that OPDS did "not have any way of knowing who the attorneys are or how many attorneys are providing the right to counsel on any given day." *Id.* at 34.

12 Between 2005 and 2017, Mr. Munn worked as a deputy district attorney and chief deputy district attorney in Malheur County.

13 Under the case credit system, each case was assigned a set number of "credits." 6A Report at 120. The number of credits was determined by various factors, including the type of case (*e.g.*, criminal, probation violation, contempt, juvenile, etc.), the allegations in the charging instrument (*e.g.*, number of counts, severity of counts, etc.), and the timing of appointment (*e.g.*, was the attorney appointed at arraignment, did the client enter diversion, was the case dismissed and reinstated, etc.). *Id.* at 120-24. Ultimately, the credit system allowed OPDS to pay "most contractors a fixed fee per case without regard to how much or how little time the case require[d] of the attorney." *Id.* at V. In 2021, OPDS moved away from the case credit system to a "Full Time Equivalent" model. ABA Oregon Report at 12-13.

14 Calculated after deducting the consortium's administrative and administrator expenses. Before these initial deductions, each credit was valued at $526.69.

15 In 2020, OPDS began providing the 22nd Defenders with additional funds to use defenderData, a case management system, to track and report time.

16 FLP did not review C.S.'s case or represent her in any capacity.

"Mr. Munn's practice did not include reviewing discovery if a client reported that they wanted to resolve the case with a plea agreement. Rather, Mr. Munn would only review discovery if the client reported they wanted a trial."

— Deitrick Bar Complaint

In 2020, C.S. was arrested on a second case. DDA Foster again informed Mr. Munn that the state would not oppose a conditional release from pretrial custody if C.S. could secure alternative housing and treatment. Instead of arranging for C.S.'s conditional release, however, Mr. Munn informed the court that C.S. was ready to accept the state's plea offer. At the plea hearing, it became clear that Mr. Munn had failed to adequately prepare for the plea: C.S. had not, for example, completed the requirements for entry into mental health court, and Mr. Munn did not know whether she had a qualifying diagnosis. As Ms. Foster summarized,

> "Had the matter proceeded [on that date], [C.S.], a 46-year old woman with no prior criminal history, significant mental illness, and limited resources in this community would have been sentenced and released with no housing, phone, or identification and no easy way to recover those items without immediately violating the terms of her probation, and her lawyer made virtually no discernible effort to try to prevent that outcome."[17]

Concerned with Mr. Munn's representation, DDA Foster reviewed the state's case tracking system and found that Mr. Munn had only downloaded a single item of discovery in C.S.'s case.[18] He had not downloaded or reviewed any police reports, recorded grand jury testimony, jail calls, or statements made by his client or the alleged victim before scheduling a plea and sentence.

DDA Foster ultimately identified 96 cases in which Mr. Munn had not downloaded or reviewed complete discovery.[19] In 37 of those cases, Mr. Munn had failed to obtain most or all of the case discovery.[20] In at least two of those cases, the client was sentenced

17 Foster Bar Complaint at 3.

18 The Jefferson County District Attorney's office uses the Karpel system. According to DDA Foster, this system allowed her to identify all cases in which Mr. Munn was assigned as counsel and had not requested or downloaded discovery. *Id.* at 4.

19 *In re Munn*, Nos. 21-39, 21-68, & 22-38, at 1 (2023) (Trial Panel Opinion).

20 *Id.*

to prison. When DDA Foster advised the Crook County District Attorney, Wade Whiting, of her findings, DA Whiting discovered additional Crook County cases in which Mr. Munn had not downloaded or reviewed the complete case discovery.

On July 24, 2020, Eric Deitrick, general counsel at OPDS, filed a second bar complaint against Mr. Munn.[21] In this complaint, Mr. Deitrick reported learning "that Mr. Munn's practice did not include reviewing discovery if a client reported that they wanted to resolve the case with a plea agreement. Rather, Mr. Munn would only review discovery if the client reported they wanted a trial."[22]

In 2020, Mr. Munn's contract with the 22nd Defenders was terminated, and his cases reassigned. OPDS contracted with OJRC to conduct an audit of Mr. Munn's cases.

On June 13, 2022, the Bar filed an Amended Formal Complaint[23] against Mr. Munn. The Bar alleged that Mr. Munn had violated the Oregon Rules of Professional Conduct by failing to provide competent representation,[24] neglecting a legal matter,[25] and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decision regarding the representation.[26]

On August 23, 2023, after a two day trial in March, the Disciplinary Board found that the Bar had proved the charged misconduct by clear and convincing evidence.[27] Weighing the mitigating factors presented by Mr. Munn—including the absence of a prior disciplinary record and "personal or emotional problems" stemming from family issues and abuse of alcohol—against the scope of the wrongdoing and the vulnerability of indigent defendants facing criminal charges, the Board suspended Mr. Munn from the practice of law for 24 months.[28]

On September 22, 2023, Mr. Munn appealed that decision to the Oregon Supreme Court. The appeal is ongoing.

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21 Deitrick Bar Complaint.

22 *Id.* at 2.

23 The Bar's Client Assistance Office is responsible for the intake and evaluation of complaints filed by the public. Mark A. Turner, *What Happens When Lawyers Face a Formal Complaint? Anatomy of a Disciplinary Trial*, Oregon State Bar Bulletin, May 2020, at 11. If the Client Assistance Office finds "sufficient evidence to support a reasonable belief that misconduct may have occurred," the complaint is then referred to the Disciplinary Counsel's Office. *Id.* The Disciplinary Counsel's Office presents the results of its investigation to the State Professional Responsibility Board (SPRB). *Id.* If the SPRB determines that probable cause exists to believe that misconduct has occurred, the "SPRB decides whether to dismiss a complaint, order more investigation, admonish the attorney, refer the attorney to the State Lawyers Assistance Committee, or file a formal complaint." *Id.* If a formal complaint is filed, the parties proceed through the discovery process to settlement or trial. *Id.*

24 In violation of Oregon Rules of Professional Conduct ("ORPC") 1.1.

25 In violation of ORPC 1.3.

26 In violation of ORPC 1.4(b).

27 *In re Munn*, *supra* note 19, at 2.

28 *Id.* at 23, 25.

Mass Case Review

OVER THE COURSE of three years, FLP has reviewed Mr. Munn's closed cases for relevant legal and factual issues that should have been identified, raised, and/or litigated. This process included an initial review, an initial contact (or attempted contact), a comprehensive review, a comprehensive discussion of issues and options, and further action or litigation where appropriate and desired.

At the outset of this project, FLP intended to review all cases in which (1) a Munn client had received a prison sentence, (2) a Munn client suffered or could suffer adverse immigration consequences, and/or (3) some or all of the case discovery was not reviewed. Through collaboration with local District Attorneys and the judiciary, FLP hoped to reach practical solutions to remediate any harm caused by Mr. Munn's actions or inactions. As discussed below, a number of factors, including a lack of cooperation from the DA's offices, ultimately narrowed the scope of this review.

Case Review Methodology

FLP requested the original case discovery from the Crook and Jefferson District Attorneys in 103 cases.[29] Upon receiving the case discovery, FLP completed an initial review. This initial review, conducted prior to client[30] contact, was generally limited to a brief assessment of the discovery and court records for any obvious legal issues.

29 These 103 cases included cases where (1) Mr. Munn had failed to download the complete case discovery or the client was incarcerated on a case in which they were represented by Mr. Munn and (2) no attorney was currently associated with the case—for example, via an appeal, PCR, or open probation violation. The DAs did not ultimately provide discovery in all 103 cases.

30 For consistency purposes, this report uses the term "client" to refer to all former Munn clients. The term does not by itself indicate an attorney-client relationship between FLP and any individual previously represented by Mr. Munn.

Following the initial review, FLP attempted to contact each client. This attempted contact included at least one letter and at least three phone calls (at least one month apart, at different times of the day, using different databases to obtain a recent phone number). Where appropriate, FLP also reached out through relatives, social media, and an investigator.

Once client contact had been established, any issues identified in the initial review were discussed. If the client indicated that they wanted the assessment to proceed, FLP completed a comprehensive and systemic review of the case. For consistency and thoroughness, FLP relied on a standardized checklist (or more accurately, a fillable outline) to complete this process.[31]

FLP's checklists directed the consideration of, among other things, the following issues:

- Procedural Posture: Did Mr. Munn represent the client pretrial or on a probation violation? Did Mr. Munn resolve the case? Did the client appeal the case or file for state post-conviction or federal habeas relief?
- Mr. Munn's Actions: Did Mr. Munn have a paper or electronic file for the case? What information appeared in, or was missing from, the paper or electronic file? Was there a release hearing? Did Mr. Munn hire an investigator, expert, or anyone else to assist with the case? Did Mr. Munn submit any requests for Non-Routine Expenses (NREs)[32] to OPDS? Did Mr. Munn procure or submit a mental health or other evaluation? Did Mr. Munn file any motions? Did Mr. Munn take the case to trial? Did Mr. Munn create any sort of sentencing work up or mitigation packet?
- Outcome: Was the case resolved by plea or trial? What benefit did the client receive in exchange for their plea? Did the prosecutor identify and/or file sentencing enhancements? What was the factual basis for each enhancement? What charges were dismissed? What other cases were dismissed? What was the client's criminal history? Was that criminal history accurate? Where did the client fall on the sentencing guidelines?
- Legal Procedural Issues: Did the DA file an information or indictment? Was the indictment legally sufficient? Was a grand jury convened? Who testified at the grand jury hearing?
- Timing: Were there any speedy trial issues? When was the client arrested? When was the client arraigned? Was the client released pretrial or held in custody? When did the case resolve? Were any speedy trial waivers filed?

31 This checklist was inspired by, and based in part on, the San Francisco Public Defenders' Checklist Project Pilot Study. *See* Elise Jensen et al., Center for Court Innovation, Consistency During the Court Process: The San Francisco Public Defenders Checklist Project Pilot Study (2018), https://www.innovatingjustice.org/sites/default/files/media/documents/2018-07/consistencyduringthecourtprocess.pdf; Emily LaGratta et al., Center for Court Innovation, Defender Checklists: A Toolkit for Practitioners (2018), https://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/Toolkit-San-Francisco-Defender-Checklist-FINAL.pdf. Checklists are an evidence-based tool that improve efficiency, build-in consistency, and ensure that critical components of a case are not missing or overlooked. Jensen et al., at 1-3.

32 OPDS is required by statute to fund non-routine case expenses—*i.e.*, "expenses for investigation, preparation and presentation of the case for trial, negotiation and sentencing"—when appointed counsel presents facts demonstrating that those services are necessary and reasonable. ORS 135.055(3).

- Search and Seizure Issues: Was there a search? Car, person, house, other? What was the basis of that search? Was there a search warrant? What factors did the police rely on for probable cause? For reasonable suspicion? What does the case law say about these particular factors? Did the client consent to the search? Did anyone else consent to the search?
- Client Statements: Did the client make any statements? If yes, where was the client when they made the statement? Who did they make the statement to? What was the content of that statement? When did that statement occur? Did the client receive *Miranda* warnings?
- Criminal Elements: What are the elements of the charge? What does the case law say about each element and the state's burden? What specific pieces of evidence support each charge? Toxicology reports? DUII breath tests? Eyewitness identification? Witness statements? 911 calls? Jail calls? Other?
- Witnesses: What do we know about each witness? Criminal history? Relevant impeachment evidence? Ever represented by Mr. Munn? Relevant statements?
- Defenses: What legal defenses might be available to the client? Does the client have any mental health issues? Is there any information regarding intoxication or other altered states? What does the client say happened? What evidence might support the client's story?
- Collateral Consequences: Is the client a US citizen? If not, what advice did the client receive about potential immigration consequences? What is or could be the impact of their conviction on their immigration status? Was the client ordered to pay restitution? How much restitution was ordered? Was there a hearing before restitution was ordered? Was the client present at the hearing?

FLP's review and analysis required taking some or all of the following actions:

- Reviewing all discovery provided by the District Attorney.[33] This included reviewing police reports, grand jury recordings, toxicology reports, body camera footage, security footage, etc.
- Discussing the case with the client. This included discussing Mr. Munn's actions or inactions, factual discrepancies, case context, mitigation information, etc.
- Obtaining and reviewing additional records. These included court documents such as plea petitions, waivers, and filed sentencing enhancements; audio recordings of court hearings such as pleas, trials, and sentencings; 911 calls; medical records; public records; jail policies; published media, etc.
- Conducting additional investigation. This included contacting witnesses, family members, and victims where appropriate.
- Conducting legal research.
- Considering and discussing available remedies.

After a thorough review, if FLP did not see a viable issue, we contacted the client, discussed our conclusions, and closed the case. For cases with a viable issue, we contacted the client to discuss

33 Occasionally, FLP was able to obtain discovery from a former attorney or investigator as well.

available options and avenues of relief. In general, these avenues included: a petition for post-conviction relief, request for clemency, joint motion for relief under SB 819, informal negotiations with the District Attorney's office, and expungement. As part of these discussions, FLP informed clients of potential risks related to any further action.

Case Review Outcomes

At this time, FLP has completed an initial review of 106 cases in which we were able to obtain discovery.

After the initial review, FLP attempted to contact each client. FLP did not take affirmative action in any case where we were unable to contact a former Munn client. Ultimately, we have been unable to contact 16 clients. Where possible, we sent closing letters to every unreachable client with our contact information and a limited open offer for review.

Of the clients we were able to reach, eight indicated that they did not want a review.

For those who wanted a review, FLP undertook the process set forth in the Case Review Methodology section above.

In these reviews, FLP identified a number of distinct issues. For example, FLP identified motions to suppress that could have been filed, mitigation evidence that could have been developed, restitution hearings that occurred without adequate notice to the client, and charges without an appropriate factual basis. Nevertheless, the majority of these issues did not result in further action. In some cases, FLP was either unable to identify an appropriate or available remedy, or unable to maintain the contact necessary for further action. In others, clients found the investment or risk untenable. Clients noted, for example, the emotional toll of reopening a case, and the reputational and financial harm that could come from a new investigation. Some clients worried about the impact that litigation might have on other cases. Some clients concluded that the potential relief available through post-conviction proceedings—typically, a new criminal trial—was too limited or too risky. Many were simply overwhelmed by the current state of their lives and the competing hardships of poverty, addiction, houselessness, divorce, custody disputes, etc.

Ultimately, FLP filed three petitions for post-conviction relief, one motion for reconsideration under SB 819, and one motion to set aside the conviction. Expungement, litigation, and review are ongoing in seven cases.

Deficiencies in Practice

FLP has identified several overarching—and interrelated—categories/patterns of practice, beyond the failure to download discovery, that directly impacted Mr. Munn's ability to provide adequate representation in many, if not most, cases.[34] As discussed below, these categories include the failure to adequately develop case facts, communicate or engage with clients,

34 Given the constraints of client confidentiality, FLP is limited in the case details it can disclose in this report.

ensure proper case administration, and conduct appropriate legal research.

Standards for Adequate Representation in Criminal Cases

In evaluating Mr. Munn's performance, FLP relied on constitutional standards, relevant statutes, caselaw, ethical rules and opinions, expert guidelines and best practices, training materials and standards, law review articles, and treatises.

Constitutional standards set the minimum, or the floor, of adequate representation in a criminal case. Under the Sixth Amendment to the U.S. Constitution and Article I, section 11, of the Oregon Constitution, people charged with crimes are entitled to the effective representation of counsel.[35] In the specific context of post-conviction proceedings, ineffective assistance of counsel (IAC) is measured against "an objective standard of reasonableness."[36] While, theoretically, this standard is based on "prevailing professional norms," the "strong presumption" of adequate representation, a "highly deferential review," and an aversion towards overturning final judgments has resulted in a pronounced resistance towards findings of deficient representation.[37] Courts have, for example, denied IAC claims in cases where the attorney appeared drunk or slept though trial.[38] Unsurprisingly, critics often argue that these constitutional standards are an empty vessel that "foster[] tolerance of abysmal lawyering."[39]

As advocates have noted, this constitutional analysis also fails to adequately address "harms suffered from inadequate representation during pre-trial and pre-conviction proceedings, such as wrongful denial of bail or unnecessary pre-trial incarceration[.]"[40] In other words, not only does the constitutional standard require too little of attorneys generally, but because of the specific context in which it can be raised—and the showing of prejudice it requires—it fails to recognize many of the ways in which inadequate representation can negatively impact clients and their cases. Thus, constitutional minimums, set forth by caselaw, do not alone provide an appropriate or effective way to evaluate an attorney's performance.

Evaluating an attorney's performance therefore necessitates a wide-ranging review of available resources. Together, these resources provide a holistic picture of the actions an attorney can, should, and must take to provide minimally adequate representation.

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35 *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Krummacher v. Gierloff*, 290 Or. 867, 872 (1981).

36 *Strickland*, 466 U.S. at 688.

37 *Id.* at 688-89; *see generally*, Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999) (describing and providing examples of how the courts have applied the *Strickland* standard).

38 *See, e.g.*, *United States v. Petersen*, 777 F.2d 482, 484 (9th Cir. 1985) (no IAC where court found that even if the attorney slept during the trial, he did not sleep through a "substantial" portion of trial); *People v. Garrison*, 765 P.2d 419 (Cal. 1989) (unsuccessful *Strickland* claim despite undisputed allegations that attorney consumed large amounts of alcohol each day of the trial and was, in fact, arrested on his way to court with a .27 BAC during the second day of voir dire); *see also McFarland v. Scott*, 512 U.S. 1256, 1259-60 (1994) (Blackmun, J., dissenting from denial of certiorari) (describing the "impotence of the *Strickland* standard").

39 William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm & Mary Bill RTS J. 91, 94 (1994).

40 Brief for The Innocence Network and The Pennsylvania Innocence Project as *Amici Curiae* Supporting Appellants at 4, *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016) (NO. 57 MAP 2015, NO. 58 MAP 2015).

Mr. Munn did not download and review complete discovery in at least 96 identified cases.

Failure to Download and Review Complete Discovery

A defense attorney who fails to review discovery places their clients at a fundamental, structural disadvantage in criminal proceedings.

In Oregon, the state has a statutory and constitutional duty to provide criminal defendants with pretrial discovery.[41] This discovery includes police reports, written or recorded statements made by the defendant or any witnesses, results of scientific tests or experiments, prior criminal convictions, and any exculpatory evidence.[42]

The importance of this discovery is clear:

> "From the moment a criminal investigation begins, the accused is disadvantaged by lack of access to crime scene evidence and investigative resources. By the time a suspect is accused or charged, the crime scene has usually been fully processed by police and relevant evidence has been taken into police custody. Criminal defendants lack both access to the evidence and to police assistance in developing additional evidence. If the crime scene is to yield evidence of innocence, the defendant typically will have to rely on police and prosecutors to find, collect, develop, and disclose that evidence."[43]

Because of this inherent structural disadvantage, prosecutorial "[v]iolations within the discovery process risk violating constitutional rights, producing wrongful convictions, and creating a justice system whose goal is conviction rather than true justice."[44]

A defense attorney's failure to review discovery risks the same harms. Without discovery, a defense attorney cannot understand the factual basis for the charges at issue. They cannot develop a theory, prepare a defense, or thoroughly investigate the case. While a defendant may possess some relevant information—such as their own recollection of what occurred—other vital evidence—such as the full names and addresses of potential witnesses or the results of scientific tests and experiments—will remain beyond their knowledge or control.

41 ORS 135.815; *State v. Bray*, 363 Or. 226, 251 (2018). Troublingly, despite this constitutional and statutory duty, prosecutors continue to charge public defenders for the provision of these materials. Indeed, according to staff, OPDS spends roughly $6 million every two years for this discovery. The Associated Press, *Oregon Public Defense Agency Agrees to Resume Paying Prosecutors Discovery Fees*, ktvz.com, Mar. 22, 2022, https://ktvz.com/news/oregon-northwest/2022/03/22/oregon-public-defense-agency-agrees-to-resume-paying-prosecutors-discovery-fees/.

42 ORS 135.815.

43 Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 898 (2008).

44 Lauren Calef, *Honoring Defendant Constitutional Rights: Dismissal of Criminal Charges as a Remedy for Egregious Discovery Violations*, 68 Drake L. Rev. 663, 665 (2020).

By failing to download discovery in at least 96 cases identified by the DA's office,[45] Mr. Munn failed to meet the minimal requirements for adequate representation.

Failure to Engage in Factual Development

Factual development follows a review of the discovery. As the Supreme Court has emphasized,

> "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."[46]

To this end, the Supreme Court has held that counsel has a constitutional duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[47]

Statutes and guidelines reiterate this duty.[48] As the ABA has noted, this duty to investigate "is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt."[49]

An investigation can provide information necessary to mount an effective defense or challenge the state's case. It can reveal inconsistencies and potential avenues for impeachment. It can lead to the discovery of new witnesses and new evidence. It can raise issues that provide a basis for excluding damaging or unreliable evidence. It can identify mitigating evidence relevant to negotiations or sentencing. Without an adequate investigation, attorneys cannot make basic and necessary strategic litigation decisions.

While attorneys can perform some investigative tasks, doing so themselves is often inadvisable and inefficient.[50] Investigators are therefore instrumental in the development of a case. Investigators have specialized skills and training and are often more experienced and efficient than attorneys at performing critical tasks, such as identifying and gathering evidence, and interviewing witnesses. In fact, studies have "found that institutional resources," specifically, the availability of investigators, "were the most prevalent explanation for the variation in effectiveness scores

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45 In its review of Mr. Munn's paper files, FLP identified evidence that Mr. Munn failed to review discovery in additional cases. Specifically, FLP found sealed envelopes with CDs containing discovery and confirmed with the DA's office that this discovery had not been provided to Mr. Munn in any other form.

46 *United States v. Nixon*, 418 U.S. 683, 709 (1974).

47 *Strickland*, 466 U.S. at 691.

48 *See, e.g.*, ORS 135.425(2) ("To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by the defense counsel or the defendant in reaching a decision.").

49 Criminal Justice Standards: Defense Function 4-4.1(b) (Am. Bar Ass'n 2017) ("ABA Criminal Justice Standards").

50 For example, attorneys cannot effectively interview witnesses alone because a third party—such as an investigator—will be needed for impeachment purposes at trial.

among defender programs."[51] In other words, the availability of investigators is frequently tied to courtroom success.[52]

There is no indication of when, how, or if Mr. Munn engaged in factual development or investigation. Mr. Munn did not employ an in-house investigator and requested investigation assistance from OPDS in only seven cases. FLP found no information (such as contemporaneous notes or memos) in the case files to suggest he ever spoke with witnesses or sought independent evidence. Notably, FLP found no record of Mr. Munn filing *any* substantive legal motions, *e.g.*, a motion to suppress, that would have been based on a factual investigation.

In fact, Mr. Munn explicitly stated that he did not believe investigation was necessary in many cases.[53] This appeared to be based, in part, on his beliefs that (1) low-level misdemeanors do not warrant the investment and (2) police reports can be relied on for a full, accurate, "true" account of what occurred in most cases.

The Minimization of Misdemeanor Cases

Misdemeanors are often deprioritized or minimized by defense attorneys and the system at large. As scholars have noted,

> "Current US law barely acknowledges the broad punitive impact of the misdemeanor experience. Criminal law draws a line between formal legal "punishment"—the jail time, probation, and fines imposed by a judge when someone is convicted—and all the other "collateral consequences" of that conviction. But in the misdemeanor arena such legal distinctions obscure the sprawling reality of the punishment experience. The full impact of a misdemeanor begins long before people are convicted and ends long after they have served their sentences. It can amount to a crushing burden, heavier than the punishment ordered by the court and often wildly disproportional to the seriousness of the offense."[54]

Misdemeanor convictions carry significant consequences. Even a few days or months in jail can destroy financial and familial stability through, for example, the loss of a job, missed housing payments, or the removal of children. Courts can impose thousands of dollars in fines, fees, and restitution. Probation, often viewed as a "minor" or "lesser" consequence, can last for years; result in additional, unanticipated jail time; and involve onerous and expensive conditions, untethered to the science of recidivism.[55]

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51 Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 Hastings L.J. 1031, 1098 (2006).

52 *Id.*

53 Bar Deposition at 34-35. In fact, Mr. Munn appeared to suggest that his review of a probable cause affidavit constituted an investigation:

A. "Well, for example, on a C misdemeanor, if I walked into the jail and the guy handed me a PC affidavit nd an early disposition offer and said, "I wanted to take this," I would quickly review -- well, I guess I would do an investigation. I would review the PC affidavit, which often mirrored a full-blown police report, based on my experience." *Id.* at 35.

54 Alexandra Natamoff, Punishment Without Crime 20 (2018).

55 Anecdotally, public defenders in Oregon have reported probation conditions that require significant financial investment, such as counseling, interlock ignition devices, and polygraphs; geographic restrictions, such as exclusions from Portland's "Prostitution Free Zones;" and public transportation limitations.

Even a few days or months in jail can destroy financial and familial stability.

"Collateral" consequences are also severe. A misdemeanor conviction can, for example, lead to the suspension, denial, or loss of low-income housing, public benefits, food stamps, financial aid, a driver's license, and professional licenses. Serious immigration consequences, such as deportation or the inability to obtain citizenship, can also arise. These consequences are widespread, with one database listing "nearly 9,000 additional statutory consequences that can kick in following a misdemeanor conviction."[56]

The systemic impact of these convictions cannot be ignored. Misdemeanor offenses make up an estimated 80% of the criminal docket.[57] As the "ratcheting dynamics" of a misdemeanor conviction grow—with police more likely to arrest than ticket individuals with prior low-level convictions, prosecutors more likely to seek bail or charge more serious crimes, and judges more likely to impose longer sentences—harm spreads through generations and across communities.[58] Indeed, as one academic summarized, the "deleterious effects [of misdemeanors] on the stability and strength of communities" is clear, as law enforcement uses these charges to "justify intensely monitoring and harassing certain marginalized communities, and prosecutors disproportionately and selectively charge members of those same communities."[59]

Mr. Munn's deposition testimony illustrates how dismissive some defense attorneys can be of these charges and convictions:

"Q. Did you have a practice of requesting discovery in every one of your cases?"

"A. No. Admittedly, like those B, C misdemeanors, and if I had a PC affidavit and a client was pushing for a negotiation and there was sufficient information in·those PC affidavits, I would -- I -- I admit that I would rely on those to -- to accomplish the client's goal."[60]

56 Natamoff, *supra* note 54, at 238.

57 *See* Press Release, New York University, Prosecuting Nonviolent Misdemeanors Increases Rearrest Rates, New Study Shows (Mar. 29, 2021), https://www.nyu.edu/about/news-publications/news/2021/march/prosecuting-nonviolent-misdemeanors-increases-rearrest-rates--ne.html.

58 Natamoff, *supra* note 54, at 34-35. For example, even low-level drug convictions can result in the eviction of families from public housing, even when the offender does not hold the lease.

59 Irene Oritseweyinmi Joe, *When the Public Defender Falls Short*, 54 U.C. Davis L. Rev. 1763, 1765, 1768 (2021) ("We cannot deny that entire communities of African American and Latinx people exist in the shadows of an institution that literally picks them up out of their homes and out of their communities, out of their jobs, out of their schools, and transplants them to an entirely new environment that is under constant surveillance. And that happens regardless of whether an arrested or cited person is even sent to an actual jail or prison. The criminal justice system uses electronic surveillance, monitoring through probation departments, or even non-incarceration-type programs that require people to attend classes or submit to drug tests, and report on their job status and/or living situation in a way that controls their engagement with the world.").

60 Bar Deposition at 85.

A defendant is entitled to adequate representation regardless of charge. All charges require appropriate investigation based on the facts of the case. In failing to recognize the significance and impact of these misdemeanors, Mr. Munn failed to provide his clients with constitutionally adequate representation.

Failure to Question Police Narratives

Mr. Munn failed to recognize the importance of challenging police narratives through investigation:

> "I mean, I've been in this game for a while, both as a prosecutor and a public defender. I've yet to come across the police report, I guess, where the officer is throwing away their -- their years of retirement benefits, health benefits over a DUII case stop. So -- but for the most part, I was fairly confident."[61]

This perspective is not rooted in science or reality. Research has confirmed that police are not more observant or better at detecting deception than civilians, and do not provide more accurate eyewitness accounts.[62] Instead, they suffer the same "perceptual and memory distortions" under stress,[63] and often have ready access to new sources of information—such as another officer's report or body camera footage—that can unintentionally impact and distort their memories.[64]

Moreover, police narratives may also be intentionally distorted:

> "Scholars have found that law enforcement officers frequently lie to their own superiors in police reports and even perjure themselves in testimony at criminal trials. The general consensus among scholars notes the pervasiveness of police perjury at suppression hearings. Indeed, substantial evidence demonstrates that police perjury is so common that scholars describe it as a 'subcultural norm rather than an individual aberration.'"[65]

Significantly, Mr. Munn's statements not only reveal a fundamental misunderstanding of the reality in which police operate, but a fundamental misunderstanding of the role and importance of a defense attorney. The legal system is *adversarial*; it relies on defense attorneys to develop facts that police may have missed, and it requires that they adequately test the state's case. As one law review article explained,

> "prosecutors at suppression hearings often attempt to persuade the court of the legality of the officers' actions by

61 Bar Deposition at 82.

62 Kathy Pezdek & Daniel Reisberg, *Psychological Myths About Evidence in the Legal System: How Should Researchers Respond?* 11 J. Applied Res. Memory & Cognition 143, 144-45, 149 (2022).

63 *Id.* at 146.

64 *Id.* at 148-49.

65 Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 Suffolk U. L. Rev. 445, 448 (2008). Indeed, this reality is no secret, with examples frequently published throughout the nation. *See, e.g.*, Michelle Alexander, *Why Police Lie Under Oath*, N.Y. Times, Feb. 2, 2013, https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html; Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. Times, Mar. 18, 2018, https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html; Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?* Slate, Aug. 4, 2020, https://slate.com/news-and-politics/2020/08/police-testilying.html.

repeating the same rhetorical question: why would the officer lie? A good opponent, however, should be quick to cite a number of reasons, for police officers often have an incentive to lie at such hearings. It may be in the officer's penal or pecuniary interest to lie, or, alternatively, an officer may face enormous pressure from his or her peers to distort the truth. Or an officer may be motivated to lie for less invidious, even noble, reasons. For example, a police officer may subjectively believe that lying at suppression hearings is an acceptable practice because it facilitates the admission of evidence that helps get dangerous criminals off of the streets (a primitive sort of utilitarian, ends-justify-the-means moral calculus). In this vein, H. Richard Ulliver, a former prosecutor, submits that police perjury manifests itself most frequently in the form of "the instrumental adjustment": "A slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result."[66]

Without the necessary skepticism, it is perhaps unsurprising that some clients reported feeling that Mr. Munn acted more like a prosecutor—with the goal of a quick and easy plea—than a defense attorney.

The Failure to Investigate Can Have Real Consequences

When questioned about the case of W.A., for example, Mr. Munn explained:

"Q. Did you interview witnesses or not interview witnesses about [W.A.]'s case?"

"A. He didn't give me any time to interview anyone. And to be honest with you, I don't know there'd any -- be any value to witnessing two drug addicts."[67]

"[A]gain, you're looking at your potential witnesses are people who actively use drugs. How certain can I be that what they say to the police is the same as what they're going to be? And then who knows what the heck they're going to say on the stand. Are they going to be high? Are they going to be withdrawing, or are they going to be, what you're hoping for, in a lucid state? And then we don't even know what their motives are at that moment, because, again, an active drug user is living moment to moment."[68]

Not only does this testimony reveal Mr. Munn's bias, but it reveals a fundamental misunderstanding of the importance of information learned during an investigation. There was no physical or forensic evidence in W.A.'s case. Had Mr. Munn interviewed the witnesses at issue, as did FLP, he would have uncovered: (1) significant impeachment evidence that could have been used to discredit the sole eyewitnesses, and (2) exculpatory evidence that supported viable legal defenses and undercut elements on which the state had the burden at trial. With this information, Mr. Munn could have either presented his own affirmative narrative or

66 Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185, 1230-31 (2010).

67 Bar Deposition at 91.

68 Bar Deposition at 81.

significantly undercut the state's version of events.

In another illustrative case, Mr. Munn failed to identify or investigate clearly relevant mitigation evidence:

> "Well, I -- I wasn't aware that [the client] had any current mental health providers at the time. The information she provided to me is that she suffered from a traumatic brain injury, a TBI she referred it to, and that she would lose track of time and not remember those incidents. And it was because of an incident of abuse she suffered in the past. So she was very adamant she didn't have mental health issues."[69]

Mental health issues, traumatic brain injuries, and a history of abuse can constitute powerful mitigation evidence.[70] Mr. Munn could have used this information during plea negotiations, to assist his client in obtaining treatment or services, or during sentencing. Without recognizing the significance of this information, Mr. Munn failed to act as a effective advocate.

Failure to Adequately Engage with Clients

> "Quality representation inherently relies on developing rapport through trust, honesty, and fostering adequate frequency of quality attorney-client communication."[71]

Attorney-client communication is a critical component of legal representation.[72] As a baseline matter, communication is necessary to establish trust. Without trust, public defenders may never learn the traumatic, embarrassing, or difficult information often necessary to provide accurate legal advice, develop avenues of investigation or legal theories and defenses, make strategic litigation decisions, or prepare mitigation for a plea or sentence. As one public defender explained,

> "A huge piece of public defense is listening to really painful stories of experiences. Not just the facts of a particular case, which definitely can include someone being very severely harmed … but it's also the background information when we get to know the people that we represent and their families and communities."[73]

69 Bar Deposition at 123.

70 As the Supreme Court has acknowledged, mitigation evidence can be vital to effective representation. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

71 Christopher M. Campbell & Kelsey S. Henderson, *Bridging the Gap Between Clients and Public Defenders: Introducing a Structured Shadow Method to Examine Attorney Communication*, 43 Just. Sys. J. 26 (2021).

72 *See, e.g.*, *Ching v. Lewis*, 895 F.2d 608, 609-610 (9th Cir. 1990) ("The opportunity to communicate privately with an attorney is an important part of [] meaningful access [to the courts]."). *See also* Model Rules of Prof'l Conduct r.1.6, 1.9 (Am. Bar Ass'n 2020); ABA Criminal Justice Standards 4-1.3; Guidelines for Legal Defense Systems in the United States (Black Letter) § 5.10 (Nat'l Legal Aid & Def. Ass'n 1976), https://www.nlada.org/defender-standards/guidelines-legal-defense-systems/black-letter.

73 Beatrice Ferguson, *The Relentless Mental Toll of Public Defense*, Slate, Jan. 4, 2023, https://slate.com/technology/2023/01/public-defender-mental-health-trauma.html (alterations in original).

Attorneys also have an ethical duty to keep clients informed of important case developments, respond to requests for information, and consult with clients on decisions relating to control and direction of the case.[74] In order to help clients make critical case decisions,[75] attorneys must fully understand a client's goals and needs, as well as the relevant case facts and context. National workload studies therefore estimate that about one third of an attorney's time should be spent on client communication or related matters.[76] To this end, the National Legal Aid and Defender Association (NLADA) recommends that defense agencies track the number, location, and duration of in-person visits, phone calls, and emails.[77]

Mr. Munn did not engage in adequate client communication. According to his clients, Mr. Munn would not answer his phone or return calls; did not respond to letters; frequently missed meetings; and, in some cases, spoke with clients only once or twice, in court, immediately before entering pleas.

FLP did not find any logs or records of written or verbal communication in any client files. Instead, FLP found, in the form of unopened letters, evidence that Mr. Munn often ignored his clients' attempts to communicate. In fact, Mr. Munn admitted that his client communication was often limited, especially with clients held in jail before trial:

> "A. Yeah. I would spend less time with clients, because I didn't like being trapped in that room. I had no -- no access to family members. So I would limit the time I spent with clients face-to-face at the jail. Probably my clients who were out of custody got a little bit more of my time at the time.
>
> Jail -- for whatever reason, jail calls were hard to get through at the Jefferson County jail. We had to pay for them. And I was instructed not to utilize the phone system, because the calls were recorded and would be used against the clients.[78] So probably just having that interaction probably did affect some of my relationship with my clients, but certainly not to the point where I did not provide them competent representation or that I neglected their cases or didn't have

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74 *See, e.g.*, ORPC 1.4; ABA Criminal Justice Standards 4-3.1; 4-5.1-5.2.

75 In a criminal case, there are certain fundamental decisions that only a defendant can make. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). For example, only a client can decide whether to enter a plea, waive a jury, testify at trial, or appeal a final judgment. *Id.* Attorneys must understand and communicate the relevant legal considerations in order to adequately advise clients about these decisions.

76 Allison Frost, *Oregon public defender crisis reaching into all corners of criminal justice system*, OPB, Dec. 7, 2022, https://www.opb.org/article/2022/12/07/oregon-public-defender-crisis-reaching-in-to-all-corners-of-criminal-justice-system/.

77 Marea Beeman, Nat'l Legal Aid & Defender Ass'n, Basic Data Every Defender Program Needs to Track: A Toolkit for Defender Leaders 8 (2014), https://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf.

78 Calls between prisoners and their lawyers are confidential and may not be listened to or recorded. *See, e.g.*, *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) ("The essence of the Sixth Amendment right is . . . privacy of communication with counsel"); *Ching*, 895 F.2d at 609 ("While prison administrators are given deference in developing policies to preserve internal order, these policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access."). This testimony therefore raises additional questions about larger patterns of adequate representation. Because confidential access to clients is an essential part of constitutionally adequate representation, any barriers should have been addressed by Mr. Munn, the 22nd Defenders, or OPDS through negotiation with the Sheriff and court, and, if necessary, through litigation.

FLP found no records of written or verbal communication in any client files. Instead, FLP found, in the form of unopened letters, evidence that Mr. Munn often ignored attempts to communicate. According to his clients, Mr. Munn would not answer his phone or return calls; did not respond to letters; frequently missed meetings; and, in some cases, spoke with clients only once or twice, in court, immediately before entering pleas.

the full and necessary communication with them."[79]

When clients did manage to speak with Mr. Munn, they often reported feeling unheard or ignored. They were told they had no defenses, that if they went to trial they would certainly lose, and that if they waived their rights, they would look better to the court. When they wanted to end the representation, some were told that it was too late, or they would receive a worse deal if they went through with the request. In fact, in one particularly alarming case, Mr. Munn failed to respond to a client's request to either rescind his plea or file an appeal mere days after the client entered his plea.

To the extent Mr. Munn's own statements provide insight into his philosophy about communicating with clients, two excerpts from his Bar deposition are notable:

"It was just -- it -- what you would say in the DA's office, amongst each other, it's a case where *there's no humans involved*. You have [W.A.], an alcoholic that goes by this pseudonym of []. And then you have these two people calling the police, who are known drug addicts, that live in a known drug trap house in the community. And you have no idea what anybody is going to say at trial."[80]

"And, again, that's one I did -- I did try and go fast on, because I wanted her out of that jail. *She wasn't a person that belonged in that jail*. And the fact that she survived that time in there as -- as she did, I think was probably thankful to her demeanor and her ability to just keep to herself."[81]

Everyone is entitled to meaningful representation. For a public defender, whose clients are particularly vulnerable to the harmful direct and collateral consequences of a prosecution, the failure to communicate—or the use of coercive communication—erodes faith in the criminal legal system. A public defender who distinguishes between who he believes is "worthy" or "deserving" of meaningful or vigorous representation compounds the harm to his clients and to the adversarial system at large.

Failure to Use Necessary Administrative Tools and Systems

As the Supreme Court has recognized,

"mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and [] a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw

79 Bar Deposition at 57. Mr. Munn's statements also illustrate the significance of challenging pretrial detention. Not only is it easier for non-incarcerated clients to communicate with their attorneys and actively participate in their own cases, but research has shown that pretrial detention increases the probability of both a conviction and a longer sentence. Léon Digard & Elizabeth Swavola, Vera Institute of Justice, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention 3, 5 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf. In fact, one study found that even four or more "days of pretrial detention increased the likelihood of conviction by 13 percent." *Id.* at 3.

80 Bar Deposition at 88-89 (emphasis added).

81 Bar Deposition at 126 (emphasis added).

materials integral to the building of an effective defense."[82]

Clients are entitled to attorneys "who have the basic tools of an adequate defense[.]"[83] These tools include the "full complement of support services and technology that a modern law office would require," such as case tracking software, document management software, conflict check systems, and online research capabilities.[84]

Access to staff who "can assist with clerical and administrative tasks, client communication, and case preparation" is also vital to adequate and efficient representation.[85] Paraprofessionals can, for example, facilitate client communication by answering phones and monitoring emails, scheduling office consultations, and handling client intakes. Paraprofessionals can also coordinate and expediate the necessary services provided by investigators, mental health professionals, interpreters, and experts. In preparation for litigation, paraprofessionals can request records, manage discovery, conduct research, and prepare for hearings and trial. During trial, paraprofessionals can manage documents and exhibits, support clients, and coordinate witness testimony.

As experts have recognized, "[t]he type and number of staff assistance to the lawyer greatly affects the amount of work the attorney can do competently."[86] In the case of Mr. Munn's client, C.S., for example, a paraprofessional could have drafted the "boilerplate" motion for review, identified available and appropriate local housing and treatment facilities, assisted with the application process for placement, coordinated with C.S.'s family, researched requirements for participation in mental health court, scheduled a staffing for entry, and assisted with the return of C.S.'s phone and identification.

Mr. Munn's contract with the 22nd Defenders did not provide or require access to necessary tools or administrative services. To the contrary, because all overhead expenses—including travel expenses, paraprofessional services, rent and utilities, office equipment and supplies, library materials, seminars, and computerized legal research software—were generally not reimbursable, the contracting system effectively disincentivized their use. Given this financial disincentive—and, according to Mr. Munn, discouragement from members of the 22nd Defenders[87]—Mr. Munn did not employ a legal assistant, administrative assistant, or paralegal. He did not maintain complete files or any specific file structure or organization. He did not maintain a comprehensive client database or employ any case management, conflict tracking, or timekeeping systems.

82 *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

83 *Id.*; Nat'l Ass'n for Public Defense, Policy Statement on Public Defense Staffing 1 (May 2020), https://idc.utah.gov/wp-content/uploads/2020/06/NAPD_Policy-Statement-on-Public-Defense-Staffing.pdf.

84 Backus & Marcus, *supra* note 51, at 1101.

85 *Id.*

86 Nat'l Ass'n for Public Defense, *supra* note 84, at 1.

87 According to Mr. Munn,

"A. I was told that -- I was told I -- I guess I -- I asked about a legal assistant, and they said, "Do you really need one?" is how -- how it was -- how I recall it being voiced to me." OSB Deposition at 48.

Munn's paper files—consisting primarily of loose-leaf pages, unassociated with any specific client or case—were transferred in two plastic bins, one garbage bag, and one uncontained stack.

Without basic administrative tools and support, Mr. Munn was unable to successfully implement and manage the systems necessary to run a legal office.

No Case or File Management System

An attorney cannot provide competent representation without complete and accessible files. In order to identify factual issues to investigate or legal issues to research and analyze, attorneys must, at a minimum, be able to track information learned from discovery, court hearings, and conversations with clients and the prosecution. Without complete and accessible files, an attorney will be unable to competently file motions or try cases.

At the outset of this review, Mr. Munn provided FLP with copies of all client files in his possession. Paper files were transferred in two plastic bins, one garbage bag, and one uncontained stack. Electronic files were copied directly from Mr. Munn's computer to an external hard drive.

FLP's review of these files revealed that Mr. Munn had no system for filing, organizing, or tracking documents received or work conducted. The paper files consisted primarily of loose-leaf pages, unassociated with any specific client or case. While the electronic documents were organized into individual client folders, not every client or case had a folder. The client folders that did exist were sparsely populated with incomplete discovery and contained almost no work product or organizational scheme.

No Identifiable Conflict Check System

Criminal defendants have a constitutional right to conflict-free representation.[88] As the Supreme Court has explained,

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, … it may … preclude[] defense counsel [] from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a

88 The right to counsel "guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired" by an attorney's simultaneous representation of conflicting interests. *Glasser v. United States*, 315 U.S. 60, 70 (1942) (superseded by rule on other grounds). "If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Id.*

conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[89]

Attorneys also have an ethical obligation to identify and avoid conflicts of interest.[90] As the National Association of Criminal Defense Lawyers has explained, the unique considerations of a criminal case—including the complexities and strategies involving co-defendants, the real possibility of cross-examining previous clients, the severity of the ultimate punishment, and the constitutional rights at issue—mean that these obligations are particularly important.[91]

There is no evidence that Mr. Munn had any system or practice for identifying or evaluating potential conflicts of interest. In the cases reviewed, at least two potential conflicts were identified. In at least one case, this failure resulted in clearly identifiable and actionable harm. Specifically, Mr. Munn failed to identify a conflict in which he concurrently represented a witness and defendant. Not only did the witness possess exculpatory information for the defendant, but this information was *inculpatory* for the witness in another case in which he was actively represented by Mr. Munn.

Even in cases without a clearly identifiable and actionable harm, the failure to track and mitigate potential conflicts reflects a failure to understand the significance of the constitutional rights at issue.

Failure to Develop Legal Issues

Understanding and applying the correct legal framework is imperative to effective client representation. As the ABA standards make clear, attorneys have

"a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation … Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area."[92]

As a baseline, legal research is therefore critical to understanding the law.[93]

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89 *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). In fact, the right to conflict free representation is so important that it is one of the rare areas where a violation can result in automatic reversal. *Id.* at 491.

90 *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); ORPC 1.7; ORPC 1.9.

91 *Ethics Advisory Committee*, Nat'l Ass'n Criminal Defense Lawyers (Sep. 27, 2023), https://www.nacdl.org/Content/EthicsAdvisoryCommittee.

92 ABA Criminal Justice Standards 4-1.3(e), 4.37(g).

93 "We recognize that there may be instances in which the circumstances are such that a lawyer exercising reasonable professional skill and judgment may be expected to anticipate an imminent departure from stare decisis—for example, after a high court has allowed review to address the question of whether to overrule precedent." *Aaron v. Kelly*, 325 Or. App. 262, 264 (2023).

Mr. Munn's statements during his deposition and the Bar trial, the absence of caselaw and legal analysis in his case files, and his failure to identify legal issues in his clients' cases, suggest that Mr. Munn believed he could determine the likelihood of a conviction by comparing the face of the applicable statute with information in the police reports.

An attorney cannot provide adequate representation by simply reviewing the applicable statute. In other words, while identifying the relevant statutory elements is a necessary step, it is not the *only* necessary step. A statute may not, for example, identify the applicable mental state or define certain statutory elements. Caselaw is often necessary to understanding the relevant fact patterns and outer parameters of the charges at issue, identifying viable pretrial motions and defenses, and recognizing what evidence may be admissible at trial.

A few notable examples illustrate the real-world impacts of Mr. Munn's failures to engage in legal development:

(1) W.A. was charged, in part, with Burglary in the First Degree. By relying on the face of the statute alone, Mr. Munn failed to recognize that caselaw not only provided a relevant defense (permission and/or license to enter the building at issue),[94] but defined certain statutory terms and illustrated how the state's facts failed to establish the elements at issue. [95]

(2) Mr. Munn failed to advise noncitizen defendants of the clear immigration consequences of their guilty pleas. Despite the Supreme Court's clear mandate in *Padilla v. Kentucky*,[96] a decade of developing state and federal caselaw,[97] and the existence of the Immigrant Rights Project[98]—specifically funded by OPDS to provide a free, centralized immigration advice service to all public defense providers in the state of Oregon—Mr. Munn made it clear in conversations and a deposition that he did not understand what advice he was required to provide.[99]
The real-world impact of this failure is tragic. At least one client was deported to Mexico after his conviction.

94 *See, e.g.*, *State v. Schneider*, 246 Or. App. 163, 166 (2011) ("When an entrant claims that he is permitted or invited to enter the premises, the state has the burden to prove two elements to establish that the entry is not otherwise licensed or privileged: (1) the person issuing the invitation lacked actual authority to do so; and (2) the entrant knew or believed there was no such authority.").

95 *See, e.g., State v. C.S.*, 275 Or. App. 126, 133 (2015) (Because the defendant's threats and gestures were vague and unspecified in time, the court found that a reasonable person would not conclude that harm had suddenly become "menacingly near" or "moments away" as required by statute.); *State v. Rennells*, 253 Or. App. 580, 586-87 (2012) (physical injury element not satisfied based on facts introduced at trial).

96 559 U.S. 356 (2010).

97 *See e.g., Daramola v. State*, 294 Or. 455, 465 (2018) ("When immigration consequences are clear, the advice a defendant receives—whether from criminal defense counsel directly, or through defense counsel's use of immigration counsel—must be equally clear."); *Chavez v. Oregon*, 364 Or. 654, 661 (2019) ("[a]fter *Padilla*, if the immigration consequences of pleading guilty to certain crimes are 'truly clear,' . . . then the Sixth Amendment requires defense counsel to advise their clients not merely that a conviction 'may result' in adverse immigration consequences but that deportation and other adverse immigration consequences will be 'virtually inevitable' as a result of the plea.").

98 The Immigrant Rights Project (IRP) is a program of OJRC.

99 Mr. Munn reported that he was instructed by the 22nd Defenders to "tell clients if they are here illegally, they would be deported" for any crime. Client Deposition at 31, 26. This blanket advice does not satisfy *Padilla.*

At least one client was deported to Mexico after his conviction. He left behind a five-year-old child. While challenging Mr. Munn's failures via PCR, the client talked with FLP about his dedication to cross-border co-parenting, the pain of separation, his struggles to continue to provide for his daughter financially, and, given the dangerousness of his home state, his fears about when he could see her again. While waiting for the PCR trial, the client disappeared.
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(3) Mr. Munn failed to file any substantive legal motions[100] during his employment with the 22nd Defenders. A review of the relevant search and seizure case law would have provided a viable basis for several non-frivolous motions to suppress.

(4) In one trial, Mr. Munn's entire closing statement[101] consisted of three sentences:

> "Your honor I don't believe there is sufficient evidence from any of the witnesses with regard to testimony or their observations that there is sufficient evidence that [client] had the requisite intent to use it unlawfully. There is a bunch of loose ends that the state is trying to tie into a

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100 *I.e.*, a motion with the potential to affect the conviction, such as a motion to suppress or dismiss.

101 As the United States Supreme Court has explained,

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
>
> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

Herring v. New York, 422 U.S. 853, 862 (1975).

> conviction and I don't believe there is sufficient evidence. I'd ask you to find [client] not guilty of all the [] charges[.]"

In another, Mr. Munn stated only:

> "The state relies on this story that this alleged victim was followed to the [other room]. I don't recall any of that evidence. It's speculation on behalf of [victim] that she was followed into the [other room]. I think what we have here is a bar, two stories, no witnesses, and the state has not met its burden and I will rely on the court's consideration."

Roadblocks to Relief

Despite the inadequacies in Mr. Munn's representation, FLP was unable to take substantive remedial action in the majority of cases. Four general issues, in particular, are noteworthy: (1) the difficulties related to notifying and communicating with Mr. Munn's prior clients; (2) the inefficiencies of individual case reviews; (3) failures to collaborate; and (4) the inadequacy of existing remedies.

Together, these issues illustrate the need for systemic solutions and remedies. Relying on the good will of individual district attorneys is often unworkable and impractical, compounding inequities through a system of justice by geography. Systemic harm—whether the result of a change in law or misconduct from a defense attorney, a prosecutor, or police officer—should result in systemic solutions.

Significant Barriers Impact Post-Conviction Notification.

At a minimum, clients should be notified when patterns of ineffective assistance of counsel are investigated and/or disciplined by the Oregon State Bar. When systemic relief is not available, clients should be informed of any individualized reviews and direct any substantive actions taken on their behalf.

As noted above, FLP was unable to establish and maintain meaningful contact with a number of Munn clients. This pattern is common in mass case reviews. For example, written notification in one Massachusetts review "triggered applications for postconviction relief in less than one per cent" of cases—and almost 90% of those applications were filed by prosecutors, not defendants.[102] Understanding why communication may be impaired is therefore important to understanding why individual reviews may be inefficient and unfair.

First, postconviction reviews occur in a different context than the original criminal trial. At the trial stage, an attorney will, at a minimum, meet a client in court at the first appearance. Court appearances ensure consistent contact and can drive communication. After a conviction, the possibility of amorphous future relief may be a secondary concern to the immediate necessities of food, shelter, employment, and safety.

Second, systemic barriers rooted in income inequality consistently impede adequate notice. For clients experiencing houselessness and housing instability, written communication is often unreliable. Similarly, internet access is often inaccessible for low-income families,

102 *Bridgeman v. Dist. Attorney for Suffolk Dist.*, 67 N.E.3d 673, 313 (Mass. 2017).

with recent data showing that 43% of adults with household incomes below 30k/year do not have home broadband services or a computer and 24% do not have smartphones.[103] On reservations, the rates are even lower. In Warm Springs, for example, only 19% of the population has access to low priced wired broadband.[104]

Telephonic communication can also be difficult, as "[p]oor neighborhoods in the U.S. get 15 percent less cell phone coverage than their richer counterparts[.]"[105] Even when service is not at issue, difficulties related to maintaining a consistent phone number can impede dependable communication. For example, while prepaid phones (without contracts or credit checks) provide feasible alternatives for many low-income customers, they often come with non-transferrable numbers—meaning that an individual cannot transfer a phone number between carriers—and strict restrictions on continuity—meaning that an individual may lose a phone number if the prepaid time runs out or if they fail to renew within a prescribed time period.

Individual Case Reviews Are Inefficient.

When a pattern of misconduct has been identified, individual case reviews are inefficient.

First, clients may not remember the details of any specific proceedings, their interactions with their attorneys, or even the incident itself. Witnesses and victims may have moved or be unable to recount the details of the event. Relevant records and evidence—such as emails, text messages, security footage, and drug tests—may no longer exist. This is especially true in the context of misdemeanors.

Second, most cases are resolved by plea. This means that common vehicles for relief, such as an appeal or petition for post-conviction relief, are more limited. It also means that the underlying court record is more limited. In this review, there were few trial transcripts and no recordings of substantive hearings in which police were questioned and evidence produced. Developing the record for the first time in a post-conviction posture often becomes significantly more difficult, as the burden of proof shifts and the standards become harder to meet.

For clients dealing with overriding concerns related to daily necessities, such as housing instability, food instability, and addiction, reviews are extraordinarily time intensive for little immediate payoff. With group relief, focused on systemic errors, courts free up dockets and courtrooms and, ultimately, spare taxpayers the expense of litigating cases one by one.

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103 Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Research Center (June 22, 2021), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.

104 Julia Tanberk & Tyler Cooper, *Searchable Data by State on More than 500 Tribes*, broadbandnow (Mar. 1, 2023), https://broadbandnow.com/research/tribal-broadband.

105 Patrick Nelson, *Low-Income Neighborhoods Have Worse Cell Phone Service, Study Finds*, Network-World (May 13, 2016), https://www.networkworld.com/article/951391/low-income-neighborhoods-have-worse-cell-phone-service-study-finds.html#:~:text=Low%2Dincome%20neighborhoods%20have%20worse%20cell%20phone%20service%2C%20study%20finds,-Opinion&text=Poor%20neighborhoods%20in%20the%20U.S.,a%20new%20study%20has%20found. In fact, rural reservations have the lowest rates of coverage in the nation. Margaret Harding McGill, *The Least Connected People in America*, Politico (Feb. 7, 2018), https://www.politico.com/agenda/story/2018/02/07/rural-indian-reservations-broadband-access-000628/.

Lack of Cooperation is a Barrier to Relief.

The most efficient avenue for relief often involves collaboration with local prosecutors. In Oregon, for example, OJRC's work with the Wasco County District Attorney has proved particularly effective.[106] Following revelations regarding a police officer's dishonesty and related discovery violations, District Attorney Matthew Ellis asked FLP to review cases and make non-binding recommendations based on agreed-upon criteria. FLP recommended relief in 115 of 197 cases. To date, 87 cases have been dismissed in full and three have been dismissed in part.

In its review of Mr. Munn's work, FLP was unable to secure cooperative or systematic relief. In Jefferson County, for example, the District Attorney would not disclose discovery for any case not originally identified by DDA Foster, despite evidence that Mr. Munn failed to review discovery in other cases. Unlike DA Ellis, both District Attorney's offices and the Attorney General's office took the position that redress should be sought through the usual court process.

Oregon's Existing Remedies Are Inadequate.

Oregon has no way to provide meaningful, efficient relief to groups of people affected by systemic harms.

Appeals: Appeals must be filed within 30 days of entry of the final judgment.[107] An individual may challenge incorrect legal rulings but cannot present new evidence or argue issues that were not raised before the trial court. An individual cannot challenge the performance of their attorneys or misconduct by the police or prosecution. Generally, and with few exceptions, the appellate court cannot review the validity of a plea or conviction. Appeals can take years to resolve, and relief typically takes the form of new proceedings in the trial court.

Post-conviction relief (PCR): A PCR petition must be filed within two years after the conviction becomes final.[108] Generally, individuals may not raise claims based on trial court error.[109] Instead, individuals can raise, for example, claims related to violations of a constitutional right or lack of trial court jurisdiction.[110] Ineffective assistance of counsel (IAC) is a commonly raised claim.

Successful IAC claims are rare. Not only must an individual show that an attorney's performance fell below an objective standard of reasonableness, but they must also demonstrate prejudice, *i.e.*, that the lawyer's poor performance adversely affected the outcome of the case. This is an extraordinarily stringent standard. PCR is not viable for most cases resolved via plea and typically does not adequately address harms suffered from inadequate representation during pre-trial and

106 *See* Malori Maloney & Brittney Plesser, Withheld: The Impacts of Secrets Held by Police and Prosecutors (2023), https://static1.squarespace.com/static/5e9a1686f716835e61268f2a/t/63d2c06b10b55b54ff51afad/1674756220071/Kienlen+Report+FINAL+%281%29.pdf.

107 ORS 138.071(1).

108 ORS 138.510(3). In reality, a petition should be filed within one year to preserve the availability of federal habeas relief. *See* 28 USC § 2244(d) (creating a one-year statute of limitations but tolling that time if a petition for postconviction relief has been filed in state court).

109 *Palmer v. State*, 318 Or. 352, 354 (1994).

110 ORS 138.530(1).

Oregon has no way to provide meaningful, efficient relief to groups of people affected by systemic harms.

pre-conviction proceedings, such as the wrongful denial of bail or unnecessary pre-trial incarceration.

Relief typically takes the form of new proceedings in the trial court. While, as a general rule, a client cannot receive a harsher sentence on remand, a court can rely on new facts to increase the sentence so long as that new sentence is not "a product of vindictiveness towards the offender."[111] A district attorney can also reinstate original charges that were dismissed as the result of an accepted plea offer.

Senate Bill 819: Senate Bill 819, passed in 2021, allows for resentencing in certain cases. Relief is only available for felony convictions (other than aggravated murder) and requires the sentencing county's DA to agree to relief before a motion is filed.

SB 819 has resulted in a patchwork of relief. Because SB 819 requires a joint motion, DAs have become, in function, the gatekeepers and arbiters of relief. Many DAs have imposed their own non-statutory requirements. For example, in some counties, DAs have restricted the eligible charges or will not consider relief where the individual has outstanding restitution; has not served at least 50% of the original sentence; has an open appeal or petition for post-conviction relief; received a downward dispositional departure; participated in treatment court; or had other charges dismissed by plea.[112] As of the writing of this report, eight counties, including Coos and Lincoln, have not granted a single application.[113] Others, like Linn (1 out of 62 applications granted) and Marion (2 out of 92 applications granted) have granted very few.

Expungement: Expungement does not allow an individual to challenge the validity of the underlying conviction. Instead, it allows a court to seal the record of that conviction.[114] Relief is contingent upon the person's circumstances after the conviction, *e.g.*, whether the person has completed their sentence and paid all restitution, and satisfied the requisite waiting period. Many crimes, including all class A felonies, are ineligible for expungement. District Attorneys must be notified and can oppose relief.

Even a successful expungement provides incomplete relief. Expunged convictions can, for example, be used in immigration proceedings or

111 *State v. Partain*, 349 Or. 10, 26 (2010).

112 *Senate Bill 819 Petitions (Policies by County)*, Oregon Justice Resource Center, https://ojrc.info/819 (last accessed December 20, 2023).

113 These numbers were obtained through an ongoing series of statewide record requests and accurate as of November 15, 2023.

114 A court can also seal the record of an arrest or charge. ORS 137.225(1)(c).

unsealed during certain investigations.[115] Moreover, the reality is that "[s]ealing and expungement are often ineffective in the face of a massive data-collection industry that scoops up arrest and conviction records as soon as they are generated."[116]

Clemency: Oregon governors hold exclusive authority over clemency.[117] Clemency is rare, typically granted only in exceptional cases. While elected officials may fear recidivism or a "soft on crime" media narrative, the advantages of prison releases—encompassing fiscal, familial, and community benefits—are challenging to quantify.[118]

As of this writing of this report, Governor Kotek has not officially disclosed her annual clemency decisions to the legislature as required by statute.[119] Concerningly, Governor Kotek has demonstrated a willingness to proactively seek out and revoke commutations by, for example, encouraging prosecutors and community corrections directors to contact her office when violations of release conditions occur "in a manner that warrants revocation of their commutation."[120]

As reflected in these brief summaries, Oregon's current remedies face significant limitations, risks, and drawbacks. Without meaningful opportunities for repair, individual reviews of systemic failures do not effectively remediate harm. As one scholar put it, attempting to redress systemic error "with a tool designed for redressing episodic instances of personal ineffectiveness" is, in other words, "to play whack-a-mole with the Sixth Amendment."[121]

115 *Motions to Set Aside Convictions, Dismissed Charges, and Records of Arrest (Expungement)*, Oregon Justice Resource Center, https://ojrc.info/expungement (last accessed December 20, 2023); ORS 137.225.

116 Natamoff, *supra* note 54, at 238. Notably, as of 2021, fewer than six percent of all eligible convictions in Oregon have been expunged. *New Report Shines Light on Backlogged, Inequitable Expungement Process in Oregon*, ACLU Oregon (Mar. 11, 2021), https://www.aclu-or.org/en/press-releases/new-report-shines-light-backlogged-inequitable-expungement-process-oregon.

117 "Although pardons, commutations, and reprieves have distinct characteristics, they are often referred to collectively as 'acts of clemency,' and the executive's power to grant them is referred to as the 'clemency power' or 'pardon power.'" *Haugen v. Kitzhaber*, 353 Or. 715, 719 n.3 (2013).

118 Naila Awan & Katie Rose Quandt, Prison Policy Initiative, Executive Inaction: States and the Federal Government Fail to Use Commutations as a Release Mechanism (2022), https://www.prisonpolicy.org/reports/commutations.html.

119 *See* ORS 144.660. While, as of the writing of this report, OJRC is not aware of any successful individual applications for clemency, Governor Kotek did issue a remission order in December that would allow 10,000 additional Oregonians to reinstate driver's licenses that were suspended because of unpaid traffic violations. *See* Jayati Ramakrishnan, *Kotek Forgives 10,000 More Driver's License Suspensions, Adding to Predecessor's Order*, OregonLive, Dec. 06, 2023, https://www.oregonlive.com/commuting/2023/12/kotek-forgives-10000-more-drivers-license-suspensions-adding-to-predecessors-order.html.

120 Noelle Crombie, *Gov. Tina Kotek Yanks 5 Commutations; Asks Law Enforcement to Tell Her of Other Case That Should Be Revoked*, OregonLive, Aug. 09, 2023, https://www.oregonlive.com/politics/2023/08/gov-tina-kotek-says-shell-consider-revoking-commutations.html.

121 Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1607 (2020).

Recommendations

"Equality of justice in our courts should never depend upon the defendant's wealth or lack of resources, but in all honesty we must admit that we have failed frequently to avoid such a result." [122]

Public defense systems across the country are in crisis. Under-funded, under-resourced, and under-staffed public defense offices are structurally unable to meet the demands placed upon them.[123] As one Washington court noted,

> "While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance. Public funds for appointed counsel are sometimes woefully inadequate, and public contracts have imposed statistically impossible case loads on public defenders and require that the costs of experts, investigators, and conflict counsel must come out of the defenders' own already inadequate compensation. Such public contracts for public defenders discourage appropriate investigation, testing of evidence, research, and trial preparation, and literally reward the public defender financially for every guilty plea the defender delivers. Such public defender systems have been called "'meet 'em, greet 'em

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122 Robert F. Kennedy, Attorney General of the U.S., Address to the New England Conference on the Defense of Indigent Persons Accused of Crime 1 (Nov. 1, 1963), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-01-1963Pro.pdf.

123 For example, ABA-sponsored public defender workload studies in Rhode Island and New Mexico found similar serious deficiencies in the number of available public defenders. John Gross, *Reframing the Indigent Defense Crisis*, Harv. L. Rev.: Crim. L. Blog Essay (Mar. 18, 2023), https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/ (reaching "the same conclusion that those states would have to double the number of attorneys they employ in order to provide adequate representation.").

As states struggle to create adequate public defense systems, the human toll on indigent providers mounts. Across the nation, public defenders face "staggering caseloads, tremendous time pressure, limited resources, and inadequate training."

—Charles J. Ogletree Jr.

and plead 'em'" justice. It is clear, even if not calculated, that the prosecution benefits from a system that discourages vigorous defense and creates an economic incentive for indigent defense lawyers to plea bargain."[124]

As states struggle to create adequate public defense systems, the human toll on indigent providers mounts. Across the nation, public defenders face "staggering caseloads, tremendous time pressure, limited resources, and inadequate training."[125] Their work is devalued by prosecutors, judges, their own clients, and society at large. They experience high levels of occupational stress and secondary traumatic stress, in part from "consistent and continued exposure to the traumatic experiences of clients and victims" without appropriate resources or support.[126] Systemic barriers to success and the "stress of injustice," *i.e.*, the "demands of working in a punitive system with laws and practices that target and punish those who are the most disadvantaged" can have profound impacts on their ability to provide meaningful representation.[127]

Oregon public defenders have, for too long, done their best "under unworkable conditions[.]"[128] Pushed to a breaking point, some non-profit offices have attempted to protect their employees and clients by, for example, temporarily halting intake, challenging court decisions appointing attorneys over their objections,

124 *State v. A.N.J.*, 225 P.3d 956, 960 (Wash. 2010) (citations omitted).

125 Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1240 (1993).

126 Elizabeth Dotson et al., *An Exploratory Study of Occupational and Secondary Traumatic Stress Among a Mid-sized Public Defenders' Office*, 4 J. of Crim. Just. and L. (2020), https://jcjl.pubpub.org/pub/v4-i1-dotson-brody-lu-public-defender-stress/release/2.

127 Ferguson, *supra* note 74; *see also* Joe, *supra* note 59, at 1771 ("I'm in a vicious cycle of fear, loneliness, and suffocating guilt that I'm not doing more.").

128 ABA Oregon Report at 36.

As the Sixth Amendment Center noted, Oregon's system of public defense has created financial incentives that pit an attorney's economic interest against the due process rights of their clients.

and filing lawsuits when counties hold people in jail without attorneys.[129]

This is not an ideal or long-term solution. First, and most importantly, it fails to address upstream systems and causes, such as the criminalization of poverty and a prosecutorial culture of overcharging, and leaves a growing number of clients without constitutionally mandated representation. Indeed, as noted by the Oregon Criminal Justice Commission, between March and June of 2023, "the number of unrepresented individuals [grew] by 198 percent;" by September of 2023, 2,862 individuals and 3,264 cases were waiting for court-appointed counsel.[130]

Second, it does not address the systemic issues identified by the Sixth Amendment Center and illustrated by this review. As the Sixth Amendment Center noted, Oregon's system of public defense has created financial incentives that pit an attorney's economic interest against the due process rights of their clients. While Mr. Munn's deficient representation can be viewed as a manifestation of this systemic issue, it cannot be viewed in a vacuum or as an isolated event. From this review, it is clear that Mr. Munn did not receive adequate supervision, support, or training from the 22nd Defenders, even after reports of troubling behavior emerged. While OPDS lacks the organizational oversight that would allow it to meaningfully identify and track problematic patterns and practices, as one dissenting Bar panel member wrote, "I suspect that an audit like Ms. Foster's would turn up similar problems in every jurisdiction."[131]

Given this reality, structural reform is necessary. To that end, the Oregon legislature passed Senate Bill 337 in 2023. In relevant part, SB 337 establishes the Oregon Public Defense Commission (OPDC) and empowers it to set standards, collect data, and establish an hourly pay formula for panel attorneys.[132] Under a gradual implementation plan, it prohibits flat fee contracting and

129 In 2022, for example, the Metropolitan Public Defenders, Oregon's largest single provider of public defense services, temporarily stopped taking cases due to attorney shortage and workload; in 2023, the Public Defender of Marion County challenged a court decision to appoint the office's attorneys over objections that, due to current caseloads, these attorneys were "unable to provide constitutionally sufficient representation to new individuals facing criminal charges[,]" Conrad Wilson, *Oregon Supreme Court Sides with Public Defender who Objected to Taking Case*, OPB (Dec. 8, 2023), https://www.opb.org/article/2023/06/18/oregon-supreme-court-ruling-public-defender-workload-marion-county/; On November 14, 2023, a federal judge ordered that all defendants held in jail without a court appointed attorney for seven days after their initial court appearance must be released. *Betschart v. Garrett*, 3:23-cv-01097-CL, 2023 WL 7621969, at *1 (Nov. 14, 2023) (expanding earlier order to release unrepresented defendants in Washington County after 10 days) (stayed on appeal).

130 Sanchagrin, *supra* note 5, at 13.

131 *In re Munn*, *supra* note 19, at 3 (Attorney Panel Member McGean, dissenting).

132 *See, e.g.*, SB 337 §§ 2, 3, 94, 96 (2023).

subcontracting with entities other than nonprofits, and requires the establishment of a trial division that directly employs trial-level attorneys.[133]

SB 337 takes steps towards rectifying many of the issues identified by outside organizations, including a lack of appropriate oversight and the existence of financial disincentives. As this report helps illustrate, however, SB 337 alone cannot ensure adequate representation for all indigent individuals charged with crimes. First, it does little to address the immediate shortage of public defenders and the current crisis of unrepresented people. Second, while a staggered implementation may be practical, it also means that certain changes will not be fully instituted until 2035. Finally, it tasks OPDC with establishing and implementing many of the policies, guidelines, and standards that will drive the functional impact of any new system. While deference to experts and professionals is certainly advisable, this means that the ultimate impact of SB 337 is yet to be seen.

133 *Id.* at §§ 94, 96, 101.

1 Oregon Must Prioritize Constitutionally Adequate Representation

AS OPDC IMPLEMENTS the mandates of SB 337, Oregon must prioritize the prevention of systemic harm through inadequate representation. At a minimum, this requires:

(1) **Reasonable data collection**. As this review noted, Mr. Munn did not provide the 22nd Defenders or OPDS with any information about his work on individual cases. FLP found no indication that he tracked his time, case-specific actions, court-related tasks, or case outcomes. Without even minimal information about attorney caseloads and outcomes, OPDC cannot set or monitor reasonable workloads or individual attorney performance. By collecting targeted data, OPDC should be able to identify and remedy problematic patterns of practice at the individual, local, and county levels. Beyond identifying and tracking patterns of ineffective assistance of counsel, reasonable data collection and analysis should allow OPDC to identify and address other systemic issues that affect indigent clients, such as racial disparities and prosecutorial or police misconduct.

(2) **Active oversight and training.** Mr. Munn received no formal supervision or oversight. Even after early reports related to the influence of alcohol during professional interactions, it does not appear that the 22nd Defenders or OPDS instituted any additional oversight, supervision, discipline, or remedial training.

At the local level, providers must create, maintain, and be compensated for formal structures of supervision and quality assurance.

All court-appointed counsel should be required and incentivized to engage in regular and ongoing education specific to criminal defense. Trainings hosted by the Oregon Criminal Defense Lawyers Association and the National Criminal Defense College can, for example, provide meaningful improvement in the quality of defense services.[134] While some nonprofit offices, such as MPD and MDI (Multnomah County) and PDMC (Marion County), have historically engaged in weekly collaborations with appellate attorneys to educate staff about developments in the law, there is no indication that these practices were required of or available to the 22nd Defenders.

At the state level, OPDC must, at a minimum, collect and analyze performance data, set clear professional expectations and standards, and clearly communicate metrics for success. It must prioritize structures that allow for meaningful oversight for all attorneys regardless of whether they work for a governmental trial division, a non-profit, or as an independent entity.

(3) **Adequate compensation and resources.** As this review noted, Mr. Munn was both actively (through self-reported informal conversations with colleagues at the 22nd Defenders) and passively (through compensation that did not provide or adequately account for the reality of overhead expenses) discouraged from investing in the support needed to run a legal office.

As discussed above, this lack of investment directly impacted his ability to provide adequate assistance of counsel.

At the local level, practitioners must be educated on the obligations of a defense attorney and given the structural resources—such as office space, administrative support, and access to case management systems and legal research databases—to succeed. Workloads must be reasonable, and time spent on oversight and quality assurance must be compensated.

At the state level, OPDC must advocate for consistent and adequate funding levels. This includes competitive salaries for public defenders and sufficient funding for the resources that attorneys rely on, such as transcription, interpretation, and investigation. Investment in programs such as IRP[135] can provide necessary, specialized, and efficient services across the state.

(4) **Eliminating financial disincentives**. As discussed above, OPDC no longer relies on the case credit system. In creating and implementing the changes envisioned by SB 337, OPDC must invest in structures that allow attorneys to devote sufficient time and resources to each case.

134 OSB's Continuing Legal Education requirements, with a three-year reporting cycle, are insufficient.

135 As noted above, IRP is a program of ORJC.

2 Oregon Must Create Meaningful Remedies

NO SYSTEM IS PERFECT. When remediation becomes necessary, Oregon must be willing to engage with and support independent mass case reviews. Significantly, this means recognizing the deep harms that systemic errors or patterns of misconduct can cause, and the ways in which our current remedies are unable to remediate this harm. It also means committing to either improving our current remedial vehicles or creating new ones. At a minimum, Oregon should consider:

(1) Enlarging or waiving the statute of limitations for post-conviction relief when convictions are affected by mass derelictions of duty and other systemic issues;

(2) Explicitly permitting and expediting class action petitions for post-conviction relief when convictions are affected by mass derelictions of duty and other systemic issues; and

(3) Promulgating procedures or court rules to authorize the review of cases when mass derelictions of duty and other systemic issues come to light.

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OJRC is a Portland, Oregon, 501(c)(3) nonprofit founded in 2011. We work to promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them. Our clients are currently and formerly incarcerated Oregonians. We work in partnership with other, like-minded organizations to maximize our reach to serve underrepresented populations, train public interest lawyers, and educate our community on civil rights and civil liberties concerns. We are a public interest law firm that uses integrative advocacy to achieve our goals. This strategy includes focused direct legal services, public awareness campaigns, strategic partnerships, and coordinating our legal and advocacy areas to positively impact outcomes in favor of criminal justice reforms.

The FA:IR Law Project of OJRC launched in October 2021 to address systemic failures and create a more fair, just, and humane criminal legal system. Specifically, the FA:IR Law Project seeks to: reverse, vacate, and prevent wrongful and unjust convictions and sentences and mitigate and prevent excessive sentences. The FA:IR Law Project is a product of our decade of experience representing people impacted by failures and injustices at every stage of Oregon's criminal legal system. Working together with our direct representation projects, including the Oregon Innocence Project, our work encompasses broad challenges based on, among other things, changes in science, laws, and community standards; best practices; and evidence of misconduct. This is accomplished through individual casework, mass case reviews, data analysis, policy change, and community education.