



# Oregon

## Office of Public Defense Services

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To: Gregory Jolivette, Legislative Fiscal Office  
Stephanie Petersen, CFO, OPDS

From: Eric Deitrick, General Counsel, OPDS

Re: Follow up answers to questions posed during the 2019 PDSC budget presentation to the  
Joint Committee on Ways and Means Subcommittee on Public Safety

Date: September 18, 2019

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**1. How many pending death penalty cases exist?** There are 34 open death penalty cases, which can be broken down into the following case types:

Trial: 4

Appeal: 4

Post-Conviction Relief Trial: 6

Post-Conviction Relief Appeal: 11

Federal Habeas: 8

Moratorium: 1

**2. How much savings would exist if the death penalty was phased out?** Please see fiscal impact statement attached.

**3. Are most death penalty cases on appeal?** Yes. Most cases are post-trial (please see answer to question 1).

**4. What percentage of termination of parental rights cases include minority families?** The agency does not have data regarding that question.

**5. Has there been costs savings for termination of parental rights cases in PCRJP jurisdictions v. others?** The agency does not have data regarding that question.

**6. How is the 30 million dollars spent on death penalty cases during the last biennium broken down by case type?** As you can see from the answer to question 1, most funding goes to cases that are post-trial, with post-conviction litigation receiving the majority of funding. A small amount of funding goes to cases pending trials. The vast majority of funding goes to cases post-trial. The agency does not have a specific breakdown but can develop one upon request.

**2019 Legislative Session**  
**AGENCY FISCAL IMPACT STATEMENT FORM**  
*(See instructions for completing form)*

Please complete this form, and return one copy each to the Legislative Fiscal Office (LFO) and the Budget and Management Division (BAM).

Agency Name: Public Defense Services Commission  
Preparer Name/Title: Amy Jackson, Senior Public Defense Analyst  
Preparer Phone #: (503) 378-2506  
Date Submitted: 6/17/2019

Measure #: SB 1013 Version: -A11 Amendments

- |  |  |
|--|--|
| <input type="checkbox"/> <b>No fiscal impact</b>         | The absence of an expenditure or revenue (non-tax) impact.             |
| <input type="checkbox"/> <b>Minimal Impact</b>           | A fiscal impact that can be absorbed with existing agency resources.   |
| <input checked="" type="checkbox"/> <b>Fiscal Impact</b> | A fiscal impact determined to be greater than a minimal fiscal impact. |

The budgetary impact of this bill was reviewed and approved by the Interim Joint Committee on Ways and Means to be recommended to be included in the omnibus budget bill.

Yes \_\_\_\_\_ No   **X**  

Is the bill anticipated by the Governor's Recommended Budget as a Policy Option Package? If yes, please identify the Policy Option Package name and number in your written analysis.

Yes \_\_\_\_\_ No   **X**  

**BILL DESCRIPTION AND AGENCY WRITTEN ANALYSIS**

Senate Bill 1013, with the –A11 amendments, modifies several provisions of Oregon's homicide statutes. Currently, persons convicted of aggravated murder are subject to a range of punishments, including the death penalty. In order to be subject to the death penalty, a jury must render verdicts on four questions following the conviction for aggravated murder. The bill removes the question that requires the jury to render an opinion on the offender's future dangerousness. The bill also requires the state to prove beyond a reasonable doubt that the defendant should receive the death penalty, following a conviction for aggravated murder. Under the existing statute, this did not have to be proven beyond a reasonable doubt. Currently, those convicted of simple murder are subject to a minimum of 25 years prison to life, including life imprisonment, and life imprisonment without the possibility of parole.

This bill removes several types of behavior currently contained within the aggravated murder statute and reclassifies that behavior as murder in the first degree, a new offense under Oregon law. Aggravated murder would apply to those who intentionally kill at least two people with a terroristic intent, or the premeditated and intentional killing of someone under age 14, or the person commits murder in the second degree while incarcerated following a conviction for aggravated murder or murder in the first degree, or the intentional premeditated killing of a police, correctional parole and probation officer or other person charged with the duty of custody, control, or supervision of convicted persons that is related to the performance of the victim's official duties. Murder in the first degree would apply to

all other remaining behavior currently subject to aggravated murder, and would be subject to a penalty of life in prison, rather than death, if the offender was at least 15 years old at the time of the offense. The person must be imprisoned for at least 30 years before eligible for release. If the offender was at least 18 years at the time of the offense, the court may sentence the individual to life without the possibility of parole.

All other cases currently covered by the simple murder statute would be reclassified as murder in the second degree, a new Oregon crime. The penalty structure would remain the same as the current simple murder statute, with a minimum of 25 years prison to life, including life imprisonment, and life imprisonment without the possibility of parole.

The –A11 amendments conform the bill to Senate Bill 1008, should SB 1008 become law. SB 1008 is a bill that makes several changes to sentencing of juveniles charged with certain offenses and waiver of juveniles to adult court for certain offenses. Specifically applicable to this bill is section 25 of SB 1008. Section 25 of SB 1008 allows a person who was under age 18 at the time of committing an offense to be eligible for parole after serving 15 years, regardless of the length of the sentence. The –A11 amendments would specify that this parole eligibility after 15 years for minors would apply to the new offense of murder in the first degree created in this bill. The –A11 amendments also clarify operative dates between the two bills and makes a conforming amendment to ORS 419C.349, should SB 1008 become law.

Changes to Oregon's homicide statutes, including those that reclassify behavior subject to the death penalty, will have a fiscal impact on the Public Defense Services Commission. While the PDSC would likely expend fewer financial resources on homicide cases if death penalty were no longer a potential punishment, the fiscal impact of this measure is largely indeterminate. The indeterminacy arises from several factors, including (1) the agency's transition away from flat fee contracting, (2) the agency's triage of most other trial level case types that need additional financial resources from the professional services account, (3) the inability to forecast the number of homicide cases that would be subject to the new aggravated murder statute; and (4) the commitment the PDSC makes to resource cases subject to the new offense of murder in the first degree. Additionally, most of the expenditures for capital cases currently funded by the PDSC are for cases that are post-sentencing, either on direct appeal, post-conviction relief, or appellate review of post-conviction relief. Those cases will continue to be treated as capital cases, likely for years, unless or until the death sentence is formally vacated.

The amount of funding provided from the professional services account arises from the PDSC's adoption of a legal representation plan for death penalty cases in 2007. As part of the plan, each death penalty team must comply with the ABA's Guidelines for Performance of Defense Counsel in Death Penalty Cases. Those guidelines include a team of two attorneys, at least two mitigators, and an obligation to investigate the client's family and past, at least two generations past. Capital defenders are compensated at \$100/hour; mitigators \$45/hour; and investigators at \$40/hour. The performance standards and requirements are significant, and OPDS tries to limit capital defenders to two capital cases at any time. That commitment continues through all legal proceedings in which a capital sentence is at stake, including trial, direct appeal, post-conviction relief, and post-conviction relief appeal.

Over the past three years, the agency has been funding an average of 87 capital cases per year. The average cost of funding a pending capital case over the same period is \$156,681 per year. This equates to roughly \$13.4 million per year. The number of capital cases filed per year has remained relatively stable:

2015 – 12  
2016 – 20  
2017 – 15  
2018 – 13

The number of cases prosecuted as simple murder cases, which may be reclassified as murder in the first degree or second degree, are less consistent:

2016 – 96  
2017 – 88  
2018 – 59

Currently, the PDSC compensates counsel a flat fee plus expenses at an average of \$33,160 for most simple murder cases. However, in February 2019, the PDSC directed OPDS to no longer engage in flat fee contracting. The agency has a pending bill before the legislature – HB 3145 – which is responsive to the structural unconstitutionality of the current PDSC structure. It is unclear at this point how OPDS will be funding cases next biennium in general, let alone a new provision which mandates at least 30 years imprisonment with the possibility of life imprisonment without the possibility of parole. While the bill, with any or all of the amendments, will certainly cause fewer aggravated murder prosecutions, it is unclear how many of the remaining prosecutions would be either murder one or murder two. And it is unclear what type of legal representation plan the PDSC will direct to the new offense of murder in the first degree, although it will likely not be as intensive as the current death penalty plan.

It's also important to note that capital cases are not funded in a vacuum. Rather, the funding arises from the professional services account, which funds all of trial services. The underfunding of those services has been a necessary choice of the PDSC to provide effective counsel to the most serious offenses. The PDSC would likely divert cost savings from this measure to those other case types.