

# OFFICE OF THE STATE PUBLIC DEFENDER

JUDICIAL BRANCH

FY 2020-21 JOINT BUDGET COMMITTEE HEARING

Friday, December 13, 2019

10:00 am – 10:25 am

## Main Presenter:

- Megan A. Ring, Colorado State Public Defender

## Supporting Presenters:

- Karen Taylor, First Assistant Public Defender
- Maureen Cain, Director of Legislative Policy and Organizational Communication
- Karen Porter, Chief Financial Officer

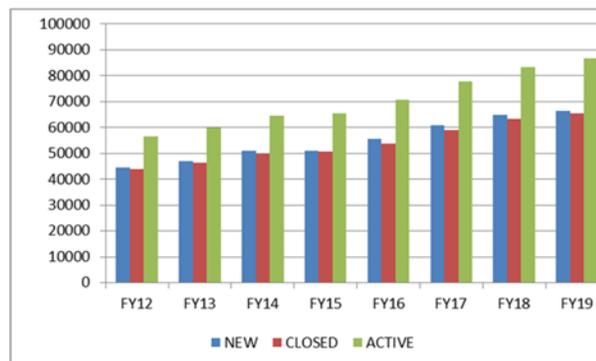
## INTRODUCTIONS AND OPENING COMMENTS

### QUESTIONS FOR THE OFFICE OF THE STATE PUBLIC DEFENDER

OSPD Question 1. What is driving the felony caseload increase (e.g., types of crimes, types and number of charges filed, etc.)?

*Over the past few years, the OSPD has experienced significant increases in felony cases each year, amounting to a 53 percent increase in its active felony cases since FY 2011-12. The Judicial Department District Courts are also reporting significant increases and over the same timeframe have experienced approximately a 58 percent increase in their felony filings. This increase in felony filings is driving OSPD felony caseload/workload increases; 23 percent of the increase is due to violent offenses.*

**Felony Case Trends**



*According to a report published October 2019 by the Department of Public Safety's Division of Criminal Justice, Exploring the increase in district court filings in Colorado, 2013-2018, the*

*rise in felony filings are being shaped by a “complex dynamic that involves multiple interactions between demographic, behavioral, and institutional factors”. While the report did not identify one particular factor that has contributed to the filing growth, the data did elucidate underlying factors that may be driving filing increases. Important findings included:*

- Overall population growth does not appear to be a significant contributor to the felony filing growth.*
- Available data does not support the possibility that an overall increase in statewide arrestees explains the growth in felony filings. The number of adult arrestees did rise slightly between 2012 and 2017 but dropped in 2018. The arrest rate rose between 2013 and 2016 but then declined in 2017 and 2018.*
- The number of people per year with felony filings increased from 30,515 to 41,134 and the number of people per year with multiple felony filings increased from 14.4 percent in 2013 to 19.7 percent in 2018.*
- Over 33 percent of the increase in felony filings from 2013 to 2018 involved a drug offense as the top charge. Filings for drug distribution remained relatively stable between 2013 and 2018 while filings for drug possession increased substantially.*
- There has been an increase in the number of individuals who have multiple drug possession cases in one year. In 2013, 23.7 percent of individuals charged with drug possession had more than one case. In 2018, 32.8 percent had more than one case. However, the number of persons charged with drug possession and drug distribution had declined from 23.2 percent to 13.4 percent.*
- Property offenses accounted for 16.8 percent of the increase in felony filings the most common of which were forgery/fraud, burglary and other property crimes. In arrests for fraud/forgery increased from 4,427 to 6,349 between 2013 and 2018 while the arrests for burglary remained relatively flat with 2,841 in 2013 and 2,840 in 2018.*
- The offense of Motor Vehicle Theft independently contributed 9 percent to the growth in filings between 2013 and 2018. The number of arrests for motor vehicle theft has also substantially increased. The percent of motor vehicle thefts filings that also contained a drug possession charge increased from 9.6 percent to 20.7 percent but still 79.3 percent of motor vehicle theft filings did not involve a drug possession charge.*
- Violent offenses have contributed to the overall growth in felony filings: 22.6 percent of the cases comprising the filings increase between 2013 and 2018 had a violent offense as a top charge. The growth in violent offense filings has primarily been driven by an increase in the number of assault cases, specifically aggravated assault. One reason for the rise in aggravated assaults filings may have to do with a statutory change in 2016 related to strangulation as a felony but this cannot be quantified.*
- During a six-year period, nearly 44.5 percent of women defendants and 38.1 percent of men defendants were drug-involved (definition: had a drug related charge during the six year period).*
- National data indicates that illicit drug use in Colorado has remained relatively flat since 2007.*

*There has been recent discussion about the rise in felony sex assault filings. Judicial Department figures demonstrate that the felony sex assault filings as a percentage of total felony filings have been relatively flat over the last 5 years (between 5 percent and 3 percent*

*of total filings). However, OSPD has experienced a 23 percent increase in our felony sex assault caseload over the last 5 years.*

**OSPD Question 2.** Are some individuals in Colorado who could afford to pay for their own defense receiving state-paid representation from the OSPD or the OADC? What are the requirements for a Colorado defendant to qualify for a public defender? Is it too easy to qualify? Have these requirements changed over time? How do these qualifications compare to those of other states? What percent of total Colorado cases currently receive OSPD or OADC representation? How does this compare with other states? How has the state-representation percentage changed over time?

*By statute, Public Defender offices are responsible for the initial determination of eligibility for court-appointed counsel, although judges make the final determination and appoint counsel. Pursuant to Chief Justice Directive 04-04, any party requesting court-appointed representation on the basis of indigency must complete Form JDF208, Application for Public Defender, Court-Appointed Counsel or Guardian ad Litem. Applicants for Public Defender representation sign this form under penalty of perjury. Applicants qualify automatically for Public Defender representation if they are incarcerated or if their income falls at or below 125 percent of the federal poverty level (as determined by the U.S. Department of Health and Human Services).*

*Rates of OSPD representation in felony and juvenile cases have remained fairly consistent. In 2008, we provided representation in approximately 76% of the felony cases compared to 80% in 2019; in 2008, we provided representation in approximately 71% of the juvenile cases compared to 70% in 2019.*

*Our rate of representation in misdemeanor cases has risen over this same time. In 2008, we provided representation in approximately 37% of the misdemeanor cases, compared to 55% in 2019. This increase was driven in part by the "Rothgery bill" passed in January 2014 (amending C.R.S. 16-7-301(4)(a)), providing defendants in misdemeanors, petty offenses and traffic offenses counsel rather than mandating that they enter plea negotiations with the prosecution prior to having counsel.*

*At this time, we do not have information on comparisons to other states but can do further research with additional time.*

**OSPD Question 3.** The total number of cases handled by the OADC seems high. What is driving the conflict of interest in these cases? Why can't the OSPD take a higher proportion of these cases? Who decides that there is a conflict of interest? Have the criteria for sending a case to the OADC changed over time? Is the OADC sometimes being used because the OSPD doesn't have enough resources to handle all the cases it potentially could handle? When there's a conflict, does the OSPD take the highest cost case?

*Public Defenders conflict off cases when there is an ethical reason grounded in the Rules of Professional Conduct and case law that prohibit them from continuing representation. One obvious example is that a Public Defender cannot represent multiple clients in the same case or matter. In FY2018-19 approximately 88 percent of the cases in which the OSPD withdrew because of a conflict were situations involving co-defendant or witness conflicts. The remaining twelve percent were for other ethical reasons. The criteria for determining conflicts has essentially remained unchanged over time. Courts consider and grant a Public Defender's motion to withdraw from a case and then order the appointment of counsel through OADC.*

*Often, depending on the other ethical issues involved, when a case involves co-defendants the OSPD will take the most serious case.*

OSPD Question 4. The Judicial Department's 2018 workload study for county court judges showed that the work required for many types of cases has gone up. Has the OSPD experienced an increase in the amount of time it takes to handle its cases? What types of cases have been affected? What are the reasons for the increase?

*Our most recent workload study took place in 2016. At that time, we did learn that certain cases required additional time (for example, class one and two felonies, sexual assault cases and crimes of violence) and that attorneys spent more time appearing at advisements as a result of the Rothgery legislation, at juvenile detention hearings and in specialty courts. In addition, we believe that the changes in the volume of discovery, including body camera footage, has impacted workload.*

OSPD Question 5. What would be the cost to the OSPD if the court reporter page rate increased by 50¢ per page?

*A 50 cent per page increase is approximately a 16.7 percent increase. When calculated on the projected costs for transcripts for FY 2020-21, the impact would be an additional \$343,669 for the OSPD.*

OSPD Question 6. OSPB's FY 2020-21 budget instructions asked executive-branch agencies to search for the following budget saving opportunities:

**Unspent funds**

Positions vacant > six months--is it really needed?

- Reversions of prior year spending--is there a pattern or a one-time occurrence?

**Actuals vs estimates**

- Fiscal notes--did enacted program really cost what was estimated?
- Decision items--are there pilot programs still on-going? Did the Department receive permanent FTE for a function no longer needed?
- End-of-year spending--review purchases for final 8 weeks of each fiscal year – were the purchases budgeted for in advance or end of year “spend-up”?
- Travel, meals, official functions -- review for least cost vs max allowable.

**Unrequested funds**

- Sunset recommendations--were any sunset recommendations not adopted by the legislature?
- Appropriations--was the Department appropriated more than was requested?
- Supplemental requests--why did the Department not include these requests in regular budget cycle?

**Underutilized assets**

- Goods or services that could be purchased less expensively in private sector.

Using these guidelines, review your agency's budget and report the results.

*We carefully manage our budget throughout the year and, over the past few years, our reversion rate has been approximately .5 percent. In addition, our actual expenditures for fiscal notes and operational costs have proven to be consistent and very close to our estimated amounts. A few years ago, we did have a fiscal note for the Rothgery legislation*

*where we gave back some attorney FTE and funds when our estimate had been slight overstated.*

*We do not have any active pilots, we have not had any sunset recommendations and we do not have any appropriations higher than what was requested.*

*The OSPD has a centralized purchasing system. We continually review purchasing needs with a crucial eye towards obtaining the best value for the dollar, whether the supplier is in the private or public sector.*

## **ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUIRED**

1. Provide a list of any legislation that the Department has: (a) not implemented, or (b) partially implemented. Explain why the Department has not implemented or has only partially implemented the legislation on this list. Please explain any problems the Department is having implementing any legislation and any suggestions you have to modify legislation.

*We have fully implemented all legislation.*

2. Does the Department have any HIGH PRIORITY OUTSTANDING recommendations as identified in the "Annual Report: Status of Outstanding Audit Recommendations" that was published by the State Auditor's Office and dated June 30, 2019 (link below)? What is the Department doing to resolve the HIGH PRIORITY OUTSTANDING recommendations? Please indicate where in the Department's budget request actions taken towards resolving HIGH PRIORITY OUTSTANDING recommendations can be found. <http://leg.colorado.gov/audits/annual-report-status-outstanding-audit-recommendations-june-30-2019>

*The OSPD does not have any outstanding audit recommendations.*

3. If the Department receives federal funds of any type, please respond to the following:
  - a. Are you expecting any changes in federal funding with the passage of the FY 2020-21 federal budget? If yes, in which programs, and what is the match requirement for each program?
  - b. Does the Department have a contingency plan if federal funds are eliminated?
  - c. Please provide a detailed description of any federal sanctions or potential sanctions for state activities of which the Department is already aware. In addition, please provide a detailed description of any sanctions that MAY be issued against the Department by the federal government during FFY 2019-20 or 2020-21.
  - d. Compared to other states, Colorado ranks low in receipt of federal dollars. How can the Department increase the amount of federal money received?
  - e. What state funds are currently utilized to draw down (or match) federal dollars? What state funding would be required to increase the amount of federal funding received?

*The OSPD does not receive any federal funds.*

4. Is the Department spending money on public awareness campaigns? If so, please describe these campaigns, the goal of the messaging, the cost of the campaign, and distinguish between

paid media and earned media. Further, please describe any metrics regarding effectiveness and whether the Department is working with other state or federal departments to coordinate the campaign?

*The OSPD does not spend any money on public awareness campaigns.*

- Based on the Department's most recent available record, what is the FTE vacancy and turnover rate: (1) by department; (2) by division; (3) by program for programs with at least 20 FTE; and (4) by occupational class for classes that are located within a larger occupational group containing at least 20 FTE. To what does the Department attribute this turnover/vacancy experience? Do the statewide compensation policies or practices administered by the Department of Personnel help or hinder the department in addressing vacancy or turnover issues?

*In FY 2018-19 the OSPD's turnover rate was 16.7 percent and vacancy rate was 2.4 percent. Below is a breakout by occupational class:*

Occupational Group	FY 19 Turnover Rate	FY 19 Vacancy Rate
Attorneys	18.2%	2.5%
Investigators/Social Workers	6.9%	2.4%
Administrative Assistants	26.2%	2.2%
Central Administration	10.1%	1.4%
<b>Total</b>	<b>16.7%</b>	<b>2.4%</b>

*While we have seen many reasons for why attorneys leave the OSPD, a consistent theme over time has been the opportunity for higher pay in other jobs, including government jobs. Last year, the agency requested and received funds to raise attorney salaries to align closer to the market. As a result, the agency has already seen a significant decrease in attorney turnover. As of the first four months of FY 2019-20, the vacancy rate has dropped to 1.4 percent.*

*The statewide compensation policies administered by the Department of Personnel can help to some degree with our agency's vacancy and turnover issues if funding keeps the OSPD at or near market level.*

- Please identify how many rules you have promulgated in the past two years (FYs 2017-18 and 2018-19). With respect to these rules, have you done any cost-benefit analyses pursuant to Section 24-4-103 (2.5), C.R.S., regulatory analyses pursuant to Section 24-4-103 (4.5), C.R.S., or any other similar analysis? Have you conducted a cost-benefit analysis of the Department's rules as a whole? If so, please provide an overview of each analysis.

*The OSPD does not promulgate rules.*

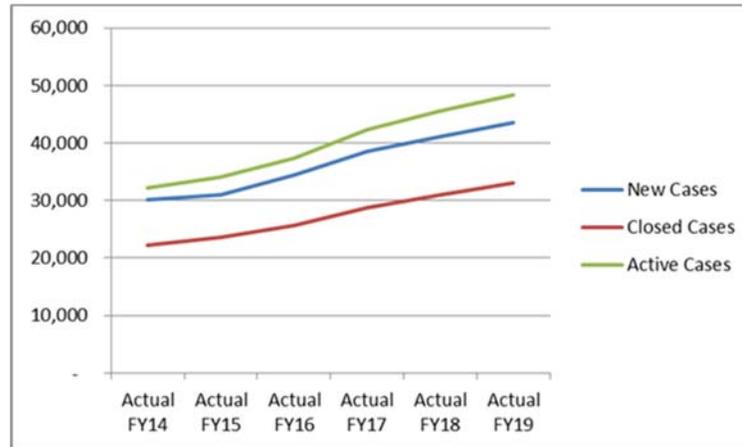
- What are the major cost drivers impacting the Department? Is there a difference between the price inflation the Department is experiencing compared to the general CPI? Please describe any specific cost escalations.

*As stated previously, our largest cost increases are tied directly to the surge in felony cases. An increase in felony cases requires more resources and thus additional FTE. Since we are a service-oriented agency with 87% of our appropriation devoted to personal services, any increase in FTE will have a direct impact on our budget.*

8. How is the Department’s caseload changing and how does it impact the Department’s budget? Are there specific population changes, demographic changes, or service needs (e.g. aging population) that are different from general population growth?

*Over the past five years, the OSPD has seen its active felony cases increase from 64,450 cases in FY 2013-14 to 86,668 cases in FY 2018-19. However, more significant within this category is the increase in the number of trial and pre-trial cases. These are cases that are taken to final disposition and require the greatest attorney effort, time and dedication of resources. Active felony trial and pretrial cases have increased from 32,199 cases in FY 2013-14 to 48,327 cases in FY 2018-19 – a 50 percent increase. Felony cases make up approximately 46 percent of our cases yet require 66 percent of our trial FTE resources.*

**OSPD Felony Cases  
Trial & Pre-trial**



9. Please provide an overview of the Department’s current and future strategies for the use of outward facing technology (e.g. websites, apps), the role of these technologies in the Department’s interactions with the public and other state agencies, the Department’s total spending on these efforts in FY 2018-19, and expected spending in FYs 2019-20 and 2020-21.

*The Office of the State Public Defender is currently working on a project to revamp its public website to be released this fiscal year. The focus of the project is to make information for the public easier to find and understand, particularly for those that need our services. The new website will also make information regarding our budget and our mission clearer in describing the extent and quality of services we provide to indigent Coloradans. We will also be looking at options for making the application process for a Public Defender available electronically; however, those forms are owned and maintained by the Judicial Department. Regarding costs, we are currently doing this work with in-house staff and minimal costs.*

10. There are many ways in which the Department may interact with internal or external customers, including the public and other departments. How is the Department gathering feedback and evaluating customer experience? Please address all interactions, e.g. technology, in-person, call centers, as well as total spending on these efforts in FY 2018-19 and expected spending in FYs 2019-20 and 2020-21.

*The Office of the State Public Defender (OSPD) is a single purpose program that is devoted to providing effective criminal defense representation to indigent persons charged with crimes except where there is a conflict of interest. Our clients are indigent people who face the*

*possibility of incarceration, are unable to afford private counsel and without counsel would otherwise be denied their constitutional right to representation throughout the criminal proceedings.*

11. Please highlight the long-term financial challenges of fulfilling the mission of the Department with particular attention to any scenarios identified in the Department's Long Range Financial Plan involving an economic downturn, department-specific contingencies, emerging trends, or major anticipated expenses (Subsections 3-6 of Section 4 of the Long Range Financial Plan submitted pursuant to H.B. 18-1430).

*(Section 4/subsection 3) Scenario Evaluation: Downturn. Any reduction in funding will have direct effects on staffing. The statutory function of the OSPD is to “provide legal services to indigent persons accused of crime that are commensurate with those available to non-indigents, and conduct the office in accordance with the Colorado rules of Professional Conduct and with the American Bar Association standards relating to the administration of criminal justice, the defense function.”*

*In order to comply with our constitutional and statutory mandates, the OSPD must have resources and staffing levels to meet the requirements of providing effective representation. If the OSPD is not adequately funded, caseloads will exceed both our internal standards and national standards relating to the number of cases an attorney can effectively handle without impairing quality or breaching professional obligations. The Guidelines for Legal Defense Systems in the United States, developed under a grant from the U.S. Department of Justice, provide that public defender systems should establish maximum caseloads for individual attorneys and that such standards reflect national standards and take into consideration objective statistical data and factors related to local practice.*

*The Office of Attorney Regulation states an attorney is not competent to provide effective representation if their caseload is too high. There are serious implications to overly high caseloads per attorney, including that the attorney may be subject to disciplinary action for accepting more cases than can be competently handled. In addition, overly high caseloads may result in rulings of ineffective representation for Public Defender clients. If a Public Defender is found ineffective, the result could be a new trial causing an exponential increase in the number of cases processed in our system.*

*(Section 4/subsection 4) Scenario Evaluation: Department-Specific Contingency. Current projections show our staffing level falling to 80 percent this year and 79 percent by FY 2020-21. This current and growing staffing deficit presents a threat to the Public Defender’s ability to ethically, responsibly and effectively meet its constitutionally and statutorily mandated mission.*

*There is another potential urgency to our request: forecasts indicating a slowdown in Colorado’s economy in the very near future. Historically, such economic conditions negatively affect income levels, thereby increasing the number of people who qualify for our services. If this forecast holds true, the number of cases and workload requirements will rise at an even faster rate than currently projected.*

12. In some cases, the roles and duties of existing FTE may have changed over time. For all FY 2020-21 budget requests that include an increase in FTE:
  - a. Specify whether existing staff will be trained to assume these roles or these duties, and if not, why;

*The OSPD strives to successfully complete all critical responsibilities. Four of our FY 2020-21 requests require additional FTE and the majority of those positions will be filled with entry-level staff. For any of the non-entry level positions, existing staff may apply and will be trained if selected for the position.*

- b. Specify why additional FTE are necessary; and

*All of our requests for FTE are either directly or indirectly tied to increasingly higher caseloads.*

- *R-1, OSPD Staffing Requirements. We requested an annualized amount of 59.6 FTE.*
- *R-2, IT. We requested an annualized amount of 3.0 FTE.*
- *R-3, Social Workers. We requested an annualized amount of 9.0 FTE.*
- *R-6, Golden Courtroom Staffing. We requested an annualized amount of 1.6 FTE.*

- c. Describe the evaluation process you used to determine the number of FTE requested.

*Our workload staffing model was used for R-1 and R-6. Where no workload staffing model exists, an internal analysis was utilized for R-2 and R-3.*

13. Please describe the impact of Colorado's low unemployment rate on the Department's efforts to recruit and retain employees.

*The OSPD hires most of its attorneys directly out of law school and recruits from both inside and outside of Colorado. Colorado's low unemployment rate has not had an impact on this process to date. Hiring for many non-attorney positions has been more challenging in that most of our positions are hired at entry-level and it is difficult to compete against employers who can pay more.*

*The low unemployment rate does impact retention, as many of our employees who leave the OSPD have the opportunity for higher pay in other jobs, including government jobs.*

14. *NOTE: An example template for providing data for this question will be provided by the JBC Staff.*

State revenues are projected to exceed the TABOR limit in each of the next two fiscal years. Thus, increases in cash fund revenues that are subject to TABOR will require an equivalent amount of General Fund for taxpayer refunds. Please:

- a. List each source of non-tax revenue (e.g., fees, fines, parking revenue, etc.) collected by your department that is subject to TABOR and that exceeds \$100,000 annually. Describe the nature of the revenue, what drives the amount collected each year, and the associated fund where these revenues are deposited.
- b. For each source, list actual revenues collected in FY 2018-19, and projected revenue collections for FY 2019-20 and FY 2020-21.
- c. List each decision item that your department has submitted that, if approved, would increase revenues subject to TABOR collected in FY 2020-21.

*The OSPD does not collect any revenues.*

15. Please describe the Department's current practice regarding employee parking and other transportation options (i.e. EcoPass). Please address the following:

a. Does the Department have adequate parking for all employees at all locations?

*As a statewide system, the OSPD has 22 offices throughout the state. As such, access to parking and any related costs vary widely. In some areas, mostly rural, parking is plentiful and either free of charge or available for a nominal fee. Employees and clients in some urban areas have more difficulty finding adequate parking and usually pay more substantial parking fees.*

b. If parking is limited, how are available spaces allocated?

*The downtown Denver area has limited parking and most parking garages in downtown Denver (state or non-state operated) have a waiting list to allocate spaces as they become available.*

c. If free parking is not available, how is parking paid for, and who pays (employee or Department)? (e.g. stipends, subsidized parking, eco passes)

*Employees of the OSPD pay for their own parking. The OSPD does participate in the EcoPass program and offers subsidized passes.*

d. If employees pay fees for parking, where is the revenue credited and how is it spent, and is it subject to TABOR?

*N/A*

e. Do parking and/or transportation benefits factor into Department compensation and/or retention efforts?

*In some locations, where either availability or costs are an issue, transportation realities are a factor in retention efforts.*

16. Please identify all continuously appropriated funds within the Department's purview with a fund balance or annual revenue of \$5.0 million or more. Please indicate if these funds are reflected in the FY 2019-20 Long Bill.

*The OSPD does not have any of these types of funds.*