

## **2024.05.03 Meeting Minutes**

### **Commission on Indigent Defense Services**

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#### **Quarterly Meeting – May 3, 2024**

Location: The Whitted Building, Hillsborough, NC & Virtual Option via Webex

#### **Commissioner Attendees:**

The Honorable Dorothy Hairston Mitchell (Chair), Bryan Jones (Vice Chair), Art Beeler, Tonya Barber (*virtual*), The Honorable Joseph Crosswhite (*virtual*), George Doyle, Marshall Ellis (*virtual*), Caitlin Fenhagen, Staples Hughes, Stacey Rubain

#### **Staff Attendees:**

Chad Boykin (Assistant General Counsel, Financial Services), Kevin Boxberger (Regional Defender), Amanda Bunch (Communications Specialist), Sonia Colon (Budget Manager), Whitney Fairbanks (Deputy Director/ General Counsel), Aaron Gallagher (Finance Officer), Angela Henderson (Contracts Administrator), Carla Huff (Recruitment and Training Coordinator), Sarah R. Olson (IDS Resource/Forensic Counsel), Mary S. Pollard (Executive Director), Max Silva (*virtual*) (Legal Assistant), Becky Whitaker (IDS Policy and Planning Attorney)

#### **Local and State Public Defender Program Attendees:**

Laura Gibson (District 2), Jennifer Harjo (*virtual*) (District 5), Ricky Champion (District 17), Traynham Dorn (*virtual*) (District 13), Jonathan McInnis (District 21), J. Chad Perry (Chief Special Counsel), Robert Sharpe (Capital Defender), Wendy Sotolongo (Parent Defender), Woodrena Baker Harrell (District 18), Eric Zogry (Juvenile Defender)

#### **Other Attendees:**

Daniel Spiegel and Phil Dixon (UNC SOG), Casey Harris-Pratt (*virtual*) (OSBM), Izzi Hernandez-Cruz (OSBM), Kathleen Johnson (OSBM), Jackie Parker/Jaclyn Arnette (OSBM)

#### **Personnel Committee of the IDS Commission (Closed Session)**

The Personnel Committee of the IDS commission met in closed session as allowed by G.S. 143-318.11a, beginning at 10 a.m. and prior to the open portion of the meeting.

#### **Call to Order (Open Session)**

The meeting was called to order at 11:01 a.m. by the Honorable Dorothy Hairston Mitchell, who then proceeded with the welcome and asked all attendees to introduce themselves.

#### **Adoption of the Agenda**

Commissioner Stacey Rubain moved to approve the proposed agenda. Commissioner Caitlin Fenhagen seconded the motion. The agenda was adopted unanimously.

## State Government Ethics Act

Chair Hairston Mitchell reminded the Commissioners of their responsibilities under the State Government Ethics Act.

## Minutes of the February 2, 2024, Commission Meeting

Commissioner Art Beeler moved to approve the minutes from the February 2, 2024, IDS Commission meeting. Commissioner Caitlin Fenhagen seconded the motion. The minutes were adopted as written.

## Remarks from the Chair

Chair Hairston Mitchell announced that after a 9- to 10-step process and by a unanimous vote, **Mary S. Pollard** was recommended for reappointment by the Personnel Committee for the IDS Commission to serve another four-year term as Executive Director for IDS, to begin immediately after the expiration of her current term, August 1, 2024. The recommendation was unanimously accepted by the Commission.

**Commissioner Art Beeler** acknowledged the lives of the four law enforcement officers who were involved in a recent standoff in Charlotte and were killed in the line of duty. He expressed heartfelt sympathy for the families of the fallen, as they courageously gave their own lives to protect and to serve.

Chair Hairston Mitchell acknowledged **Commissioner Art Beeler** for being named an American Correctional Association E.R. Cass Award recipient. This national award is *the* highest achievement one can attain in the field of Corrections. Beeler stated that it is the staff who do the work, day in and day out, who are most deserving of the comments and fanfare.

## Director's Report on IDS Business

### Welcome New Staff

IDS Executive Director Mary Pollard introduced two new IDS staff members, Sonia Colon (IDS Budget Manager) and Joseph Oder (Senior Research Associate).

### 2024 Agenda for the Legislative Short Session

IDS Executive Director Mary Pollard noted that the primary purpose of the short session is to adjust the biennial budget that was approved in the prior long session. The highest priority for the short session, she reported, was to ask for enough funds for the Private Assigned Counsel ("PAC") Fund that would allow IDS to continue to pay PAC uninterrupted through FY 2025.

IDS initially requested \$12 million for the PAC Fund. The initial request also included five fiscal staff positions for the central office (2 of which already existed but would be moved from receipt-supported to appropriations); 14 full time positions in the existing statewide and PD offices that were not previously funded in the biennial budget; and \$1 million for hardware and software updates related to the eCourts rollout.

Since the original short-term request, IDS asked for an additional \$20 million to be held in reserve due to an “historic and unabated demand on the PAC Fund.”

Pollard reported that the Governor’s *recommended* budget granted all requested positions, the \$12 million for the PAC Fund, and \$250,000 for the technology upgrades. It also included (1) a provision for greater raises than what was granted as well as (2) some additional labor market reserve funds. Pollard assured the Commission that she was in regular contact with legislators, including Justice and Public Safety Committee members and that she would continue to communicate the needs of IDS to lawmakers.

#### OASIS Update

Executive Director Pollard reported that since the Commission’s February 2 approval to launch the Online Attorney State Invoice System (OASIS) electronic invoicing system to pay PAC faster, the project went from incubation stages to issuing its first successful payment to PAC in just three months. Steps along the timeline included: building the initial code; acquiring web hosting and domain name; building the site; cooperation with NCAOC on Python code to keep the data secure; internal and external testing; and finally, issuance of the first payment to PAC in the pilot group on April 25. Pollard described this timeline as nothing short of “amazing.” She said thanks to a modest \$6K investment and hundreds of hours of staff effort, OASIS is a “game changer.” And it will launch for PAC in the first eCourts district (District 2) in June, with future spread into all Odyssey counties.

#### Efforts to Address Attorney Deserts

With regard to “attorney deserts,” Commissioner Marshall Ellis (an attorney in District 1), sought input from the Commission, IDS staff, and others in attendance on ways to address and improve upon what was described as a “dire” need for PAC, specifically in Districts 1 and 2, and other rural areas. He stated he believed if every criminal defense attorney in these two “desert districts” would step up and do *some* of the work, it [the problem] would “go away, or at least mitigate itself quite a bit.” So he posed the question of how the Commission can help get lawyers to step up and take (some) indigent cases.

First, the group identified other parts of the state where PAC shortages are dire, noting also that the shortage of attorneys is an issue that is not unique to criminal defense but is problematic for the legal profession overall. The group agreed that soliciting help from the local benches and the local bars could be a good way to build awareness about the problem and to recruit attorneys to take on court appointed work. Commissioners and others shared ideas on what, besides a much-needed increase in the pay rates, might entice attorneys to do the work.

In addition to PAC rate increases, the Commission suggested exploring additional resources such as promoting free and low-cost CLE, loan repayment assistance, direct

outreach to firms and attorneys close to attorney deserts, reservation wages, increased court costs, and launching campaigns with professional associations. The Commissioners presents supported seeking more resources in addition to more money for PAC in in the upcoming legislative long session.

Jonathan McInnis, Chief Public Defender in District 21, cautioned against judges appointing attorneys to cases they “do not want;” that it can be equally harmful for a client as it is to go for an extended period without representation.

Chair Hairston Mitchell noted that at the State Bar level and the Office of the Chief Justice, there are subcommittees working on addressing legal deserts. But, as an entity, the State Bar cannot raise funds for differentiated pay.

Executive Director Pollard mentioned that, since the State Bar is a regulatory agency, they cannot lobby for a PAC rate increase. However, *individuals* may help by urging their representatives to support and engage in discussion about the issue of legal deserts.

Laura Gibson, Chief Public Defender for District 2, shared that Districts 1 and 2 work together to attempt to cover all the cases, but geography and logistics inhibit this strategy from being a long-term solution; PAC are still very much needed. For one PD office to provide assistance to another, defenders may drive upwards of 2-3 hours just to appear for a client in another county.

Commissioner Caitlin Fenhagen stated for the record she is against an increase in any fee for indigent clients.

Commissioner Doyle stated he plans to go to the annual meeting of the Bar Association (June 20-21) and would like to give remarks at the Board of Governors about legal deserts. Executive Director Pollard said she would share IDS talking points with him and anyone else willing to engage in discussion prior to that date.

### **Therapeutic Courts**

Executive Director Pollard reported there is a movement in many areas in North Carolina for IDS to employ staff for treatment courts (i.e., recovery, veterans, mental health). She said in areas where there is a public defender office, typically that office will staff the courts there. However, IDS received inquiries about whether the agency can pay PAC to work in treatment courts in areas where PD offices do not exist.

She said that some treatment courts operate like probation violation courts; in others, there is deferred prosecution, still others where they are diverted. Given the varieties of these treatment courts and that each no two are probably the same, Executive Director Pollard requested for Chair Hairston Mitchell to lead an *ad hoc* committee of interested

commissioners, PAC and public defenders to develop a policy on *when* IDS can pay, when IDS can't pay and when we can't, should IDS pay?

This could mean seeking an amendment to the enabling statute in certain circumstances to allow IDS to pay. The Chair agreed to establish the *ad hoc* committee.

## Staff Reports

### Year to Date Spending for FY2024/IDS PAC Fund Update

IDS Chief Fiscal Officer Aaron Gallagher reported that IDS will run out of funds in the fiscal year 2025 unless the General Assembly appropriates additional funding to support the agency.

He reported the last time IDS ran out of money was in 2016, and PAC went for several months without compensation. He said that additional funds for IDS were approved in the Governor's Recommended Budget this year, and IDS is hopeful as the General Assembly considers those recommendations and makes a favorable decision.

Gallagher gave a presentation that outlined current challenges to everyday fiscal operations, the unprecedented demand upon the PAC Fund, year-to-date PAC spending, the potential shortfall / worst case scenario, and a realistic look at how much additional money is needed from the Legislature to stay afloat and meet the demand of the PAC Fund. But he began by sharing that IDS is doing business at a rate faster than ever, thanks to being fully staffed with efficient professionals, their technical mastery of the state's new financial system (NCFS) and some (new) online automation to processes by way of OASIS.

The following challenges were noted:

- eCourts
- Set-Off Debt module still needed in eCourts (In addition, all receipts are down.)
- Budget reductions: The cut/shift from the PAC Fund to establish 8 new PD Offices was immediate (IDS was not given discretion on how to fund the new offices, and it will take time for those new offices to absorb cases and offset the heavy need to rely upon PAC.)
  - This year (FY 2024), the budget was reduced by \$4.5 million; next (FY 2025) year, the reduction is set for \$9.7 million and looks "grim."
  - IDS is hopeful that the new PD offices will be able to take on 65-75% of the PAC demand in those counties, but this is not immediate.

Mr. Gallagher reported that the demand for the PAC fund is increasing rapidly and has been rising since 2022. He expected it to continue to trend upward into the next several years. He said because of the increasing demand, IDS could face a budgetary shortfall next year of upwards of \$40 million. Gallagher advised that even if the work is there the agency cannot spend beyond its appropriation," he added.

Mr. Gallagher explained reasons for this increase in demand, citing first, the uptick of murder cases during the pandemic that are now coming to trial. Second, since the last fiscal report to the Commission back in October 2023, fiscal staff productivity increased; the team that was processing approximately 11,000 fee apps per month is now processing roughly 14,000 fee apps per month. In addition, the numbers of cases overall, and especially the capital cases, are being disposed of more rapidly since the lift of the pandemic.

For FY 2025, Mr. Gallagher projected the demand on the PAC Fund to be about \$100 million / \$8.33 million per month. He anticipated an approximate \$32 million shortfall, given existing resources and other miscellaneous monies that may be acquired to address that projected shortfall (i.e., via over realized IV-E receipts, the impact of PD expansion, PD lapsed salary, additional receipts through recoupment).

IDS asked for an additional \$12 million to “address the possible shortfall immediately and for an additional \$20 million in reserve funds to be accessible to IDS the needs arise.

Gallagher concluded that he was erring on the side of caution in his projection. Pollard added that the unknown is whether the recent spike in demand was the new normal.

### **Report of the Capital Defender**

State Capital Defender Robert Sharpe gave a presentation that included numbers/stats related to capital defense—or cases in which the death penalty is sought—in the state, post-COVID.

The presentation covered the following main data points:

- Currently there are 2,247 potentially capital cases pending in the state as of mid-April 2024.
- Capital roster numbers have remained relatively the same over the past few years. Mr. Sharpe noted a slight increase in the number of capital roster members. He said it is trending in the right direction, and he outlined the latest recruitment and retention efforts made by the Office of the Capital Defender. He also noted an apparent correspondence between the most recent rate increase and apparent improved recruitment and retention in the capital roster.
- In FY2019, there were 480-500 case dispositions. The number dropped drastically in 2020 and 2021, due to the pandemic. But the latest reports indicate that dispositions for FY2022, FY2023, and the projected numbers for end of FY2024 saw a sharp uptick.
- In a little less than four years, the OCD went from having 1,475 pending cases to 2,247.
- Since 2018, the total number of appointments made by the OCD reached a new record level with each passing year. Mr. Sharpe said perhaps the number for FY ending 2024 would *not* be a new “high,” but it will be close to the numbers from 2023.

- The ideal caseload cap capital defense attorneys to be effective is eight (8) or fewer capital cases. In December 2023, roughly 362 attorneys across the state were servicing the need for 2,133 instances of clients who had asked for representation from the OCD.
  - Currently, one-third of those attorneys have 1-3 cases; one-third have 4-7 cases; and one third have 8-18 cases they are currently working.
  - Ninety-seven per cent of the clients facing capital/potentially capital charges have appointed attorneys—not retained counsel.
- Assistant Public Defenders handle about 10% of appointments, and Mr. Sharpe said they are a tremendous help to the OCD.
- From 2015 to present, the trend of the number of death verdicts in North Carolina declined. Mr. Sharpe shared a Center for Death Penalty report on the number of death verdicts rendered per year. The report indicated the decline went from roughly 21 instances per year in 2015 to, at present, a little less than one per year, statistically.
- A May 2, 2024, snapshot of roster attorneys indicated 348 current members. Nearly 69% of those are PAC. And of those who are on the roster now, 31% of those were added from the year 2020 to present.
 

Mr. Sharpe pointed out that having qualified counsel at the onset of a capital case is leads to improved outcomes at most points in a case, including appeals and motions for appropriate relief.
- Sharpe noted that OCD sends assistant capital defenders to NC legal deserts. While not all OCD staff are based in Durham, travel has increased for them as well as for PAC. There are six Regional Capital Defender Offices located in the following counties: Buncombe, Durham, Forsyth, Nash, New Hanover and Robeson.
- Mr. Sharpe noted once a case *begins* with the OCD, it *remains* with the OCD—and at that capital rate (\$100/hour). He said it is disruptive to remove counsel, even if the District Attorney later decides not to seek the death penalty.

### **Commission Business**

Before continuing with the next item on the agenda, Chair Hairston Mitchell announced that official word was given that Kevin Boxberger, IDS Regional Defender, was appointed to the Wake County district court bench by Governor Roy Cooper. She said, “While we will miss you tremendously in your role with us here at IDS,” she said, “we know you are going to do super ... well as a district court judge... Congratulations.”

### The John Rubin Award for Excellence and Training

Deputy Director and General Counsel Whitney Fairbanks read into the record that the Commission voted on the recipient of the John Rubin Award for Excellence and training. Seven commissioners voted. Six of the seven votes were for David Andrews from the Office of the

Appellate Defender. Mr. Andrews was notified of the honor, and it was reported he would be recognized for this award at the 2024 Spring PD conference in Winston-Salem, May 8-10.

#### Waiver of the One Year Deadline for Fee Applications

This item was not set up for a vote prior to the May 3 meeting so that it could be read into the record. Ms. Fairbanks sent an email to all Commissioners with the applications along with the reasons given by Executive Director Pollard as to why she recommended the waivers be granted. A motion was made by Commissioner Art Beeler to approve all waivers as presented. The motion was seconded by Commissioner Caitlin Fenhagen and was unanimously approved.

#### Other Business

There was no other business.

#### **Adjournment**

All agenda items having been addressed, the Chair adjourned the meeting at 1:44 p.m.

**Next Meeting:** Virtual via Webex – August 9, 2024 | 10:00 a.m.