

MEMORANDUM



JOINT BUDGET COMMITTEE

TO Members of the Joint Budget Committee
FROM Alfredo Kemm, JBC Staff (303-866-4549)
DATE January 30, 2024
SUBJECT JUD supplemental comeback 2 – OSPD-OADC CBI Analyst Defense Funding

This item was not officially submitted as a request. Staff was first alerted to this item as an issue that may need to be addressed on January 24th. The State Public Defender reached out to staff by email more urgently and specifically on January 29th for advisement on how a request might proceed at this point in the budget process.

While staff initially considered seeking a figure setting recommendation for a supplemental add-on in the Long Bill, it is staff's recommendation that this instead be addressed to the extent possible within the current supplemental process to retain as much policy and timing connection to the associated Department of Public Safety S1 request item.

Due to the lateness of the identification of this need, staff recommended to the OSPD that JBC staff simply address this as a staff recommendation in order to accelerate the Committee consideration process for this item. Staff met with the OSPD on January 30th and reached agreement on the staff recommended solution.

BACKGROUND – GENESIS

On November 6, media reported on the discovery of anomalous forensic testing of a sample of cases from a single former CBI analyst. The OSPD states that on November 9th, the Colorado District Attorneys' Council (CDAC) communicated with the Department of Public Safety estimating potential district attorney litigation costs of \$10 million over the next two years; that CDAC noted that initial litigation will likely occur under a post-conviction review pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure; and that CDAC is anticipating their costs to be caused by having to respond to post-conviction motions filed by defendants.

This OSPD supplemental comeback is generated as a result of the Department of Public Safety S1 Retesting of DNA Samples request. The Committee approved the staff recommendation (generally as requested) for \$7.4 million General Fund. The request and recommendation includes \$3.0 million to enable the CBI to contract for independent third party retesting for an estimated 3,000 DNA samples and \$4.4 million to reimburse district attorneys for costs associated with post-conviction review but not necessarily retrial.

DEFENSE COUNSEL PARTICIPATION/INITIATION

The investigation and filing of post-conviction motions is work that must first be done by public defenders and alternate defense counsel contractors. Rule 35(c) has strict timing requirements; in many instances, this will require defendants, almost all indigent and incarcerated, to act quickly or face arguments that they waived any post-conviction issue. Public defenders and alternate defense counsel attorneys will be required to review cases, conduct investigation, consult forensic experts, write complicated motions, and conduct post-conviction hearings. For successful challenges, these cases will then be reset for trials.

Given the initial communication with clients, investigation, writing of post-conviction motions, and post-conviction hearings, OSPD estimates that at least the same number of hours will be spent by defense lawyers for indigent clients initiating and litigating these post-conviction issues as is spent by prosecutors in responding to them. Further, defense will have additional, possibly substantial costs in hiring forensic experts to review testing and cases which will require at least \$150 per hour for experts. Relying on CDAC's estimates and CBI's description of the scope, OSPD estimates that OSPD and the Office of Alternate Defense Counsel (OADC) will initially need \$5 million. Like CDAC, OSPD has an urgent need for resources and anticipates additional expenditures will be required.

STAFF RECOMMENDATION

Staff recommends that the Committee approve \$5.0 million General Fund for this identified need for the OSPD and OADC. There are two issues to be addressed in getting resources to the OSPD and OADC for this purpose: the first is securing the actual funding; the second is providing spending authority. Staff recommends one of two options to the Committee for locating and enabling this funding:

- Option 1: A three-year, time-limited cash fund with continuous spending authority and required annual reports through the budget process on expenditures from OSPD and reimbursements to OADC for this purpose.
- Option 2: A \$5.0 million appropriation in a one-year line item with extended spending authority ("roll-forward" in the vernacular) for up to three years (through FY 2025-26). In order to properly enable spending authority for the OADC, this will require a matching reappropriated funds appropriation (for the estimated amount – perhaps half or more) in the OADC to enable spending of reimbursements from the primary appropriation in the OSPD.

The budget will appear significantly larger with an appropriation of \$5.0 million and an estimated reappropriation of perhaps \$2.5-3.0 million for OADC for an item that is not a standard operating budget item and will not remain in the budget beyond a single fiscal year. A one-year appropriation with three-year spending authority, while reflected "on budget", may not actually receive annual budget scrutiny, as it is formally in place for only one year – the current fiscal year, which is generally complete in terms of budget work.

For this reason, staff recommends that the Committee may wish to consider a General Fund transfer to a time-limited cash fund with continuous spending authority and required annual reports. While a continuously appropriated cash fund marginally reduces budget transparency, annual reporting ensures affirmative accountability within the budget process, and maintains an operating budget that is standard and continuous in its components and not unusually inflated in a single year, which may distort agency growth and average cost-per-case calculations.

Finally, running legislation that may run a bit later and outside of the supplemental process due to the timing, will not additionally delay production and publication of the supplemental appropriations package as decided and drafted to this point.