



**State Appellate Defender Office**

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## **SADO Budget Priorities Fiscal Year 2023**

### **Priorities**

- In recent years, Michigan has invested over \$150 million to reform the trial level public defense system. SADO's budget priorities represent a fraction of this amount for the appellate system:
- Continued funding of \$962,900 in FY 23 for SADO's Juvenile Lifer Unit and a transition of this funding to SADO's General Fund.
- Funding of \$445,100 in FY 23 for administrative support to account for SADO growth.
- Funding of \$287,900 in FY 23 to make SADO's sometime grant funded Wrongful Conviction Unit permanent.
- The Executive Budget Recommendation includes each of these priorities.

### **Introduction**

The State Appellate Defender Office (SADO) fulfills the statutory requirements of the Appellate Defender Act (MCL 780.712) and the Sixth Amendment of the United States Constitution to represent people appealing their criminal convictions who cannot afford counsel.

SADO consists of three divisions: The public defender division, the Michigan Appellate Assigned Counsel System (MAACS), and the Criminal Defense Resource Center (CDRC). The state-funded public defender represents at least 25% of individuals appealing their convictions. MAACS manages county-funded private attorneys who represent the other 75%. Together SADO and MAACS represent approximately three thousand clients who appeal felony trial or plea convictions each year. The CDRC provides training and resources to the state's court-appointed trial and appellate counsel.

SADO's work has helped exonerate at least twenty wrongfully imprisoned clients in recent years and SADO attorneys regularly secure new trials for clients, holding the criminal legal system accountable and helping to ensure fairness in the system. SADO's success in correcting sentencing errors has resulted in a reduction in prison terms by almost 201 years in 2021, a savings of over \$7.4 million, when classified as money saved from reductions in the cost of incarceration.

In addition, a special unit funded year-to-year at SADO since 2016 has represented 193 clients serving life without parole sentences for offenses committed as children. These individuals require new sentencing and evidentiary hearings because they are serving mandatory life sentences in violation of the constitutional prohibition against cruel and unusual punishment.

### **1. Juvenile Lifer Unit Funding**

SADO requests a continuation of funding to review Michigan's mandatory life without parole prison sentences as required by United States Supreme Court decisions. These sentences violated the Eighth Amendment of the United States Constitution's prohibition against cruel and unusual punishment and the similar provision in Article I, Section 16 of the Michigan Constitution.

Michigan had the unwelcome distinction as one of a handful of states with hundreds of people serving this unconstitutional sentence. An office with significant sentencing expertise, SADO stepped up to represent 193 of Michigan's 364 juvenile lifers, including many former clients. 132 of these individuals have now received sentences providing the opportunity for parole and 69 of them have been either paroled or discharged from the Department of Corrections. According to MDOC, of the 151 SADO and non-SADO clients released, only one has re-offended.

SADO constructed an operating Juvenile Lifer Unit with one supervising attorney, one senior attorney, four mitigation specialists, and one reentry coordinator to focus on representation and mitigation for hearings. In-kind contributions of SADO attorneys and staff complement the work of the Unit.

The work needed to ensure constitutional compliance and give youth serving a life without parole sentence a second chance is immense. First, SADO's Juvenile Lifer Unit must evaluate decades-old information, including social circumstances, rehabilitative potential, education, conduct in the Department of Corrections, and mental and physical health of individuals serving life in prison. Second, reentry plans must be composed for people who now have the possibility for release.

Finally, for 34 remaining contested hearings, where SADO seeks the opportunity for an individual's release and prosecutors push again for a life without parole sentence, the Juvenile Lifer Unit must litigate complicated mitigation

hearings that require extensive preparation and investigation. These multi-day hearings are still new and novel in Michigan and approach the complexity of death penalty litigation in other states.

This work is especially critical now. Since 2020, the advent of the COVID-19 pandemic shifted the work of the Unit such that more hearings and client conferences have been conducted remotely. One of SADO's former juvenile lifer clients, died of COVID-19 weeks before his scheduled parole.

Continued funding of \$962,900 for SADO's Juvenile Lifer Unit is necessary. Failure to adequately comply with the constitutional mandate will likely produce costly litigation and repeated proceedings that will limit closure and further traumatize victims' families. SADO has already represented clients on multiple appeals of sentencing hearings held by non-SADO attorneys. Four have resulted in a trial or appellate court order for another sentencing due to legal error at the original hearing. One appeal resulted in an agreement for a new 28-year sentence replacing the initial life without parole result.

## **2. Reversion of Juvenile Lifer Unit funding to the General Fund**

MAACS, the system for appointing criminal appellate counsel in all Michigan circuit courts merged with SADO in 2014. The MAACS roster of 150 lawyers represents approximately 75% of indigent individuals appealing felony convictions.

In 2015, after decades of operating under an inefficient assignment model and inadequate resources, MAACS launched a regional assignment process to encourage the trial courts' voluntary adoption of a standardized attorney fee policy. After starting with 14 trial courts, the pilot grew to include 50 out of 57 circuit courts statewide. In 2017, the Supreme Court approved these reforms permanently, and MAACS continues to grow the project to the benefit of trial courts, appointed counsel, and indigent individuals. MAACS also implemented reforms in roster oversight, training, and litigation support.

Despite these reforms, the MAACS roster still struggles. Counties have adopted new uniform fee schedules to compensate appellate attorneys at a rate of \$50 or \$75 per hour, depending on the type and complexity of the appeal. However, this amount falls far below new Michigan Indigent Defense Commission (MIDC) proposed rates of \$100 to \$120 per hour, which have been implemented for several trial level indigent defense systems. In recent years, the MAACS roster has also lost several attorneys to new salaried trial public defender offices due to these inadequate hourly rates.

SADO and MAACS are exploring solutions to this incentive structure with the MIDC, but the best way to reduce pressure on the MAACS roster is to increase the

number of SADO public defense attorneys and SADO's share of appeals. This goal is accomplished by reverting the Juvenile Lifer Unit funding to SADO's General Fund so that SADO can start to take on a larger share of appeals as the resentencings conclude.

This reversion to the General Fund is also necessary due to increasing appeals of both the non-SADO juvenile lifer resentencings and new juvenile lifer sentencing hearings.

### **3. Administrative support in FY 23 to account for SADO growth**

Three dynamics have combined to form a significant administrative burden for SADO over the last eight years.

First, SADO and MAACS merged in 2014. Before 2014, SADO and MAACS were separate agencies in the Judicial Branch, each governed by the Appellate Defender Commission. SADO conducted independent finance, information technology, and human resources operations with four dedicated staffers (one finance, one HR, one general IT, one programmer), while MAACS relied on Judicial Branch support from the State Court Administrative Office and Judicial Information Services for these functions.

In 2014, the Supreme Court issued Administrative Order No. 2014-18 (ADM File No. 2014-36) at the request of the Appellate Defender Commission, which merged SADO and MAACS into one office. SADO immediately took over finance, information technology, and human resource needs for MAACS, which included the addition of five new employees and services for a roster of over 150 attorneys and 57 circuit courts. MAACS has since added two additional staffers – a litigation support counsel and mitigation specialist.

Second, with repeated one-time funding, SADO established a Juvenile Lifer Unit. SADO's Juvenile Lifer Unit added seven new staffers supported by the same skeleton finance, human resources, and information technology staff.

Third, as part of successful trial-level reforms, the Michigan Indigent Defense Commission now requires twelve hours of continuing legal education for trial level public defenders. The result is a growth in subscribers to SADO's Criminal Defense Resource Center from 479 people in 2014 to over two thousand expected in FY 22. CDRC has a staff of only two people providing all training materials and organizing resources for this growing group.

Certain statistics highlight the extent of these changes and the pressure on SADO's administration:

- SADO's entire budget including the Juvenile Lifer Unit and grants increased from \$6.8 million in FY 2015 to \$9.9 million in FY 2022. FTEs increased from 44 to 63 during this same period.
- This eight-year funding increase amounts to 46% and the eight-year FTE increase 43%.
- Between 2009-2013, SADO had an average of 41 employees on staff. Between 2017-2021, this number grew to 55 people. From 2009-2013 SADO had an average of six workforce transactions per year including hirings, retirements, and separations. In 2017-2021, this number increased to fourteen.
- The CDRC had 479 online subscribers in 2014, 701 subscribers in 2018, 1,704 in FY 21, and over two thousand expected in FY 22.

The result has been scaled-up work and an intense burden on SADO administrative and CDRC staff:

- In addition to budget planning and projections, the Finance and Budget Administrator has been responsible for processing expenses and purchases for fourteen additional staffers and administration of multiple contracts.
- The Office Administrator has needed to manage a significant increase in hiring, onboarding, recruiting, training, development, and expanded information technology functions, while managing a larger and more complex workspace.
- The Office and Finance Administrators conduct grant management duties in addition to their other administrative functions.
- The Information Technology Manager has had to implement basic technology support, database administration, network security and contract support for much larger operations in both Lansing and Detroit. The Applications Development Manager has held software development and maintenance responsibilities for both SADO and MAACS – two offices with very different programming needs.
- CDRC staff has produced training, resource content, and customer support for four times the number of subscribers.

SADO has persevered through these challenges, with serious sacrifices. There have been fewer time and resources for recruitment programs and optimal staff training and onboarding. Finance and Human Resource Managers perform multiple jobs. Training offerings are not as robust as they should be for over two thousand expected customers of the CDRC in FY 22.

Perhaps the most notable sacrifice has been information technology. In 2019, SADO suffered a serious cybersecurity incident. The Michigan Cyber Civilian Corps reviewed SADO networks and issued recommendations and the Michigan Cyber

Command Center of the Michigan State Police conducted a full investigation. SADO had not been fully prepared for either preventing or responding to the incident. The information technology challenges of shifting to remote operations during the pandemic only compounded this challenge. In 2021, when the Judicial Branch hiring freeze lifted, SADO had to replace an attorney position with an Information Technology Technician.

To meet these increased administrative needs, SADO needs to immediately fill four positions at a total cost of \$445,100:

- One support staffer to assist with human resource and finance administrative functions ranging from bill paying, to benefits information, to contract maintenance.
- One attorney to fill the attorney position lost when SADO had to hire an Information Technology Technician to allow for full support and better cybersecurity protection. The decrease in appellate numbers during the pandemic allowed for the loss of this attorney position, but as courts have reopened and appeals again increase, this position must be filled.
- One grant manager to take on all the grant administration functions now performed by the human resource and finance manager in addition to their other expanding duties from SADO growth.
- One Criminal Defense Resource Center program officer to help with programming and administration from a 500% increase in subscriptions.

#### **4. Permanent establishment of Wrongful Conviction Unit**

SADO successfully advocated for the freedom of over twenty of the people listed on the National Registry of Exonerations. A portion of this success comes through an early intervention Wrongful Conviction Unit, funded by the Department of Justice from 2010 to 2013, 2015-2017, and again in 2021. Unlike funding sources such as Byrne JAG grant, the FY 2021 Bureau of Justice Assistance grant for “Upholding the Rule of Law and Preventing Wrongful Convictions” will not renew. SADO will lose grant funding and specially trained employees. The success of the grant and the creation of Conviction Integrity Units at the Department of Attorney General warrant permanent establishment of a Wrongful Conviction Unit at SADO.

The grant has set up a temporary Wrongful Conviction Unit, where attorneys and investigators have reviewed 560 cases, identified 39 for early assignment, and accomplished five full exonerations and six new trials.

Michigan’s appellate system is unique because court rules allow evidentiary hearings to explore the facts of the conviction on direct appeal and discover new evidence. SADO attorneys can respond to a client’s claim of innocence with trial court

motions presenting evidence that was not part of the original trial. In most jurisdictions, evidentiary hearings take place on collateral review years after the conviction. In contrast, attorneys in Michigan may challenge wrongful convictions on direct appeal, when evidence is still fresh, witnesses are available, and memories are intact. Examples include evidentiary hearings with new eyewitnesses, expert testimony, and physical evidence. Hearings regularly are held within a year or two of the conviction.

Despite this unique opportunity, SADO attorneys face unrealistic time constraints that can prevent them from presenting new evidence. Substantial early and quick investigation is required to convince a court to hold an evidentiary hearing and establish a basis for relief. Even a modest competing caseload makes it difficult for an attorney to gather discovery and investigate cases before these deadlines expire.

In this context, a specially trained attorney and investigator are necessary to screen and investigate cases as early as possible after assignment to SADO. Cases in the Wrongful Conviction Unit are scrutinized for indicia of actual innocence and investigated for favorable evidence that was missing from trial. Where screening reveals issues such as problematic eyewitnesses, unreliable jailhouse informants, false confessions, or problematic science, the cases will be flagged for early work by a litigation team. Ordinarily, new SADO cases wait in a holding pattern, often for months, until transcripts are prepared, and the appellate deadlines start running. Without a team dedicated to review of cases during this months-long holding pattern, opportunities for exoneration are lost.

As part of a BJA Wrongful Conviction Grant Assessment, the National Association of Criminal Defense Lawyers reviewed SADO's Project in 2010. The report that followed concluded in part:

While the SADO Fast Response Project is an outgrowth of Michigan's distinct statutory scheme, the Assessment Team's observations apply more broadly and serve to underscore the differences among wrongful conviction project models. Specifically, projects based in public defenders' offices enjoy certain unique advantages: in-house attorneys, investigators, paralegals and support staff. The availability of in-house legal expertise to evaluate and develop wrongful conviction claims makes this model particularly well-suited for the complex legal claims that arise in non-DNA cases.

Perhaps key to the Fast Response Project's success is the way in which it directly contributes to SADO's core mission: zealous and effective appellate representation. By screening and investigating cases before transcripts are prepared, the Project maximizes the time

SADO attorneys can devote to motion and brief preparation. The Project's efforts also help ensure that wrongful conviction claims are advanced earlier in the proceedings, avoiding the procedural hurdles that might bar meritorious claims. In sum, the Project contributes to the effectiveness and efficiency of the State Appellate Defender Office, and thereby enhances the quality of defense available to all of SADO's indigent clients. (BJA Evaluation Report, p. 95).

The work of SADO's Wrongful Conviction Unit has generated proven results, including multiple exonerations and new trials. It has boosted SADO's ability to effectively advocate for all its clients on direct appeal, and to increase caseload capacity. The work of the Wrongful Conviction Unit will result in the release of more innocent people from prison.

Seventeen-year-old Rayshard Futrell, an innocent youth convicted of murder provides one example. Shortly after SADO received the appellate appointment, the Wrongful Conviction Unit screening attorney identified an issue of faulty eyewitness identification. The screening attorney and SADO's investigator located a previously unknown eyewitness and a surveillance video showing that Mr. Futrell did not shoot the victim. He was exonerated of the murder less than 10 months after a sentence of life in prison without parole, a result that would have taken years to achieve without the screening and early investigation, if at all. Two actual perpetrators of the murder were later identified and convicted.

SADO has a grant funded attorney and investigator performing this work through FY 21 when the Department of Justice grant expires. The team consists of attorney Tabitha Harris, a former Washtenaw County Assistant Public Defender and probation officer, and Investigator Angie Jackson, a former award-winning reporter for the *Detroit Free Press*. The grant funding and their work will end on September 30, 2022, but a modest investment of \$287,900 means their unit at SADO will instead become permanent.

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