

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Monday, February 14, 2022

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Lee, Anthon, Thayn, Zito, Burgoyne, and Wintrow

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Lakey** called the meeting of the Senate Judiciary and Rules Committee to order at 1:30 p.m. **Chairman Lakey** suggested using a motion to send to print all of the RS's on the February 14, 2022 agenda.

MOTION: **Senator Thayn** moved to introduce **RS 29503, RS 29384, RS 29376, RS 29377, RS 29378, and RS 29485** to print. **Senator Anthon** seconded the motion. The motion passed by **voice vote**.

PRESENTATION: **David Carroll, Executive Director, Sixth Amendment Center**, gave a brief introduction of the purpose and history of the Sixth Amendment Center (6AC). He explained the history of the Public Defense Commission rules and assured the Committee that the rules which have been promulgated in Idaho are consistent with the parameters of the 6th Amendment and are not outside the norms of other states (see Attachment 1).

DISCUSSION: **Senators Lee and Wintrow** asked Director Carroll what the appeals process was for counties that are found deficient by the Commission. **Director Carroll** stated that there should be an appeals process and assured the Committee that the process was thoroughly thought through by the early Idaho Legislatures.

PASSED THE GAVEL **Chairman Lakey** passed the gavel to Vice Chairman Ricks. **Vice Chairman Ricks** reminded the Committee that the discussion relating to the Public Defense Commission (PDC) dockets would continue.

DOCKET NOS. 61-0101-2101, 61-0102-2101 **Anne Taylor, Idaho Association of Criminal Defense Attorneys and Kootenai County Public Defender** concluded her remarks from last week and asked for questions on those remarks. She commented that she agreed with Mr. Carroll's remarks about case load, workload and how important it was to allow public defenders the ability to do their jobs well. **Ms. Taylor** said her concern with the rules was the lack of due process for attorneys who could be subject to removal based on decisions by the PDC.

TESTIMONY: **Aaron Bazzoli, Chief Public Defender, Canyon County**, assured the committee that his objections, and those of the office he represents, were not based on an overall objection to rules. He stated that the rules presented from last year and this year lack significant protections for the clients, the people they serve across the state, and the attorneys in his charge, saying they remove fundamental due process protections. **Mr. Bazzoli** added that some of the data referenced in Mr. Carroll's testimony was not fully reliable because of changes in the system and that there was a more accurate tracking system currently in place. He also explained some of the elusiveness in "case counts." He reiterated that due process was important and that there needed to be an appeals process (see Attachment 2).

DISCUSSION: **Senators Lee, Burgoyne, and Wintrow** questioned what Mr. Bazzoli would like to see happen with the PDC rules. He stated he would like to have face to face dialogue so ideas and comments could be responded to. Several questions were asked relating to the Public Defense Commission denying an attorney due process. **Mr. Bazzoli** explained that he was not aware of any violations but he was prohibited from speaking on that matter. He said there was a negotiated rule making process, and the PDC was good about involving them in public hearings.

Chairman Lakey questioned the nuanced counting standards. **Mr. Bazzoli** added the counting standards reflect much more than the number represents.

Senator Lodge asked what suggestions Mr. Bazzoli had relating to the Tucker lawsuit. **Mr. Bazzoli** responded that he did not believe the Tucker case was as frightening as some thought. He added that the Legislature had done an excellent job in addressing the concerns related to the lawsuit. **Senator Lodge** asked if Mr. Bazzoli would be content with the PDC rules as they were currently. **Mr. Bazzoli** said that he could live with them but he would continue to rally on due process.

TESTIMONY: **Elisa Massoth, Idaho Association of Criminal Defense Lawyers**, asked that the Committee oppose the PDC rules because they do not provide due process. The current rules do not set forth the right of criminal defense lawyers to have due process in application for, or removal from, the defending roster. She shared copies of a waiver she had to sign at the end of her application to maintain status on the defense roster (see Attachment 3). She believes the waiver is illegal and that the PDC goes beyond statute. She originally didn't sign the waiver, but when it was sent back, she felt that she had to sign it because she had two death penalty cases and felt pressured into it. **Ms. Massoth** stated she should not be forced to choose between her own right as a practicing lawyer and those of her clients to have someone fighting for them. She referenced Senator Burgoyne's earlier question, and stated that there was a process, but it's been deemed a "personnel" matter. She believed the involved parties were fighting about what "due process" was because it was not clearly spelled out. **Ms. Massoth** added executive sessions of the Public Defense Commission were not public. People did not have visibility into what the decision-making process was for whether or not to include someone on the roster. **Ms. Massoth** stated that the PDC was abusing its power, and assuming power beyond what was given to them in the statute.

DISCUSSION: **Senator Burgoyne** asked questions relating to due process and the Administrative Procedures Act. **Ms. Massoth** responded that it was unclear because the rules appear in some places and not in others and the processes were not spelled out. She stated there had been a play on words relating to whether someone had actually been removed from the roster. **Ms. Massoth** stated that at times an executive session is appropriate. If decisions were made outside the executive sessions and an appeal was filed, there must be a record. She added that there was a written decision given to the attorney but they were seldom clear about the end result.

TESTIMONY: **Tammy Zoken, Quality and Compliance Counsel, Public Defense Commission**, reminded the Committee that stakeholders in such circumstances were not just counties and defending attorneys. They were also citizens who cannot afford an attorney. The role of everyone present was to safeguard the delivery of constitutional representation. **Ms. Zokan** responded there was an appeals process, and the rules added clarity about what can be appealed. She also reiterated that last year, the PDC did work with stakeholders to try to come to a mutually agreeable decision, including using language that the stakeholders wanted included in the rules. She also stated that when it came to caseloads, there was opportunity for conversation around that, not just a hard and fast rule with no context.

TESTIMONY: **Mark Coonts, Public Defender, Gem County**, stated that one of his concerns was although the county is growing, it may be difficult to employ enough contract conflict attorneys willing to work for what the county pays hourly. He mentioned losing a contract attorney because of all the procedural requirements to remain on the public defense roster.

TESTIMONY: **Tony Geddes, Chief Public Attorney, Ada County**, stated it had always been challenging in public defense in Idaho to get enough resources, staffing, and expertise in rural counties. He reiterated that the PDC does reject standards for oversight. He said the rules should be rejected because they were confusing and unnecessarily intrusive, with a focus on micro management and bureaucratic red tape, which hinders rather than enhances the delivery of indigent defense. The defending attorney rosters the PDC maintains did not have sufficient due process safeguards in the event someone was removed from the roster. There was also an exclusion of public defender voices. **Mr. Geddes** added many of the problems with the rules could have been resolved or mitigated by involving actively practicing public defenders. He stated that the negotiated rulemaking process had been awkward and clunky, and that the PDC had not allowed dialogue or discussion. There was talk of a working group last year, and that never happened. He submitted a letter from his Board to the Committee (see Attachment 4.)

Kathleen Elliott, Executive Director, Public Defense Commission, reminded the Committee that they had been there on the same rules. After working on rules and negotiating, she stated that she was surprised that people were upset. They came up with 21 provisions working with stakeholders, but it wasn't negotiated rulemaking, it was a lot of private meetings. Case counting was up for approval again next year, but with COVID, the data is going to be challenging. **Director Elliott** stated there would be a safety valve, where attorneys can state why they were not still meeting constitutional standards. In addition, they were still having challenges getting institutional officers to understand what "active cases" meant. It was not only cases they opened that year, but cases which their attorneys carried over and were working on this year. They were trying to establish methodology and that meant they were counting consistently across the state. There were two rosters: the public defense roster, and the capital council roster. The public defense roster is a simple form to be filled out and various questions answered. The capital council roster focuses on expertise in the area of capital trials. The rules were not perfect, but they were working on it. **Director Elliott** does believe there was due process in the rules.,

MOTION: **Senator Burgoyne** moved to approve **Docket No. 61-0101-2101**. **Senator Wintrow** seconded the motion.

AMENDED MOTION: **Senator Burgoyne** moved to approve **Docket No. 61-0101-2101** and **Docket No. 61-0102-2101**. **Senator Wintrow** seconded the motion. The motion passed by **voice vote**.

**PASS THE
GAVEL**

Vice Chairman Ricks passed the gavel back to Chairman Lakey.

ADJOURNED:

There being no further business **Chairman Lakey** adjourned the meeting at 3:00 p.m.

Senator Lakey
Chair

Sharon Pennington
Secretary