Idaho Senate Judiciary Committee
Hearing on Public Defender Commission Rules
February 14, 2022

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Good morning. I am David Carroll the Executive Director of the Sixth Amendment Center (6AC). For those of you who are not familiar with me, the 6AC is a non-profit, non-partisan organization created to assist policymakers to meet their state's constitutional obligation to provide effective representation to the indigent accused at all critical stages of criminal and delinquency proceedings that carry a potential loss of liberty.

Although the 6AC was founded in 2013, I have been providing public defense technical assistance in one form or another for over 25+ years. In that time, I have been to 49 of the 50 states. Prior to founding the 6AC, I worked for the National Legal Aid & Defender Association (NLADA) and wrote the 2010 evaluation that focused the Idaho legislature to consider indigent defense improvements.

The 6AC is founded on the principles that:

1. We never get involved in litigation of indigent defense systems – neither individual cases, class action lawsuits, nor even filing amicus briefs in other organizations' litigation. That is, we do not want policymakers fearing that seeking out answers to their constitutional obligations will lead to litigation.
2. We never go where we are not invited. My subsequent involvement in legislative hearings that led to the creation of Idaho's public defender commission was at the request of your legislative leaders at that time. Today, I am providing technical assistance today at the request of Chairman Lakey.
3. We are truly non-partisan. Our Board represents viewpoints from across the political spectrum and our funding comes from both the left and the right. So for every dollar we get from a philanthropic house like the Public Welfare Foundation, we get similar funding from the Charles Koch Foundation (now known as Stand Together). Indeed, over the prior four years, the most funding we received came from the Trump Administration where I was an approved provider of technical assistance on behalf of the DOJ.

The reason for my insistence on a non-partisan approach is that the right to counsel is a uniquely American ideal that pre-dates the founding of our country. You see the adversarial system of justice is rooted in the very fabric of our nation. Because many of the people who arrived on the shores of America had been subject to persecution in the courts, the people of the new emerging nation were not content to adopt the justice systems of their mother countries. Having experienced tyranny firsthand, the people of the new American colonies were suspicious of concentrated power in the hands of a few. An individual's right to liberty was self-evident, and therefore there needed to be a high threshold to allow government to take away the liberty that the

Creator had endowed in each and every individual. Even before the American Revolution, American courts were appointing defense attorneys for the accused. Even before there were professional prosecutors, there were criminal defense attorneys for the accused. The very first right to counsel statute in what would become the United States comes from Rhode Island in 1660.

Once Americans threw off the shackles of a tyrannical monarchy in the Revolution, the patriots were not about to create a new government that could infringe on the rights of individuals. Thus, the framers of the U.S. Constitution created a Bill of Rights to specifically protect personal liberty from the tyranny of big government. All people, they argued, should be free to express unpopular opinions, or choose one's own religion, or take up arms to protect one's home and family, without fear of retaliation from the state.

Preeminent in the Bill of Rights is the idea that no one's liberty can ever be taken away without the process being fair. That is, to protect against the tyrannical impulses of government, the country's founders devised an adversarial justice system that consciously made it difficult for government to put someone in jail or prison. A jury made up of everyday citizens, protections against self-incrimination, and the right to have a lawyer advocating on one's behalf are just a few of the anti-tyranny ideals enshrined in the first ten amendments to the United States Constitution.

Indeed, the right to counsel in Idaho pre-dated its own statehood (1890). The Idaho 1874 Territorial Criminal Practice Act § 3 conferred on defendants the "right to the aid of counsel in every stage of the proceedings and before any further proceedings are had." The same Act continued that it is a defendant's right to have counsel "before being arraigned." This meant that if the defendant wished an attorney, and one was not present in the courtroom, "the magistrate had to adjourn the examination and send a peace officer to take a message to the attorney within the township or city as the defendant may name."

In 1887, Idaho Revised Statutes added a new wrinkle: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. *If he desires and is unable to employ counsel, the court must assign counsel to defend him.*" (emphasis added.)

There the right to counsel stood in Idaho until 1923, when the Idaho Supreme Court, in State v. Montry, 37 Idaho 684 (1923), determined: "It is the policy of this state . . . to accord to every person accused of crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In a case of indigent persons accused of crimes, the court must assign counsel to the defense at public expense."

Four years later, the Court overturned a 1st degree murder conviction and life sentence based upon ineffective assistance of counsel in State v. Poglianich, 43 Idaho 409 (1927). Foreshadowing the case of Clarence Earl Gideon, Mr. Poglianich too was acquitted of all charges at a second trial six months later.

So, with all this history, why is there so much fanfare about the 1963 case of Gideon v. Wainwright? You see *Gideon* is not just a 6th Amendment case; it is also a 14th Amendment case. That is, states are require by the 14th Amendment to ensure that the 6th Amendment is properly implemented.

The 2010 NLADA report my colleagues and I wrote found that the State of Idaho could not meet their 14th Amendment obligation to provide effective 6th Amendment services because there was no state entity charged with setting rules and standards to ensure that county governments can carry out the anti-tyranny ideals of due process. Moreover, the report found that there were great systemic deficiencies throughout the state.

For example, the NLADA report states that: "If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might be the most important benchmark of an effective system. Yet none of the studies counties have any workload controls in place."

"In Bonneville County: A single attorney is assigned to handle more than four full-time attorneys' worth of work – and a caseload that allows only one hour and ten minutes per defendant."

"In Canyon County: Attorneys handling misdemeanor and juvenile cases averaged 954 cases per year" per attorney.

The Idaho Public Defense Commission was statutorily created to make indigent defense services independent and to enforce oversight. Here, Idaho needs to be explicitly commended. When the NLADA report was released, there were 14 states with no indigent defense commissions. Today, there are only 7. Indeed, I can draw a direct line from how Idaho's changes impacted the states of Nevada, Utah, and California. So, I thank the Idaho Legislature for their leadership in helping these other states.

So, all of that is a long introduction to the PDC rules. I can say with confidence that the rules that have been promulgated in Idaho are consistent with the parameters of the 6th Amendment and not outside the norms of other states. If anything, the PDC rules are conservative compared to other states. For example, the PDC caseload policies indicating that an attorney can handle no more than 210 non-capital felonies per year or 520 misdemeanors is significantly above your neighbor Oregon's limits of 150 felonies or 300 misdemeanors. And, lest someone think that Oregon is an anomaly, Montana has a complex workload system in which all lawyers

track their time (an idea Idaho should consider) that allows felony attorneys to handle no more than 80-100 non-capital cases per year and 200-240 misdemeanors per year.

So, the question becomes, since the Idaho Public Defense Commission has promulgated its rules in a transparent and inclusive way that is ensuring the state's obligation under the 6th and 14th Amendments (albeit in conservative fashion), why then all the focus on changing the rules today? In my 25+ years of working all across the country, I can say with certainty that the last people standing against such good governance are, typically, a small cross-section of the criminal defense bar that simply does not want oversight. I have not spoken with the Idaho attorneys who are recommending changes here today, so I cannot say that my national perspective is indicative of what is happening here, but nationally criminal defense lawyers often have figured out how to put food on their families' tables under the old ways and do not want change. This, even though lax supervision has resulted in the state being sued by the ACLU.

In closing, let me point to one suggested change that could increase Idaho's exposure to litigation. Proposed changes to the "minimum requirements for capital defense teams" want to allow defense attorneys to *only consider* putting together a team comprising a fact investigator and a mitigation specialist, rather than requiring it. The requirement for such a team comes directly from the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Guideline 4.1.A.1 states: "The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist." I cite this ABA standard – not because the ABA has any holding over this legislative body – but because the Supreme Court says in Wiggins v. Smith, 539 U.S. 510 (2003) and other cases to look to precisely these ABA standards to determine what is reasonable professional judgment under *Strickland* in providing necessary investigations into mitigating evidence.

In my professional opinion the PDC's existing rules are reasonable. I am happy to take any questions and provide on-going technical assistance to this august body. Thank you.