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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, et al., Plaintiffs-Appellants, vs. STATE OF IDAHO, et al., Defendants-Appellees.	Supreme Court No. 46882-2019 Ada Co. Case No. CV-OC-2015-10240

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

Appeal from the District Court of the Fourth Judicial District for Ada County
The Honorable Samuel A. Hoagland, District Judge, presiding

Gia L. Cincone, residing at San Francisco, California; Jonah J. Horwitz, residing at Boise, Idaho; Andrea Reynolds, residing at Boise, Idaho; Brian C. McComas, residing at San Francisco, California; Douglas A. Pierce, residing at Coeur d'Alene, Idaho; Craig H. Durham, residing at Boise, Idaho; for *Amici Curiae* National Association of Criminal Defense Lawyers and Idaho Association of Criminal Defense Lawyers.

Richard A. Eppink, residing at Boise, Idaho; Jason D. Williamson, residing at New York, New York; Robert B. Duncan, W. David Maxwell, Elizabeth C. Lockwood, Kathryn M. Ali, James N. Tansey, Yu Fuchs, William M. Burgess, Tyler A. Blake, residing at Washington, D.C.; for Plaintiffs-Appellants.

Steven L. Olsen, Scott Zanzig, and Leslie Hayes, residing at Boise, Idaho; for Defendants-Appellees the State of Idaho, Darrell G. Bolz, Angela Barkell, Dan Dinning, Hon. Linda Copple Trout, Sen. Chuck Winder, and Rep. Melissa Wintrow.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this appeal because NACDL has a specific and demonstrated interest in ensuring that all accused persons have access to qualified counsel at every stage of a criminal proceeding. NACDL has filed a

[1] No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

number of *amicus* briefs in federal and state courts in cases involving issues similar to those raised by this appeal, including in New York in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), and in Maryland in *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013). NACDL also submitted an *amicus* brief to this Court in connection with prior proceedings in this case.

NACDL, informed by the experience of its membership, is uniquely well positioned to inform this Court of the consequences that are visited upon criminal defendants when they are subjected to representation by overburdened and under-resourced counsel, as is alleged by plaintiffs here. Moreover, NACDL has published groundbreaking reports chronicling deficiencies in public defense. *See* www.nacdl.org/reports. NACDL has a direct interest in seeing that defendants have a vehicle to redress systemically deficient representation, and brings a perspective that can inform the Court's consideration of the issues in this appeal.

Idaho Association of Criminal Defense Lawyers

The Idaho Association of Criminal Defense Lawyers (IACDL) is also a non-profit voluntary organization of lawyers. It is the only organization of lawyers in the State of Idaho whose members work exclusively on the criminal defense side of the justice system. The organization's statement of purpose is as follows:

> The objective and purpose of the Idaho Association of Criminal Defense Lawyers is to promote study and research in the field of criminal law and related subjects; to disseminate by lecture, seminars, and publications the knowledge of the law relating to criminal defense practice and procedure; to promote the proper

> administration of justice, to foster, maintain, and encourage the integrity and independence of the judicial system and the expertise of the defense lawyer in criminal cases; to hold periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby to protect individual rights and improve the criminal law, its practices and procedures.

Membership in the IACDL includes state and federal public defenders, as well as private counsel and defense investigators. The IACDL was first incorporated in 1989. The organization's focus continues to be the advancement of the practice of criminal defense, especially as it relates to public defense. For all of the above reasons, IACDL has a particular interest in the outcome of this appeal and particular insight into the day-to-day problems caused in Idaho by structural deficiencies in public defense, which are outlined below.

ARGUMENT

I. INTRODUCTION

Plaintiffs in this case are a class of criminal defendants "who are unable to afford an attorney and who depend on the State of Idaho to provide them with effective legal representation." (First Amended Complaint ["FAC"] ¶ 102.) They allege systemic deficiencies in Idaho's provision of public defense services, and seek prospective relief. This Court has already determined that plaintiffs' claims should not be analyzed under the same framework as retrospective claims based on ineffective assistance of counsel. *See Tucker v. State*, 394 P.3d 54, 62-63 (Idaho 2017) (rejecting application of *Strickland v. Washington*, 466 U.S. 668 (1984), to

plaintiffs' claims). Accordingly, the task currently before this Court is to determine what standard should be applied to plaintiffs' claims. For the reasons set forth in Appellants' Brief and in cases from other courts that have addressed this issue, *amici curiae* NACDL and IACDL (collectively "*amici*") believe that in order to obtain the requested prospective relief, plaintiffs should be required to demonstrate that Idaho's public defense system presents a substantial risk of harm to members of the plaintiff class. *See, e.g., Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert. denied*, 495 U.S. 957 (1990); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

Amici do not intend to revisit the legal issues, which are fully addressed in Appellants' Brief. Rather, *amici* believe it will be helpful to this Court in considering those issues to understand the real-world consequences of the kinds of structural deficiencies alleged by plaintiffs. That is, when plaintiffs reference a substantial risk of harm to individuals across Idaho who rely on public defense, what types of harm are threatened, and why should those harms be redressable in court? *Amici*, two organizations whose members routinely represent defendants in criminal proceedings, are in a position to address those questions by presenting research and anecdotal information regarding the situations that criminal defendants encounter when their public defenders are overburdened, lack time or

resources to consult with them or investigate their cases, or lack the experience and training required to be effective advocates on their behalf.

In some of the instances described below, retrospective relief was available to the defendants; in others, courts held that the high bar for relief under *Strickland* was not met, or a *Strickland* claim was not even available. But as this Court has already held, the case-by-case analysis that is required under *Strickland* is not the proper vehicle for addressing claims of structural inadequacies and requests for prospective relief, such as plaintiffs assert here. The examples below are offered instead in the hope that they will assist this Court to understand the harm that can flow from the systemic deficiencies that beset the public defense system in Idaho, and consequently, the severity of the stakes for defendants who rely on that system to provide the effective assistance of counsel to which they are constitutionally entitled.

II. THE VIOLATIONS ALLEGED BY PLAINTIFFS CAUSE ONGOING HARM TO DEFENDANTS, THEIR FAMILIES, AND THEIR COMMUNITIES AND IMPOSE BOTH ECONOMIC AND SOCIAL COSTS

Plaintiffs allege that public defense clients across Idaho "have been denied their right to effective counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law." (FAC ¶ 10.) They allege, *inter alia,* that Idaho

defendants in need of public counsel are unrepresented at their initial appearances, contributing to unnecessary detention; that they lack access to their lawyers, and are often unable to meet with them to help prepare their defense; and that counsel's caseloads are significantly higher than national standards, making it impossible for counsel to provide meaningful assistance. (FAC ¶¶ 13-23.) Plaintiffs seek various forms of declaratory and injunctive relief. (FAC at pp. 64-65.)

In reversing the District Court's dismissal of plaintiffs' original complaint, this Court noted that plaintiffs are seeking to "effect systemic reform" rather than obtain relief in their individual cases, and that such claims are supported by *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and *State v. Montroy*, 37 Idaho 684, 690, 217 P. 611, 614 (1923). *See Tucker*, 394 P.3d at 62-63. This Court also noted that plaintiffs allege both actual denials of counsel (that is, lack of representation at critical stages of their prosecution) and constructive denials of counsel (that is, counsel being nominally available but under conditions where no lawyer could provide effective assistance). *See id.* at 63 (citations omitted). In order for this Court to determine the proper standard to apply to these claims, *amici* believe it is critically important for this Court to understand the very real harms that are suffered, on an ongoing basis, by defendants across Idaho whose counsel are being appointed under the circumstances alleged in the Complaint. Examples of the systemic violations alleged here, and their consequences, are detailed below.

A. High Bail and Unnecessary or Overlong Pretrial Detention

Defendants who are unrepresented at their initial appearance, or who do not have the opportunity to consult with counsel prior to that appearance, may forfeit their right to immediate release on bail or on their own recognizance, resulting in unnecessary jail time. This can be a consequence of a number of factors, including defendants' unfamiliarity with court requirements and procedures; unfamiliarity with applicable criminal statutes and standards; inability to plead their case effectively; improper considerations such as racial profiling; or any combination of the above.[2] Research has established that defendants who are not represented at their bail hearings are incarcerated for longer periods than represented defendants – incarceration that is either not necessary at all, or is longer than appropriate. As the highest court in Maryland found, "Unrepresented suspects are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable 10% fee to regain their freedom." *DeWolfe v. Richmond*, 76 A.3d 1019, 1024 (Md. 2013) (citation omitted).

[2] Unrepresented defendants may also undercut their own interests in future proceedings against them, for example by speaking on their own behalf in order to advocate for their release but in the process, compromising their Fifth Amendment protection against self-incrimination.

Empirical research confirms the Maryland court's conclusions. "Absent counsel, an accused is likely to receive an excessive or unreasonable bail. Those who cannot afford bail, including many charged with nonviolent crimes, will remain in jail between two and 70 days, waiting for their assigned lawyer's advocacy before a judicial officer. Taxpayers are left to pay the high cost of incarceration before trial." Douglas L. Colbert, *When the Cheering (for Gideon) Stops: The Defense Bar and Representation at Initial Bail Hearings*, CHAMPION (June 2012).[3] One study in Maryland found significant differences in the treatment of unrepresented versus represented defendants: 13% of unrepresented defendants were released on their own recognizance, versus 34% of defendants who had lawyers as part of the Baltimore City Lawyers at Bail Project; bail was reduced for 59% of those represented defendants, but only 14% of unrepresented defendants; and the amount of the bail reduction was significantly higher for the represented defendants. *See* Douglas L. Colbert, Ray Paternoster and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1753-56 (May 2002); *see also* The Constitution Project National Right to Counsel Committee, DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING

[3] Available at https://www.nacdl.org/Article/June2012-WhentheCheering(forGideon)Stop.

(March 2015) (detailing consequences to individuals and society as a whole from denial of effective counsel at early stages of criminal prosecution).[4]

Unnecessary detention, in itself, constitutes serious injury. The United States Supreme Court has rejected the notion that "a minimal amount of additional time in prison cannot constitute prejudice," making clear instead that "any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter") (citation omitted). Indeed, this is the reason why the Sixth Amendment right to counsel attaches at the defendant's first appearance, where the defendant's "liberty is subject to restriction." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 213 (2008).

Even apart from the deprivation of liberty, unnecessary or overlong pretrial detention for even short periods can have significant harmful effects on defendants and their families. *See Argersinger*, 407 U.S. at 37 (imprisonment "may well result in quite serious repercussions affecting [the accused's] career and his reputation"). Defendants who are detained in jail while waiting for the assistance

[4] Available at https://archive.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

of their lawyers are separated from their families, may lose their jobs or homes, have their educations interrupted, and even lose custody of their children.

> For people who have jobs when they are arrested, being held in jail can jeopardize their employment – not only affecting their own lives, but the financial stability of their families. . . . [S]pending time in jail can push people already on the economic margins further into poverty. Incarceration can have a ripple effect on families and communities that is difficult to measure, but extremely significant – all before a person has even been convicted of an offense.

Justice Policy Institute, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 19 (July 2011);[5] *see also* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31-SPG CRIM. JUST. 23, 26 (Spring 2016) ("Even one day in custody can cause a person to lose a job, miss school, or be unable to care for dependents."). The Maryland Court of Appeals agreed:

> [T]he failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but . . . they may be employed in low wage jobs which could be easily lost because of incarceration.

DeWolfe, 76 A.3d at 1023.

Research also demonstrates that defendants who are detained prior to trial "are more likely to be convicted, if convicted they are more likely to be sentenced to incarceration, and if incarcerated their sentences are likely to be longer." John P. Gross and Jerry J. Cox, *The Cost of Representation Compared to the Cost of*

[5] Available at http://www.justicepolicy.org/research/2756?utm_source=%2fsystemoverload&utm_medium=web&utm_campaign=redirect.

Incarceration, CHAMPION (March 2013);[6] *see* Léon Digard and Elizabeth Swavola, Vera Institute of Justice, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 2 (April 2019) ("A growing body of evidence suggests pretrial detention leads to worse outcomes for the people who are held in jail – both in their court cases and in their lives – as compared with similarly situated people who are able to secure pretrial release.");[7] Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, The Laura and John Arnold Foundation, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (Nov. 2013) (defendants who are detained for the entire pretrial period are more likely to be sentenced to jail and more likely to receive longer sentences; the effects are largest for low-risk defendants).[8] This increases both the likelihood of substantial harm to the defendants, and the costs to the criminal justice system. *See* Aditi Juneja and Nidhi Vij Mali, *Value of Improving Funding for Indigent Defense and Recommendations for Implementation*, 54 GONZ. L. REV. 23, 25-26 (2018/2019) (providing indigent defense services at bail hearings and on appeal "has been shown to save administering governmental bodies millions of dollars").

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[6] Available at https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Gross%20and%20Cox%20-%20Cost%20of%20Representation.pdf.

[7] Available at http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf.

[8] Available at https://www.issuelab.org/resource/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes.html.

Again, empirical research confirms that these consequences are more severe for defendants who lack representation. "Absent counsel, an accused is more likely to suffer the serious consequences of pretrial incarceration beyond personal liberty, namely economic and social losses . . . . A defender's courtroom presence helps balance a playing field that otherwise leans heavily in favor of the unopposed government prosecutor." Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 387 (April 2011).

Many examples are offered in the articles cited in this brief. As just one example, a 19-year-old African-American man, unemployed and living with his grandmother who worked as a housekeeper, was charged with marijuana possession. He was not represented at his bail hearing and although he had no prior convictions or prior arrests, he was required to offer a $3,000 bond or $300 cash bail; neither he nor his grandmother was able to come up with $300 for bail. He spent 24 days in jail before a Maryland law student gained his release. DON'T I NEED A LAWYER?, *supra*, at 32. Another defendant spent 28 days in jail after his bail was increased on a charge of driving while impaired; during his incarceration, his pregnant wife and 18-month-old baby were evicted and ended up in a homeless shelter. *Do Attorneys Really Matter*, *supra*, at 1735. A high school senior, never previously arrested, spent four weeks in jail on an assault charge following a fight with an older man who was allegedly abusing the defendant's younger sister. *Id.*

Both of the latter two defendants were released on their own recognizance after law students intervened on their behalf. *Id.*

Another type of harm that can result from inadequate or no representation at an initial appearance, and that can also have lasting consequences on whether or not the defendant is ultimately convicted, is failure to refer a defendant to an appropriate treatment program. Such programs are generally "much cheaper and more effective at reducing recidivism than incarceration. Defense attorneys are in the unique position to effectively identify defendants who have substance abuse issues or mental health issues" and would benefit from these programs. Gross and Cox, *supra*. In some jurisdictions and under some circumstances, if a defendant does not have a lawyer at an initial appearance or if that lawyer has not had time to meet with the defendant and assess his or her circumstances, that defendant may lose the opportunity to be referred to a diversion program that could help avoid unnecessary and counterproductive jail time.

The record on summary judgment demonstrates that defendants in Idaho must represent themselves at some initial appearances and that even when defense lawyers are appointed in time to appear, they often have not had the opportunity to prepare for the initial appearance by meeting with their clients in advance or speaking with the clients' families and as a result, are unable to provide substantive or meaningful representation. These defendants have not been – and may never be

– convicted of any crime. Nevertheless, as demonstrated above, the defendants may suffer prolonged harm in the form of pretrial incarceration, and lasting consequences from such incarceration. Even the prospect of an ultimately favorable outcome does not address these harms, which may be irreversible.[9]

B. Guilty Pleas

Defendants who face the threat or reality of prolonged pretrial detention may feel pressure to plead guilty in the hope of getting out of jail more quickly, even if they are innocent.[10] Defendants who are not represented, or who must wait to consult with their attorney, or whose attorney has not had adequate time to learn the facts of the case and conduct additional investigative research if needed, may not have the benefit of the legal counsel they need in order to make an informed decision about a plea. For this reason, the Supreme Court has held that plea negotiations constitute a critical phase of criminal proceedings in which the defendant is constitutionally entitled to effective counsel. Indeed, it may be "the only stage when legal aid and advice would help him." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)); *see*

[9] As with the other types of harm described in this brief, *amici* have cited research and anecdotal evidence from outside Idaho, but note that – as borne out by the record before the lower court on summary judgment – these harms flow inevitably from a public defense system that suffers from the deficiencies that currently beset Idaho's system.

[10] The Innocence Project website lists 41 cases of defendants who pled guilty to crimes of which they were later exonerated. *See* https://www.innocenceproject.org/all-cases/#plead-yes.

also Argersinger, 407 U.S. at 34 (counsel is needed at entry of guilty plea "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution"); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.").

A defendant who pleads guilty because of absent or inadequate representation may, unknowingly, jeopardize his or her future due to the "collateral consequences" that accompany a criminal conviction. *See* SYSTEM OVERLOAD, *supra*, at 20; *see also* The Constitution Project National Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 72 (April 2009) ("Collateral consequences can result in more severe sanctions for a defendant than the actual criminal sentence, including the loss of legal immigration status, public benefits, housing, a driver's license, and employment.").[11] In Idaho alone, there are over 600 collateral consequences of a criminal conviction, ranging from ineligibility to serve as the guardian of an incapacitated person, to ineligibility to serve on a jury, to suspension or revocation of a teaching credential. *See* National Inventory of Collateral Consequences of Conviction (https://niccc.csgjusticecenter.org/); *see*

[11] Available at https://archive.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

generally John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 80-86 (2013) (detailing some of the "state-imposed barriers to the exercise of certain rights or privileges as a result of a conviction" and noting that "we must view all of the potential consequences of a conviction as a web of enmeshed penalties"); Karen Houppert, CHASING GIDEON 171 (New York: The New Press 2013) (quoting retired Judge Calvin Johnson of Louisiana: "The conviction is a life sentence. That conviction will go with you till the day you die.").

One particularly egregious example is the "severe 'penalty'" of deportation that can result from a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). In *Padilla*, the defendant pled guilty to a drug charge without realizing that he would face deportation as a result, even though he had been a lawful permanent resident of the U.S. for 40 years and had served in the armed forces in Vietnam. *Id*. at 359. More recently, in *Lee v. United States*, 137 S. Ct. 1958 (2017), the Supreme Court addressed a similar case of a defendant, also a lawful permanent resident, who pled guilty to a drug charge without knowing that he would be subject to mandatory deportation as a result. *Id*. at 1962. The defendant "had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents – both naturalized American citizens"; thus, avoiding

deportation was of paramount importance to him. *Id*. at 1968. In cases like these, where remaining in the U.S. may be more important to the defendant than the risk of jail time, *see Padilla*, 559 U.S. at 368, a defendant who does not have the benefit of meaningful legal counsel when he or she decides to enter a guilty plea may suffer permanent, and devastating, consequences.

Severe collateral consequences can result even from misdemeanor convictions. *See Argersinger,* 407 U.S. at 47-48 (Powell, J., concurring in the result) ("The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'").

> A misdemeanor conviction bars eligibility for numerous professional licenses. It can affect child custody, food stamp eligibility, or lead to deportation. It can affect the right to vote. A misdemeanor drug conviction renders students ineligible for federal student loans. By pleading guilty to disorderly conduct, a noncriminal violation, a person is 'presumptively ineligible for New York City public housing for two years.' In Baltimore, a misdemeanor conviction renders the person ineligible for public housing for eighteen months. A misdemeanor can make it difficult to rent an apartment, make the offender ineligible for health care programs, or land the offender in a sex offender registry.

Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325-26 (July 2012) (citations omitted).

A federal judge in New York outlined some of these collateral consequences in deciding to sentence a woman convicted of drug offenses to probation rather than imprisonment:

> Remarkably, there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. . . . The range of subject matter that collateral consequences cover can be particularly disruptive to an ex-convict's efforts at rehabilitation and reintegration into society. . . . [I]n addition to the general reluctance of private employers to hire ex-convicts, felony convictions disqualify individuals from holding various positions. Oftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless. In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle.

United States v. Nesbeth, 188 F. Supp. 3d 179, 184-86 (E.D.N.Y. 2016). The judge concluded, "[T]he collateral consequences Ms. Nesbeth will suffer, and is likely to suffer . . . [have] compelled me to conclude that she has been sufficiently punished." *Id*. at 194.

A defendant who is unrepresented or who receives rushed or inadequate advice from an overworked public defender, who may have been in jail for an extended period already, and who decides to plead guilty even if innocent in order to avoid any more jail time, may be completely ignorant of these collateral consequences or insufficiently educated about them, and thus unaware of the permanent and irreparable harm that a guilty plea will inflict. Similarly, a defender who lacks adequate time to meet with their client will be less likely to learn

important information such as the client's current and future employment and education plans, or housing status. Without such information, the attorney will be unable fully to advise the client of the specific collateral consequences that can flow from their conviction or be able to better mitigate those harms in plea negotiations. And even if the court offers a perfunctory explanation of those consequences, a defendant who does not have an attorney to explain them in detail, answer questions about them, and apply them to his or her particular circumstances, is at risk of serious repercussions.

One of the named plaintiffs in this action, Tracy Tucker, serves as an example. He was not represented at his initial appearance and was unable to post bail. He spent nearly three months in jail, during which he had tremendous difficulty in reaching his attorney and his attorney had no time to confer with him or to conduct any meaningful investigation into his case. Mr. Tucker eventually pled guilty in a desperate attempt to get out of jail. (FAC ¶ 6.)

Another named plaintiff, Naomi Morley, exemplifies the situation in which overworked defense attorneys may counsel a defendant to accept an overly harsh plea bargain. Ms. Morley was severely injured in a car accident and subsequently faced criminal charges. Despite her injuries, she was incarcerated for three weeks before her bail was reduced. Although Ms. Morley insisted on her innocence, her attorneys did not have time or resources to investigate her case and urged her to

plead guilty to serious felony charges that would have led to her being sentenced to ten years in prison. Ms. Morley refused to do so and after two years of persistence on her part, the state finally dropped all but one minor charge, and she was sentenced only to a fine and probation. (FAC ¶ 8.)

At the same time, a defendant may suffer harm if, as a result of the absence or inadequacy of legal counsel, he or she decides not to accept a favorable plea bargain. For example, the lead plaintiff in *Hurrell-Harring*, the New York lawsuit that claimed systemic deficiencies in representation, was charged with sneaking a small amount of marijuana to her husband in prison. The crime was usually charged as a misdemeanor and did not often lead to a jail sentence, but she pled guilty to a felony and spent four months in jail before her conviction was overturned. "During that time, she lost her nursing-assistant license, her job, and her home." Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1571 (Nov. 2018).

C. Lack of Time and Resources to Prepare Defenses

The excessive caseloads alleged in plaintiffs' complaint can have a range of detrimental effects. *See generally* Norman Lefstein, ABA Standing Committee on Legal Aid and Indigent Defendants, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 55-94 (2011).[12] One of the most severe

[12] Available at https://www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defe

consequences of Idaho's underfunded public defense system is the inability of public defenders, due to lack of resources and excessive caseloads, to investigate adequately their clients' cases or to procure appropriate expert assistance. One commentator has described the harm that results:

> What are the precise ways that indigent defendants suffer when their advocates carry excessive caseloads? First and foremost, their cases are not adequately investigated and prepared. . . . A comprehensive case preparation entails investigating the facts relating to the criminal charge: visiting the scene of the crime, accessing and examining key pieces of evidence, and locating both the prosecution and possible defense witnesses. . . . [A]dequate trial preparation may well be more critical to success than the forensic skill demonstrated in court.

Richard Klein, *Civil Rights in Crisis: The Racial Impact of the Denial of the Sixth Amendment Right to Counsel*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 163, 203-04 (2014) (citations omitted).

> When there are too many cases, lawyers are forced to choose among their clients, spending their time in court handling emergencies and other matters that cannot be postponed. Thus, they are prevented from performing such essential tasks as conducting client interviews, performing legal research, drafting various motions, requesting investigative or expert services, interviewing defense witnesses, and otherwise preparing for pretrial hearings, trials, and sentencing hearings.

The Constitution Project, JUSTICE DENIED, *supra*, at 65; *see also* Laurence A. Benner, American Constitution Society, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 11 (March 2011) ("When the underfunding of indigent

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defense systems result in such excessive caseloads that defense counsel is unable to conduct a 'prompt and thorough-going investigation,' the government denies the assistance of counsel to which the defendant is entitled.") (citations omitted).[13]

Moreover, it is critical that defense counsel have resources to commence an investigation as soon as possible after the defendant's arrest so that essential evidence is not lost. "As time passes, witnesses become more difficult to locate and their memories fade. Physical evidence may be lost or begin to deteriorate." Gross and Cox, *supra*. Even if a defendant is represented, a delay in the appointment of a public defender, or an excessive caseload that makes it difficult for the public defender to turn immediately to that defendant's case, can make it more difficult to obtain accurate investigative results – regardless of whether funding is a problem.

Again, there are numerous examples of cases in which lack of time or resources for an investigation caused harm to a defendant. One such example is the case of Donald Gamble, who was charged with armed robbery in New Orleans, Louisiana. His public defender was unable to investigate his case due to excessive workload. Eventually, a private attorney was appointed to represent him. Once she reviewed security camera footage, which the public defender had not had time to do, Mr. Gamble's attorney was able to demonstrate to the court that he could not

[13] Available at https://www.acslaw.org/issue_brief/briefs-2007-2011/when-excessive-public-defender-workloads-violate-the-sixth-amendment-right-to-counsel-without-a-showing-of-prejudice/.

have committed the crime. The charges were dropped and Mr. Gamble was released, but he had already spent 16 months in jail for a crime of which he was innocent. *See* Backus and Marcus, *supra*, at 1570-71.[14]

In another example, Terrence Miller was charged with drug crimes in New Jersey. He had several changes of counsel and was ultimately appointed a public defender whom he did not meet until the morning of his suppression hearing, which was the day before his trial. Mr. Miller had witnesses who corroborated his claim that he was innocent of the crimes charged, but his lawyer did not have time to investigate his account or contact his witnesses (the trial judge denied a defense request for a continuance). *State v. Miller*, 76 A.3d 1250 (N.J. 2013).[15]

Also in New Orleans, Joseph Allen was arrested in connection with an exchange of gunfire in a public park, despite the fact that he was in Houston at the time of the incident. Mr. Allen's family was able to hire a private defense attorney who found security camera footage that established his innocence, and charges were dropped. The chief public defender in New Orleans observed that if Mr. Allen had been represented by a public defender, the footage might never have

[14] Mr. Gamble's case was profiled on the CBS news magazine program "Sixty Minutes." *See* "Inside Nola Public Defenders' Decision to Refuse Felony Cases," https://www.cbsnews.com/news/inside-new-orleans-public-defenders-decision-to-refuse-felony-cases/.

[15] *Miller* is also an example of the inadequacy of post-conviction remedies to address the type of harm at issue here, as the Supreme Court of New Jersey held that Mr. Miller's constitutional right to effective representation of counsel had not been denied even though the trial court refused to grant the requested continuance, and affirmed his conviction. *Miller*, 76 A.3d at 1268.

been found, because his office had only eight investigators for 21,000 cases per year and an investigator might not have had time to obtain the footage before it was erased. *See* Lorelei Laird, *The Gideon Revolution*, 103-JAN A.B.A. J. 44, 45 (Jan. 2017).

One indigent defendant who suffered from unavailability of resources for expert evidence is Frederick Mardlin, who was charged with arson for burning down his home. Mr. Mardlin's public defender was able to hire an investigator who found that the fire was caused by faulty wiring, but the investigator lacked the expertise to testify about the wiring, and the public defender could not obtain funds to hire an expert. Mr. Mardlin was convicted, but his appointed appellate attorney found an expert who agreed to take the case free of charge and whose tests found conclusively that the fire was accidental. *See* American Civil Liberties Union, FACES OF FAILING PUBLIC DEFENSE SYSTEMS: PORTRAITS OF MICHIGAN'S CONSTITUTIONAL CRISIS 31-32 (April 2011).[16]

These cases are examples of the types of harm that defendants can suffer if their lawyers do not have time or resources fully to investigate and prepare their cases, or to hire appropriate expert witnesses. But they also exemplify the fact that post-conviction remedies cannot always, or even often, remedy those harms. Post-conviction petitioners challenging the performance of their attorneys must "focus

[16] Available at https://www.aclu.org/other/faces-failing-defense-systems-portraits-michigans-constitutional-crisis.

on errors of commission; however, especially with overworked defense attorneys, ineffective assistance more often results from an attorney's errors of omission." Rodger Citron, *(Un) Luckey v. Miller: The Case for A Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 487 (1991). The prospective relief that plaintiffs seek here is the only way to prevent such errors of omission from occurring. And even if an error of omission is corrected before it results in a wrongful conviction, the defendant may already have suffered from an extended period of incarceration which turned out to be completely unwarranted, and which can never fully be repaired or compensated.

D. Wrongful Convictions

Excessive caseloads, as alleged in plaintiffs' complaint, also contribute to the harms associated with wrongful convictions. *See* SYSTEM OVERLOAD, *supra*, at 21. Although there can be many causes of wrongful convictions, "inadequate representation often is cited as a significant contributing factor." American Bar Association Standing Committee on Legal Aid and Indigent Defendants, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 3 (Dec. 2004).[17] The Innocence Project website lists 22 cases in which inadequate counsel contributed to a wrongful conviction, resulting in a collective 425 years in prison.

[17] Available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

See https://www.innocenceproject.org/all-cases/2#inadequate-defense. "For persons wrongfully convicted, the cost of inadequate defense representation is reflected in countless wasted years spent in prison, the deprivation of cherished rights, adverse immigration consequences, and quite possibly the loss of life." GIDEON'S BROKEN PROMISE, *supra*, at 4. Surely there can be no worse violation of the principles of *Gideon* and its progeny than to send an innocent person to jail because his or her lawyer was too overworked or lacked sufficient resources to test the strength of the prosecution's case. *Cf. United States v. Cronic*, 466 U.S. 648, 659 (1984) ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable").

E. Systemic Harms

One noted expert has summed up the harms to criminal defendants, and to society, caused by the types of constitutional violations alleged by plaintiffs here:

> The cost of this one-sided system is enormous. Innocent people are convicted and sent to prison while the perpetrators remain at large. . . . People are sentenced without consideration of their individual characteristics, allowing race, politics, and other improper factors to influence sentences. Over 2.2 million people – a grossly disproportionate number of them African Americans and Latinos – are in prisons and jails . . . . Even those who have completed their sentences may be deported, denied the right to vote, dishonorably discharged from the armed forces, denied public benefits, and denied business or professional licenses. Reentry into society is extremely difficult, extending the costs to the families and communities of those who have been imprisoned.

Stephen B. Bright and Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2154-55 (June 2013) (citations omitted). Research has also made clear that many of these harms fall disproportionately on people of color:

> Because of the higher rates of minority poverty and the higher rates at which minorities are arrested, public defenders and court-appointed counsel have a disproportionate number of minority clients. As a result, the crisis in America's public defense system has a much more acute impact on communities of color. The dramatic under-funding and lack of oversight of America's indigent defense services . . . has placed people of color in a second class status in the American criminal justice system.

Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, National Association of Criminal Defense Lawyers, MINOR CRIMES, MASSIVE WASTE – THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 47 (April 2009).[18] It is important to note that Idaho has the fifth highest rate of incarceration of African-Americans of all states in the U.S., and the third highest rate of Hispanic incarceration. Ashley Nellis, The Sentencing Project, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4, 7 (June 2016).[19] It is reasonable to assume that the harms outlined in this brief, which result from the

[18] Available at https://www.nacdl.org/Document/MinorCrimesMassiveWasteTollofMisdemeanorCourts.

[19] Available at https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

deficiencies in Idaho's public defense system alleged by plaintiffs, will impose significant burdens on defendants of color who rely on that system.

Moreover, the types of harms reflected in the lower court's record on summary judgment do not affect only those defendants who may be unnecessarily detained or wrongfully convicted, or their families; they have a pervasive and disturbing impact on our criminal justice system and our society as a whole. The absence of an effective state-wide public defense system can reduce the incentives for prosecutors and law enforcement to make sure they are operating properly and within constitutional boundaries. "In a community without an effective public defense system . . . the prosecutor doesn't need to worry about whether his cops are bringing him well-investigated, solid cases, and if the prosecutor isn't worried, then the police have no systemic incentive to investigate thoroughly and confirm that their arrest is solid." Houppert, CHASING GIDEON 175 (quoting Tulane Law School Professor Katherine Mattes). Thus, a public defense system that is under-resourced can actually result in less effective law enforcement and increased threats to public safety.

An inadequate public defense system imposes economic as well as social costs. As detailed above, inadequate representation worsens outcomes across the board. The likelihood and length of pretrial detention is increased, defendants are less likely to be referred to treatment programs that reduce recidivism, the

likelihood of wrongful guilty pleas and convictions increases, and sentences are more likely to be excessive or inappropriate. All of these consequences consume unnecessary resources in the form of higher incarceration costs and expensive appeals, as well as the reduced ability of defendants attempting to re-enter society to find gainful employment and contribute to society. "The reality is that defense attorneys reduce incarceration costs, increase efficiency, and increase the accuracy of the criminal justice system. Defendants benefit, society benefits, and even the victims of crime benefit by having their complaints resolved quickly and accurately." Gross and Cox, *supra*. In short, "[A] system in which defenders have the time and resources to provide a quality defense can actually save money, as well as have a positive impact on people and communities." SYSTEM OVERLOAD, *supra*, at 17.

III. CONCLUSION

The violations alleged by plaintiffs can cause irreversible harm to individuals who rely upon Idaho's system of public defense, whether or not they are ever convicted of a crime. Moreover, the types of harms described above also erode public trust in our justice system. Anyone who is or might be subject to the vagaries of the system, anyone who has seen a friend, co-worker, or family member unfairly treated, may lose confidence that they will be treated fairly or that the system will produce just results. The resulting cynicism cannot but be harmful

to the fabric of our society. *See* SYSTEM OVERLOAD, *supra*, at 23 ("An eroded trust in the justice system can negatively impact public safety and community well-being.").

"All Americans . . . have a stake in ensuring that publically provided defense services deliver representation of the highest quality because anyone's son, daughter, relative, or friend could become caught up in the web of the criminal justice system and be wrongfully accused." Benner, *supra*, at 15. The failings alleged by plaintiffs "matter not only because they permanently damage lives, families, and communities, but also because they leave the criminal courts without credibility or legitimacy. . . . [E]veryone in society should be concerned with a major public institution that is supposed to be about justice and is failing so badly." Bright and Sanneh, 122 YALE L.J. at 2172.

All of these elements of harm, which flow from the allegations in plaintiffs' complaint, should be taken into account in determining the proper standard to apply to plaintiffs' claims. Given the stakes – not just for members of the plaintiff class, but also for their families, communities, and society as a whole – *amici* respectfully submit that this Court should not impose the burden on plaintiffs of requiring them to demonstrate individual or particularized harm to each named plaintiff, or instances of actual harm in each county. Indeed, this Court has already held that this type of case-by-case analysis is inappropriate here. *See Tucker*, 394

P.3d at 62-63. Rather, in order to evaluate plaintiffs' claims of systematic harm and prayers for prospective relief, this Court should require plaintiffs to show structural deficiencies that present a substantial risk of unconstitutional harm. *Amici* accordingly urge this Court to adopt the standard proposed in Appellants' Brief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March 2020, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the iCourt E-File system, which sent a notice of electronic filing to the following persons:

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