IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, *et al.*,

Plaintiffs-Appellants,

vs.

STATE OF IDAHO, *et. al*,

Defendants-Respondents.

Supreme Court Docket No. 51631-2024

District Court No. CV-OC-2015-10240

Appeal from the District Court of the Fourth Judicial District

The Honorable Samuel A. Hoagland, District Judge, Presiding

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

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Richard A. Eppink, Paul Southwick, residing at Boise, Idaho; Robert B. Duncan, Joe Cavanaugh, Jimmy McEntee, Devin Urness, Alessandra Carozza, residing at Washington, D.C.; Elizabeth C. Lockwood, residing at Washington, D.C.; Emma Andersson, residing at New York, New York; Ashika Verriest, residing at Washington, D.C. for Plaintiffs-Appellants.

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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 tens of thousands more with its network of affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to defendants, defense lawyers, and the criminal legal system as a whole.

NACDL has a particular interest in this appeal because NACDL has a demonstrated interest in ensuring that all accused persons have timely and meaningful access to qualified counsel at every stage of a criminal proceeding. NACDL has filed numerous amicus briefs in cases involving issues like those raised by this appeal, including in New York in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), in Michigan in *Duncan v. Michigan,* 795 N.W.2d 820 (Mich. 2011), in Maryland in *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013), and in Wisconsin in *State v. Lee*, 955 N.W.2d 424 (Wisc. 2021). NACDL also submitted an amicus brief to this Court in connection with prior proceedings in this case.

Additionally, NACDL worked to promote reforms of federal, state, and local public defense systems including our reports and filings in Florida[1], Indiana[2], Louisiana[3], South Carolina[4], Tennessee,[5] and Wisconsin,[6] our examination of the underutilization of investigator services in Texas,[7] defender workloads in Rhode Island,[8] our study of defender independence in the Federal Public Defense system,[9] and our work supporting early access to counsel in Colorado,[10] New Jersey,[11] Texas (Harris County[12] and statewide[13]), and Wisconsin.[14]

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[1] National Association of Criminal Defense Lawyers, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts* (2024), (last visited Sept. 20, 2024).
[2] National Association of Criminal Defense Lawyers, *Indiana Public Defense*, https://www.nacdl.org/mapdata/IndianaPublicDefense (last visited Sept. 20, 2024).
[3] National Association of Criminal Defense Lawyers, *State of Crisis: Chronic Neglect and Underfunding for Louisiana's Public Defense System* (2024).
[4] National Association of Criminal Defense Lawyers, *Rush to Judgment: How South Carolina's Summary Courts Fail to Protect Constitutional Rights* (2024), https://www.nacdl.org/Document/RushtoJudgmentSCSummaryCourtsDontProtectConstRight (last visited Sept. 20, 2024).
[5] National Association of Criminal Defense Lawyers, *Submission in re Rule 13, Sections 2 and 3, Rules of the Tennessee Supreme Court*, No. ADM2018-00796 (Tenn. 2018).
[6] National Association of Criminal Defense Lawyers, *Public Comment on Assigned Counsel Rates in Wisconsin, Re: Rule Petition 17-06, In Re: the Petition to Amend SCR 81.02* (May 2, 2018).
[7] National Association of Criminal Defense Lawyers, *Texas Public Defense: A Study of County-Based Public Defender Offices* (2023), https://www.nacdl.org/Landing/TIDC-Report-2023 (last visited Sept. 20, 2024).
[8] National Association of Criminal Defense Lawyers, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workloads* (2017), https://www.nacdl.org/Document/TheRhodeIslandProjectStudyofRIPDSystemandWorkloads (last visited Sept. 20, 2024).
[9] National Association of Criminal Defense Lawyers, *Federal Indigent Defense 2015: The Independence Imperative* (2015), https://www.nacdl.org/Document/FederalIndigentDefense2015IndependenceImperative (last visited Sept. 20, 2024).
[10] National Association of Criminal Defense Lawyers, *Colorado Pretrial Advocacy Manual* (2020), https://www.nacdl.org/Document/ColoradoPretrialAdvocacy (last visited Sept. 20, 2024).
[11] National Association of Criminal Defense Lawyers, *New Jersey Pretrial Advocacy Manual* (2021), https://www.nacdl.org/Document/NewJerseyPretrialAdvocacy (last visited Sept. 20, 2024).
[12] National Association of Criminal Defense Lawyers, *Harris County Pretrial Advocacy Manual* (2019), https://www.nacdl.org/Document/HarrisCountyPretrialAdvocacy (last visited Sept. 20, 2024).
[13] National Association of Criminal Defense Lawyers, *Texas Bail Manual* (2022), https://www.nacdl.org/Document/Texas-Bail-Manual (last visited Sept. 20, 2024).
[14] National Association of Criminal Defense Lawyers, *Wisconsin Pretrial Advocacy Manual* (2021), https://www.nacdl.org/Document/WisconsinPretrialAdvocacy (last visited Sept. 20, 2024).

Idaho Association of Criminal Defense Lawyers

Established in 1989, the Idaho Association of Criminal Defense Lawyers (IACDL) is a nonprofit, voluntary organization of criminal defense attorneys. IACDL has over 400 lawyer members that include both public defenders and private counsel; attorneys who work in Idaho state as well as federal courts; and attorneys who focus on trials, appeals, post-conviction actions, and federal habeas proceedings. IACDL has a strong commitment to ensuring that Idaho defendants have fair and just proceedings at all stages of the process.

I. INTRODUCTION

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *United States. v. Cronic*, 466 U.S. 648, 654 (1984).

The right to counsel in a criminal case is the right upon which all other rights depend. Without an attorney who has the time, resources, and skill to serve as a zealous advocate for those who are accused of criminal wrongdoing, the remaining protections promised by our constitution fail. Underfunded, overloaded, and insufficiently independent public defense systems lead to wrongful convictions, excessive punishment, and uneven application of the law, eroding public confidence and undermining our nation's promise that all people stand equal under the law. This matter is before this Court for the third time, all in an effort to ensure the people of Idaho are provided one of their most foundational constitutional rights. The trial court's decision to dismiss this case as moot on the hope that the latest reshuffling of the state's public defense delivery system will redress decades long structural deficiencies is premature at best, and likely to result in irreparable harm to hundreds if not thousands of Idahoans.

In granting the State's motion to dismiss based on "prudential mootness,"[15] the District Court found that Idaho's reforms "constitute a sincere and genuine promise by the State to create and implement permanent structural changes to provide constitutionally adequate indigent services," that the transition from the county-based to the state-based public defense system "fundamentally changed the structure and system of public defense, addressing each area Plaintiffs allege are deficient," and that further litigation was unnecessary because "the State has done more than express mere statements of repentance; it has eliminated the county-based system." *Tucker v. State,* No. CV-OC-2015-10240, at 18–19 (Idaho Dist. Ct. Feb. 6, 2024) (Amended Mem. Decision & Order Granting Mot. to Dismiss).

In dismissing the case, the District Court relied heavily on promises of reform without fully assessing their impact on the unresolved systemic and structural defects that lie within the heart of Idaho's public defense system. The trial court's assumptions regarding the efficacy of these reforms are untested, based solely on theoretical improvements rather than demonstrated results. By invoking the doctrine of prudential mootness, the court ignores the ongoing nature of the crisis and fails to account for the continuation of constitutional violations. This premature dismissal exposes current and future criminal case defendants to irreparable harm. Though the District Court left open the possibility of future challenges, it ignores the very real likelihood that the new system will continue to fail to provide constitutional representation, and Idahoans will

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[15] Citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) and *Great Beginnings Child Care, Inc. v. Office of Governor of State of Idaho*, 160, 911 P.2d 751, 753 (1996), the District Court purportedly applied the prudential mootness doctrine, concluding that further litigation was unnecessary due to the reforms implemented by the State. *Tucker v. State*, No. CV-OC-2015-10240, at 14–15 (Idaho Dist. Ct. Feb. 6, 2024) (Amended Mem. Decision & Order Granting Mot. to Dismiss*)*.

continue to pay the price for that failure. This case, which has already been ongoing for nearly eight years, demonstrates the critical need for *timely* intervention. It is for this very reason that courts have long recognized that the temporary discontinuation of harmful conduct or the promises of reform are not sufficient reasons to abandon its role and "militates against a mootness conclusion." *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944*); Nelson v. Marshall,* 497 P.2d 47, 49 (1972).

II. THE CONSTITUTIONAL UNDERPINNINGS OF MEANINGFUL PUBLIC DEFENSE

A. Sixth Amendment Guarantees

The Sixth Amendment guarantees that states provide competent legal representation to all defendants in criminal cases.[16] U.S. Const. amend. VI; Idaho Const. art. I, § 13; *Gideon v. Wainwright*, 372 U.S. 335, 334–35 (1963). Access to counsel is a foundational element of the American criminal legal system, ensuring that every defendant receives a fair trial. As the Supreme Court explained in *Gideon*:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344.

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[16] The right to counsel at state expense is limited to cases where the defendant faces the present or future possibility of incarceration. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that no person may be imprisoned for any offense unless represented by counsel); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (limiting the right to counsel to cases where actual imprisonment is imposed, not when incarceration is merely a potential consequence).

Beyond providing access to counsel, states have an obligation to ensure such lawyers and the systems they operate in provide effective legal assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that the Sixth Amendment right to counsel is violated if a defense attorney's performance falls below an objective standard of reasonableness and prejudices the defendant); *Cronic*, 466 U.S. at 656-57 (recognizing that systemic deficiencies can result in a constructive denial of counsel, even without specific evidence of deficient individual performance). Effective representation mandates that attorneys have the necessary time, skills, and resources to function as meaningful adversaries to the government. *Id*. at 654-657. Additionally, counsel must be appointed in a timely manner to allow for sufficient preparation and the presentation of a defense. See *Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *Powell v. Alabama*, 287 U.S. 45 (1932). As the Supreme Court explained, "[T]he State's conduct of a criminal trial itself implicates the State in the defendant's conviction, and no state may proceed against a defendant whose counsel, appointed or retained, cannot defend him fully and faithfully." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

The Supreme Court has made clear that effective, meaningful assistance of counsel is not limited to the courtroom on the day of trial. It also requires active engagement in the investigation of guilt and mitigation. *Sears v. Upton*, 561 U.S. 945, 955 (2010) (holding that counsel's failure to conduct a thorough investigation of mitigation evidence constituted ineffective assistance of counsel); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (finding counsel's failure to uncover and present evidence of post-traumatic stress disorder and other mitigation evidence unreasonable under *Strickland*). Additionally, effective representation includes seeking and utilizing experts where necessary. *See Hinton v. Alabama*, 571 U.S. 263, 275-76 (2014) (per curiam)

(finding ineffective assistance where counsel failed to seek necessary funds to hire a qualified expert); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that indigent defendants have a constitutional right to expert psychiatric assistance when sanity is a significant factor at trial). Furthermore, defense counsel must engage in meaningful conversations with their clients, particularly regarding plea offers and the collateral consequences of convictions. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (holding that counsel's deficient advice regarding a plea offer resulted in ineffective assistance); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (finding ineffective assistance where counsel failed to advise a non-citizen client of the immigration consequences of a guilty plea); *Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (noting that the Sixth Amendment right to counsel includes the right to discuss defense strategy with one's attorney).

Unlike its retrospective counterpart, *Strickland*, the Supreme Court's companion ruling in *Cronic* recognized that when the failing is with the system's structure itself, courts must *act prospectively* to prevent the denial of counsel. *Cronic*, 466 U.S.at 654. Public defense systems with structures that result in excessive caseloads; lack standards, oversight, and supervision; or are underfunded and lack access to resources are inherently deficient. *Id.* at 658-60. In these instances, ineffective assistance is presumed, as the system creates a constructive denial of the right to counsel.

Over the past two decades, as states have placed greater and greater burdens on their public defense systems while simultaneously failing to infuse those systems with commensurate increases in staffing, resources, and funding, we have seen systemic failures that are only redressed through court intervention. From New York to Washington, Michigan to Missouri, and Pennsylvania to Georgia, courts have increasingly stepped in to correct systemic issues undermining the

constitutional right to counsel. See *Hurrell-Harring*, 930 N.E.2d at 220 (challenging systemic deficiencies in New York's public defense system; court allowed claims to proceed, prompting reforms); *Wilbur v. Mount Vernon*, 989 F. Supp. 2d 1122, 1130–31 (W.D. Wash. 2013) (public defenders were overburdened, leading to ineffective assistance of counsel; court found constructive denial of counsel and imposed oversight); *Duncan*, 795 N.W.2d at 828 (alleging inadequate resources and funding for public defenders in Michigan; court allowed case to proceed, resulting in a settlement and reforms); *David v. Missouri,* No. 20AC-CC00093 (Mo. Cir. Ct. Cole Cnty. Feb. 6, 2023) (challenging Missouri's public defense system for failing to provide adequate representation; case resolved by consent decree requiring reforms); *Kuren v. Luzerne County*, 146 A.3d 715, 727 (Pa. 2016) (systemic deficiencies in public defense created imminent constructive denial of counsel; court allowed class action lawsuit to proceed); *Warren v. Commonwealth,* Petition for Review (Pa. Commw. Ct. June 13, 2024). (class action lawsuit filed over Pennsylvania's failure to reform public defense system; ongoing litigation seeking court-mandated reforms); *NP v. Georgia*, No. 2 2014CV241025 (Ga. Super. Ct. Fulton Cnty. Apr. 20, 2015) (youth denied timely representation due to understaffed public defender office; settled with consent decree mandating reforms). These cases underscore the role of judicial intermediation in addressing systemic inadequacies in public defense and protect the constitutional right to counsel.

B. The Public Defense Function's Role in A Fair System

Public defense plays a critical role in the criminal legal system. Nationally, it is estimated that 80% of individuals rely on the services of a public defense lawyer. *See* U.S. Dep't of Just., Bur. of Just. Stat., *Defense Counsel in Criminal Cases* 1 (2000). As such, shortcomings in the public defense system have a substantial impact on the efficacy and reliability of the entire

criminal legal system. Trust in the system is closely tied to the adversarial process,[17] where zealous and effective representation benefits not only the accused but the community as a whole.

In addition to the impact on trust in the system, a strong public defense system mitigates wrongful convictions, prevents excessive punishments, and minimizes harsh collateral consequences. It acts as a safeguard against government overreach and abuse of power, ensuring that the state is held to its burden and that the rule of law is properly enforced. By connecting individuals to effective defense services, public defense facilitates the sound use of state resources and ultimately reduces recidivism. Moreover, well-functioning public defense promotes public confidence in the legal system by maintaining a fairer and more balanced adversarial process.

When public defense systems fail—whether by allowing excessive workloads, failing to allocate adequate resources and staffing, or undermining defender independence—they are unable to meet their constitutional obligations. In such circumstances no lawyer, regardless of their dedication or effort, can provide each of their clients with the meaningful representation the Sixth Amendment envisions. The Constitution's requirement is not met if a lawyer provides effective representation to just some or even most of their clients; rather, the law mandates that *every individual* has access to an attorney with the time, skills, resources, and ability to provide a robust defense and serve as a zealous advocate against the government. As the Supreme Court stated, "The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 653-57.

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[17] Sevier, Justin. (2014). *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*. Psychology, Public Policy, and Law.

III. PREMATURE DISMISSAL WILL EXPOSE INDIGENT DEFENDANTS TO ONGOING HARM WITH NO RELIEF

This Court has made it clear that a legal challenge is not rendered moot simply because the defendants have promised reform. *Tucker v. State*, 484 P.3d 851, 864 (2021) (*Tucker II*). Instead, the State must demonstrate that "future harm is *unlikely*." *Id.* (emphasis in original). As this Court further explained, "the risk of future harm takes on greater importance than proof of past or present actual harm." *Id.*

A. The District Court Misapplied the Mootness Doctrine

The District Court's reliance on the "prudential mootness" doctrine is misplaced, as Idaho's public defense system's issues are ongoing and the latest changes to the public defense statutes do little to reach the core sources of the system's issues – excessive caseloads, limited funding and resources, and a lack of structural independence. Individual criminal defendants will eventually have their charges resolved, placing systemic litigation like this within the exception for matters that are "capable of repetition, yet evading review." *See Mallery v. Lewis*, 678 P.2d 19, 26 (1983); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (noting that a well-established exception to mootness applies when the challenged conduct is of such limited duration that it cannot be fully litigated before ceasing). However, the structural deficiencies of Idaho's public defense system persist, making any application of prudential mootness premature at best.

Idaho's old public defense system was characterized by widespread and persistent deficiencies, which the court itself acknowledged. Amended Mem. Decision & Order Granting Mot. to Dismiss at 17. These included high caseloads, lack of effective communication between public defenders and their clients, and inadequate preparation for cases. *Id*. Public defenders faced

severe resource constraints, limited access to necessary investigative tools, and insufficient training, which collectively contributed to ineffective assistance of counsel. *Id.* at 21.

These issues are deeply entrenched and extend beyond the changes made by the latest amendments to the State's public defense statutes. The legislative reforms have made an important change in who is providing the funding for the public defense system, *see* I.C. § 19-6008 (releasing counties from financial responsibility for providing indigent defense services and transferring those obligations to the state through the Office of the State Public Defender (OSPD)), but not to the number of cases the system is being asked to handle. The new structure has changed how the leader of the public defense system is selected, *see* I.C. § 19-6004 (detailing the process for the selection of the public defender, their term of service, the means by which they can be removed, and who sets their compensation), but has not added any additional attorneys, investigators, paralegals, or social workers to the system that leader is overseeing.

By relying on the mootness doctrine, the trial court ignored the ongoing nature of these systemic issues, which are likely to continue absent other important changes. The court should have retained jurisdiction over the case to ensure that the public defense system in Idaho is brought into compliance with constitutional standards.

B. Dismissing the case before the "effectiveness of the remedial promise" can be assessed prevents meaningful scrutiny of the system's effectiveness, allowing future violations to go unaddressed.

As the District Court noted, it "must consider the genuineness of the promise to reform, the effectiveness of the remedial promise, and in some cases, the character of the past violations." *Citing W.T. Grant Co.*, 345 U.S. at 898; *O'Boskey v. First Federal Savings & Loan Ass'n,* 739 P.2d 301 (1987), Amended Mem. Decision & Order Granting Mot. to Dismiss at 15.

However, the decision seems to rest entirely on the court's perception of the genuineness of the promise of reform, without considering the risks and practical realities of whether the proposed measures will effectively address the problems at hand.

The trial court's "wait and see" approach comes at the expense of thousands of Idahoans who face irreparable harm if they are denied timely access to attorneys who possess proper training, adequate resources, assistance from support staff, and sufficient time to fulfill their constitutional obligations. The harm faced by indigent defendants from delays in accessing counsel, as well as the systemic lack of resources for counsel to provide effective representation, cannot be remedied after the fact. These are constitutional violations that have immediate and lasting effects on the defendant's ability to receive a fair trial and due process.

The proper course of action should be the inverse—courts should prioritize protections for the plaintiff class and maintain jurisdiction which allows courts the ability to act promptly if the new system does not remedy the current crisis and make adjustments and provide support to promising changes that are undertaken. It should place the burden on the state to demonstrate via tangible evidence, the efficacy of the new system as measured against tangible benchmarks that can show an improved public defense delivery system. The District Court's decision to wait until the system has further demonstrated its continued failings, then forcing plaintiffs to refile the suit before the courts intervene, will result in severe and irreparable harm.

To ensure that the courts can actively address the ongoing deficiencies in the public defense system, it is critical that they retain the flexibility to intervene when necessary. The urgency of this issue is not theoretical—it has real and immediate consequences for defendants who are left vulnerable by a system unable to provide adequate representation.

A failure to act swiftly can have devastating, irreversible effects on individual cases. Attorneys who lack the time or staff to conduct a thorough and timely investigation put their clients at risk of irreparable damage to their cases. Prompt and timely attention to a case helps ensure a defendant can gather the information needed to corroborate a legal or factual defense, undermine the credibility of a government witness or theory, lessen the degree of the offense or minimize his role, or mitigate his sentence. When a lawyer is able to promptly engage with clients, they can:

- Document bruises, abrasions, and other injuries before they heal to corroborate self-defense claims.
- Capture critical, but transient features of relevant locations, such as foliage on the trees, construction on a roadway, a dimmed streetlamp, or obscured signage on a fence.
- Locate and interview witnesses before their memories fade or they change jobs or addresses.
- Recover video surveillance footage from stores, home security systems, red light cameras, and automated license plate readers before retention policies call for their erasure.[18]
- Capture social media posts, preserve text messages, and document other digital content before it is deleted.[19]

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[18] Because of volume, businesses regularly purge surveillance video content. This is especially true for cameras that record 24/7. See, e.g., *How Much Video Surveillance Storage Does My Business Need?,* Business News Daily (Mar. 10, 2021) (recommending most small and mid-size businesses retain video footage for 30 days), https://www.businessnewsdaily.com/16024-video-surveillance-storage.html. Similarly, state laws or local police policies may require regular destruction of footage from red light cameras and automated license plate readers believed to be of no known evidentiary value. See, e.g., National Conference of State Legislatures, *Automated License Plate Reader Statutes, State Statutes Related to Privacy and Data Retention*, https://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx.

[19] Whether intentionally deleted to prevent discovery or removed because of ignorance as to its evidentiary value, social media posts, text messages, and other digital content can quickly become beyond the reach of the defense, making it critical to photograph, download, or otherwise preserve this information. Major cell phone providers, for example, may retain call detail records (date, time, and number contacted) for several months but retain the content

- Identify a lack of organized thinking, paranoid statements, delusional beliefs, and racing thoughts that can be the indicia of serious mental illness. Prompt identification and recognition of mental illness can both provide corroboration for a plea of not guilty by reason of mental disease or defect or other mental health-based defense and minimize risks of significant deterioration that cause lengthy restoration of competency efforts.

Importantly, it is not only the person accused who is harmed by incomplete or untimely action by counsel. These systemic failings harm victims and the community at large, undermining the very integrity of the criminal justice process.

No matter how sincere the State's efforts are in attempting to reform the public defense system, the nature of such a transition requires sustained judicial engagement. This engagement is necessary to ensure that the reforms are implemented in a manner that satisfies constitutional requirements and provides meaningful protections to indigent defendants. Without continuous oversight, there is no guarantee that the reforms will be effective in addressing the deep-rooted issues that have plagued Idaho's public defense system for years.

IV. THE DISTRICT COURT RELIES ON PROMISES OF REFORM WITHOUT ASSESSING THE IMPACT OF UNRESOLVED SYSTEMIC AND STRUCTURAL DEFECTS

The District Court's ruling assumes that the new system will address all the deficiencies identified in this case even though the system has yet to be implemented, and it ignores the fact that the statutory changes do not reach to the problems that lay at the core of the current crisis – excessive caseloads, underutilization of support services, and systemic independence. Instead,

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of the communication for only days. See Joseph B. Evans, *Cell Phone Forensics: Powerful Tool Wielded By Federal Investigators, Fordham J. Corp. & Fin. Law Blog* (June 2, 2016), https://news.law.fordham.edu/jcfl/2016/06/02/cell-phone-forensics-powerful-tool-wielded-by-federal-investigators/.

the trial court's decision rests solely on its faith in the "sincerity" of the SPD and the OSPD to implement standards and effect change.

All those impacted by this litigation, particularly those currently or potentially facing criminal charges in Idaho, earnestly hope that the SPD will implement reforms that fundamentally improve public defense in the state. But hope and faith are not a sufficient legal basis to support the dismissal of a class action lawsuit that, for nearly 8 years, was aimed at protecting the liberty and good name of the thousands of Idahoans facing criminal prosecution without meaningful legal representation.

A. The New System Retains the Existing Structure

The current structure of Idaho's public defense system retains the existing institutional public defender offices in 14 counties, which handle indigent defense with state-employed public defenders. These offices serve the more populous counties, while the remaining 30 counties rely on contract counsel who have signed agreements with the SPDO.

The new system will provide for uniform contracts and payments, but that change does not mandate any oversight, supervision, or limitations on attorney workloads. In fact, according to the SPD's new website, "[a]ll private attorneys who sign a contract with the State Public Defender can also take private clients. How a contract attorney manages their workload and balances their public defender vs. private case work is exclusively up to them."[20]

Although the website further notes, "the SPD expects all case work for public defense to be done at the highest level and requires Constitutional representation in all contract cases," *Id.,*

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[20] See State Public Defender, Can Contract Attorneys Also Have Private Clients—And Will There Be Load Limits?, Idaho State Public Defender's Office, https://spd.idaho.gov/contract-conflict-attorneys/.

this is the same expectation that would have existed under the prior structure, as all attorneys always had an obligation to provide constitutionally effective representation. The announcement that under the new system that workload management will remain an obligation solely in the hands of the contract lawyers, perpetuates the existing posture in which attorneys have, for a variety of reasons, excessive caseloads that jeopardize the quality of representation provided to indigent clients. Without supervision, structure, and mechanisms for relief to aid attorneys in balancing public and private caseloads, the system is likely to continue to fail to meet constitutional standards for effective representation, despite the SPD and attorneys' noblest intentions.

Similarly, the new system empowers the SPD to "[i]mplement the most current American bar association standards [sic] for defending attorneys delivering indigent defense" I.C. § 19-6005(4), but there are no indications that any new processes or procedures have been put into place enact such standards or staff hired to ensure those standards are being met.

For example, the American Bar Association (ABA) Standards for the Defense Function provide "[d]efense counsel has a duty to investigate in all cases" regardless of factors such as the strength of the prosecution's evidence, the client's alleged admissions, or the client's desire to plead guilty. American Bar Association *Standards for Criminal Justice: Defense Function* § 4-4.1(a), (b) (4th ed. 2017). With that investigation beginning promptly to preserve evidence and gather relevant information while it is still available. *Id.* at 4-4.1(c). However, there is no indication that under the new structure additional investigators have been hired, additional training has been employed, or additional checks have been put in place to increase the frequency of case investigations occurring.

Similarly, the ABA standards direct defenders establish robust, long-term relationships with their clients, building a relationship of trust and confidence, discuss the client's objectives for representation, and maintain "effective and regular" communication throughout the case. *Id*. §§ 4-3.1(a), 4-3.3(a), 4-3.1(f). This includes meeting with the client as many times as necessary, keeping them informed of case developments, and sharing case materials as appropriate. *Id.* §§ 4-3.1(f), 4-3.9(a), 4-5.1(b). However, there has been no demonstration of how, under the new system, the attorneys will have more time to devote to building robust relationships or conducting more frequent client meetings.

B. The New System Does Not Increase Independence of the Defense Function

Independence is one of the foundational pillars of a healthy public defense system. As the Supreme Court has made clear, "it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages. *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981). Individual lawyers must have the independence to act zealously on behalf of their clients, challenging the government and advancing each client's position without concern for how it may affect decisions to renew their contracts, receive appointments, or have the court impartially decide their next case. They must be their client's devoted advocate, bound by their ethical obligations to pursue the client's lawful objectives irrespective of public opinion or system pressures. Similarly, public defense systems must be able to operate independently, being able to advocate for the needs of the lawyers and staff who work within their system as well as the clients and communities they serve. They must be able to take unpopular stands, call out government abuses, and challenge current norms. So critical is independence to all a public defense system does, that is the first of the ABA's *Ten Principles of a Public Defense Delivery System*.

See ABA, *Ten Principles of a Public Defense Delivery System*, Principle 1 (2023). The guarantees of the Sixth Amendment cannot be fulfilled if public defenders are not free to act independently.

The latest amendments to the Idaho public defender statutes, on their face, raise concerns about independence. While the structure adopted uses a board to recruit and recommend candidates to the Governor, who then selects the State Public Defender (SPD), the new structure also provides that the Governor selects all the members of the board. I.C. § 19-6004. The governor also has the sole authority to remove the SPD (for good cause) with only an obligation to notify the legislature after the fact. I.C. §19-6004(2)-(3). The Governor's influence also extends to the hiring of the District Defenders. While the District Defenders are hired by their jurisdiction's district magistrate commission, the Governor has the direct authority to appoint 5 members of that commission. See I.C. §§ 19-6007, 1-2203.

This structure raises the troubling specter that political considerations may unduly influence the SPD's actions. And while individual governors and/or state public defenders may prove themselves to be above such encroachments, independence is compromised not just when there is actual influence imposed, but also when there is an appearance of the same. Critical to defender operations is their credibility with their clients and their community that they are working solely in the best interest of and in support of those they represent. Inherent in any public defense system is a seed of doubt, as public defenders are typically paid by, employed by, and selected by the same government that is prosecuting their clients; but that seed can quickly blossom when defense leaders are forced to make decisions which can put them in direct opposition to those that hire and can fire them. See generally Alex Bunin, *Public Defender Independence*, 27 Tex. J.

on C.L. & C.R. 1 (2021), (discussing the various ways in which a public defender leader may be compelled to challenge government authorities, such as addressing police misconduct, opposing bail practices, contesting fees and fines, and supporting legal challenges to the public defense system).

C. Under the New System, Excessive Caseloads Remain Unaddressed

The newly implemented system does not reduce the number of cases handled by public defenders, nor does it increase the availability of lawyers to manage these cases. To date no new caseload standards have been established, no additional staffing has been added to redress current system overload, and no policies have been established to address what steps are to be taken when attorneys have too many cases.

While the new legislation references caseload standards, stating that "the state public defender shall have the power to . . . [i]mplement the most current American Bar Association standards for defending attorneys delivering indigent defense pursuant to this chapter, including caseload standards," I.C. § 19-6005(4) (emphasis added), those standards will require attorneys to carry significantly fewer cases than they currently do.

The recently released *National Public Defender Workload Study* (NPDWS) [21] provides the most in depth and methodical effort to date to help identify proper caseload standards for defenders. Published in the fall of 2023, the NPDWS makes two substantial improvements on the 1973 National Advisory Commission on Criminal Justice Standards and Goals[22] (NAC Standards)

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[21] Daniel S. Nagin et al., *National Public Defense Workload Study*, RAND Corporation, RR-A2559-1 (2023), available at https://www.rand.org/pubs/research_reports/RRA2559-1.html.
[22] Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, *Report on Courts* (1973).

((which have long been considered the foundational benchmarks for defender caseload limits, although widely criticized for being outdated and not based on empirical data). First, unlike the NAC Standards which broadly categorized cases as felonies, misdemeanors, etc., the NPDWS differentiates cases by case type, creating distinct categories that account for charge type (e.g. sexual assault, homicide, property crimes, etc.) and penalty (life, more than 15 years, 3 to 15 years, etc.).[23] This is a critical step as it is not hard to recognize that a homicide case will involve substantially more time than a larceny and a rape accusation will demand greater attention from a defender than drug possession charge.

Second, the NPDWS recognizes the increased complexity of modern criminal representation. Unlike 50 years ago, today's criminal cases often require additional time due to:

> modern criminal defense practice, including the tremendous expansion of digital discovery from body-worn cameras, cell phone data, and social media data; the increasing use of forensic evidence; and the expanding scope of a criminal defense lawyer's obligations, such as advising clients on the collateral consequences that attend criminal convictions.

Id. at vii. In assessing the time needed, on average, to provide constitutionally effective representation, the NPDWS considered 8 key task areas defense lawyers are expected to undertake based on prevailing ethical standards of representation[24].

- Client communications
- Discovery and investigation
- Engaging with experts
- Legal research and motions practice
- Negotiations

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[23] *Nagin et. al., supra.*
[24] *Id.* at 53-57.

- Court preparations
- Court time
- Sentencing, mitigation, and post-conviction assistance[25]

It also considered that more than 90% of criminal cases today are resolved without trial, making sure there was substantial focus on the work done when cases ended in pleas, not just on the tasks and time needed when they went to trial.[26]

Applying these standards and utilizing the Delphi method,[27] the NPDWS created a framework, identifying recommended average hours per case. These averages recognize some cases will prove more complex, requiring additional time, while others will be less involved and thus require less time than the average. It is important to note that the NPDWS only addresses time attorneys spend on case-related work. It does not include time for training, supervision activities, serving on committees and working groups, and participating in treatment and alternative court programs. Most notably for rural communities, the NPDWS does not account for the time attorneys may spend traveling to and from courthouses, crime scenes, and detention facilities[28].

Under the prior public defense system, Idaho had adopted general workload standards.[29] These numbers were framed like the NAC model, broadly categorizing cases as probation

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[25] *Id.* at 61-62.
[26] *Id.* at 57.
[27] "The Delphi method is a group-based process for eliciting and aggregating opinion on a topic with a goal of exploring the existence of consensus among a diverse group of handpicked experts. The Delphi method was developed at the RAND Corporation in the early 1950s to obtain a reliable expert consensus, which is often used as a substitute for empirical evidence when it does not exist." Dmitry Khodyakov, *Generating Evidence Using the Delphi Method*, RAND Commentary (Oct. 17, 2023), https://www.rand.org/pubs/commentary/2023/10/generating-evidence-using-the-delphi-method.html.
[28] *Nagin et al., supra, at.* at xiii, 33, 61.
[29] *Idaho Public Defense Workload Study*, Idaho Policy Institute (2018), https://pdc.idaho.gov/idaho-workload-study/.

violations, misdemeanors, and felonies. This methodology did not differentiate between the complexity of charges like rape, drug distribution, carjacking, or theft, treating them as indistinguishable in terms of time allocation. Those standards called for attorneys to spend an average of 4 hours per misdemeanor matter and 10 hours per felony.[30] This one-size-fits all approach to time allocation fails to account for the complexities of individual cases, making it nearly impossible for attorneys to provide the thorough and dedicated defense that certain serious charges demand.

Regardless of what model is used or what rules, if any, are applied to ensure reasonable workloads, there is nothing in the new provisions that increased the number of lawyers available to provide representation. There is no indication that Idaho has enough public defenders, assigned counsel, or contract lawyers to meet the current caseload demands under any standards. In fact, the SPD's 2026 budget request supports the conclusion that they are already operating with an insufficient number of lawyers. According to one report, the SPD's 2026 budget request, submitted in September, requested 17 additional FTE positions and projects a budget shortfall of over $16 million.[31] The situation in Idaho is consistent with national trends which show a growing need for more defense lawyers and support staff to adequately meet these demands.[32]

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[30] According to the Idaho State Public Defender Caseload Calculator, attorneys with adequate support staffing and cases of "average complexity" should handle no more than 210 felonies per year or 520 misdemeanors per year (or a relative percentage of each if an attorney has a mixed case load). Using a standard of 2080 hours/year in which the attorney was able to devote 100% of that time to casework (40 hours week * 52 weeks, with no time off for vacation, holidays, sick leave, training, etc. and none of that time spent on supervision, administrative tasks, etc.) means that attorneys would be devoting, on average, 9.9 hours/felony case and 4 hours/misdemeanor case. Idaho State Public Defender, *Caseload Calculator*, https://spd.idaho.gov/caseload-calculator/ (last visited Sept. 23, 2024).

[31] Ruth Brown, *Public Defense Changeover Raises Concerns for Some*, Idaho Reports (Sept. 16, 2024), https://blog.idahoreports.idahoptv.org/2024/09/16/public-defense-changeover-raises-concerns-for-some/ (last visited Sept. 21, 2024).

[32] See Emily Hamer, *Broken Defense Across the West*, Helena Independent Record, https://helenair.com/broken-defense-across-the-west/collection_fa8c747c-a3f4-11ed-b672-03178a7dd478.html#1.

As noted earlier, the SPD has already indicated there will be no direct monitoring or restrictions on caseloads undertaken by the private attorneys who will be providing primary representation in 30 of the state's 44 counties and there will be no requirement for these attorneys to disclose the amount of retained work they are performing on top of their appointed workload.[33]

While the SPD has indicated an intention to have attorneys track their time, I.C. § 19-6005 (outlining the duties of the SPD), this, on its own, does not prevent attorneys from having too many cases to provide meaningful representation. In fact, solely tracking time and tasks to assess workload may only perpetuate inadequate representation. Attorneys operating in systems where they are overloaded are forced to cut corners and triage cases. No matter how well intentioned and diligent they are, time is finite. If an attorney has too many cases, even working 12 or 16 or 18 hours a day, will not afford them sufficient time to meet the core standards for representation – timely and thorough investigation, regular client meetings that build trust and confidence, seeking and reviewing all discovery and physical evidence, researching and filing motions, collecting information in mitigation, and pursuing zealously the client's lawful goals and objectives, be those trial or plea. See generally, ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function* (4th ed. 2017).

D. The New System Does Not Increase Overall Resources Dedicated to Public Defense Representation

The new state-based public defense system does not increase the overall resources dedicated to public defense representation. While there is some question as to whether the current

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[33] Idaho State Public Defender. Frequently Asked Questions, *Idaho State Public Defender*, https://spd.idaho.gov/faq/ (last visited Sept. 18, 2024).

allocation for the SPD is slightly lower than the spending from the prior year, at best, the funding remains the same. This raises an obvious question: how can the new system address critical issues such as caseloads, adequacy of defender time and resources, or better oversight and supervision to ensure higher quality representation if no additional funds are provided to do so?

The SPD may indeed desire change and reform but without a corresponding increase in funding, it is unclear how that desire—no matter how powerful or well-intended—can address the systemic flaws that have long plagued Idaho's public defense system. Without additional financial support, the new system may fall short of its goals, failing to reduce caseloads or improve the quality of representation provided to indigent defendants.

The SPD may have a genuine desire to operate a strong, effective, and robust public defense system, but he will be unable to deliver on that promise without increased resources, staffing, or funding beyond what the prior system had. There is nothing in the SPD's budget allocation, enabling statutes, or rules that call for the hiring of additional attorneys, investigators, or social workers. Without these essential resources, any expectation that the new system will succeed in alleviating the persistent issues in Idaho's public defense system is at best speculative and at worst not possible.

E. Without More Evidence, There Is No Reason to Conclude That the Quality of Representation Will Improve

To effectively analyze whether the new state-based public defense system will truly improve the quality of representation, it is crucial to look beyond the promises made, and closely examine the infrastructure upon which the new system is being laid. While the State boldly asserts that the new system will address longstanding deficiencies in indigent defense, these claims remain

wholly speculative. Idaho's most recent changes to its public defense system vests discretionary power in the hands of the SPD to "[i]mplement procedures for the oversight, implementation, enforcement, and improvement of indigent defense standards so that the right to counsel of indigent persons is constitutionally delivered to all indigent persons in this state," I.C. §§ 19-6005(3), but provides no additional funding to hire attorneys or staff to accomplish this. Similarly, the statute also *empowers* the SPD to implement ABA defense and caseload standards, I.C. §19-6005(4), but it creates no mandates for such and there is nothing else the court can turn to as a reliable assurance that there will be meaningful standards which are enforced, and which actually result in improved representation.

While it is *possible* that overtime Idaho's public defense system will right itself, redressing problems through changes in personnel and practices, and it is *possible* that the unification of the system under a central state leader may bring about changes to the legal system's culture and attitude towards public defense, it is *improbable* that those changes will instantly occur on October 1st, when the new public defense system begins. It is also *improbable* that the changes will occur weeks or even months later as these reforms require foundational shifts in the way public defense is practiced in Idaho.

Sincerity alone does not address the core issues of inadequate resources and systemic shortcomings. No matter how well-intentioned the leadership may be, without sufficient funding, staffing, and structural reforms that tackle the underlying deficiencies in Idaho's public defense system, the quality of representation will not meaningfully improve. In the absence of these resources, even the sincerest efforts cannot guarantee constitutional public defense. While the State's optimism may be well-intentioned, it lacks the evidentiary foundation required to ensure

that these assurances will translate into actual improvements and as the District Court acknowledged, "no concrete evidence has been provided to support these claims." Amended Mem. Decision & Order Granting Mot. to Dismiss at 30.

V. CONTINUED JUDICIAL ENGAGEMENT WILL ENSURE THAT THE REFORMS MEET CONSTITUTIONAL OBLIGATIONS

Continued judicial engagement is essential to ensure that the reforms to Idaho's public defense system meet constitutional obligations. Dismissing the case before the new system begins operations would prevent the judiciary from performing its critical role of ensuring constitutional representation is met. This is necessary to ensure that the promised reforms are effectively implemented and that they truly protect the constitutional rights of indigent defendants.

A case that highlights the importance of judicial engagement is *David v. Missouri*. In 2020 a class action lawsuit was filed on behalf of thousands of individuals in Missouri who qualified for public defense representation but were placed on waiting lists to have an attorney assigned to their case because the state had an insufficient number of lawyers to meet the demand. *David v. Missouri*, No. 20AC-CC00093, (Mo. Cir. Ct. Cole Cnty. Feb. 27, 2020) (class action petition for declaratory judgment and injunctive relief). Much like the case at bar, while the litigation was pending, the state legislature acted. In that case, the legislature provided more funding to hire additional lawyers, helping to reduce the waitlists. With the promise of the funding in hand, the State of Missouri moved the court to stay the proceedings. The trial court granted the stay but continued to conduct ongoing reviews to ensure that the increased funding was indeed reducing the waitlists.

By November of 2021, the waitlists had been fully eliminated. *David*, No. 20AC-CC00093, at 19 (Mo. Cir. Ct. Feb. 6, 2023). However, the court continued to maintain the case, ensuring the waitlists remained empty. *Id*.at 5. Finally, a year after the waitlist had been cleared, the State moved to dismiss the case as moot. Rather than see the issue as moot, however, the trial court recognized it for what it was, an important reprieve for criminal defendants, but one that could readily resume if case filings increased, or the number of lawyers decreased. *Id*. at 24–25. Utilizing the public interest exception to the mootness doctrine, the *David C*ourt noted,

> the waiting list is at zero, not because Respondents have renounced its use, but because the State is currently providing sufficient funding to avoid resorting to it. . . The history of providing defense counsel for indigent defendants in Missouri is replete with claims of inadequate resources for providing effective representation.

Id.

The *David* Court also recognized that it was crucial to provide clear direction to prevent future harm to indigent defendants, who would otherwise have to file new lawsuits and endure years of litigation to obtain relief. In its final opinion the court declared that a constitutional violation occurred if an eligible individual waited more than two weeks to receive counsel or if they did not receive representation in time to assist with an earlier critical stage, such as a bond hearing or a change of venue request. *Id.* at 26.

Likewise, this Court should not allow the case to be dismissed as moot, as the new Idaho system is untested. There is no affirmative evidence that its creation has ended the systemic problems that have plagued the state's public defense system for nearly a decade. Judicial engagement is necessary to ensure that the reforms are properly implemented, and that indigent defendants' constitutional rights are protected. Dismissing the case before the new system begins

operations prevents the judiciary from performing a critical role of ensuring that the promised reforms truly protect the constitutional rights of indigent defendants.

VI. EARLY INDICATIONS CONFIRM THE IMPROPRIETY OF DISMISSAL

Although the transition to the state-wide system has not yet formally taken place, events over the past several months indicate the process will not be smooth or result in rapid structural improvements. IACDL's members provide public defense representation throughout the state. Many of them are actively dealing with the transition process and are reporting events that suggest that things may get worse, rather than better, for criminal case defendants, making it especially important for the court remain actively engaged during this critical transition period.

First, a significant number of attorneys are discontinuing their state public defense work. Lawyers are departing from institutional defender offices and contractors are not seeking to renew their contracts. According to a recent report from Kootenai County, Idaho's third largest by population, "most" of the "more than 30 conflict attorneys who helped handle the county's public defense work" "can't afford to work for the state's rate" and will let their contracts expire on September 30.[34] IACDL is aware of other contract attorneys across the state with similar concerns complaints, including those working in places where there is currently no institutional office.

In discussions about why they are departing, many have expressed that the pay scale is insufficient and the perceived shortcomings in the administrative support that will be provided by the

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[34] *Kootenai County Braces for New Public Defense System*, CDA Press (Aug. 18, 2024), https://cdapress.com/news/2024/aug/18/kootenai-county-braces-for-new-public-defense-system/ (last visited Sept. 22, 2024).

SPD for overhead and the like, leave them no choice but to abandon their public defense work. Concerningly, some of the attorneys leaving public defense are those with the most experience, leaving gaps in knowledge, skills, and relationships that will be difficult to replace and may take years or even decades to build in someone new.

Institutional offices are facing similar dynamics. In Kootenai County, for instance, only half of the office's 14 public defense lawyers "have agreed to continue working for the state after" October 1.[35] The devastating harms of that are magnified given this office was already seriously under-staffed. The office's current caseload indicates they "need [] about 22 attorneys" to properly function. [36] Put another way, the transition in Kootenai County is expected to leave the public defender office there with roughly *one third* of the attorneys it needs to do its job. At least one Kootenai County Commissioner has indicated they are "gravely concerned our Idaho State Constitutional mandate to provide representation to indigent persons cannot be met and the new system will fail."[37] Those concerns are echoed by the county's Prosecuting Attorney who has indicated the new system has "made things worse" because "[w]e're going to have defendants appear in court, and the public defender's office is not going to have anyone to represent them."[38]

The tumult in the public defense community is also reflected by a new public ethics opinion issued by the Idaho State Bar. In the opinion, issued just days ago, the Office of Bar Counsel noted that it had "received multiple requests to address issues related to the transition to the State

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

Public Defender system."[39] Bar Counsel summarized the requests as including whether reductions in compensation can create conflicts of interest and whether lawyers are allowed as a result to withdraw from cases.[40] The fact that such queries are even being posed indicates that attorneys are contemplating the transition to the new system will have negative effects on them and their intention to continue providing court-appointed representation. The Bar's response was that "[l]awyers whose financial compensation will decrease from their current county pay rate face a potential concurrent conflict of interest" and directing that they must individually "assess whether there is a significant risk that their representation of clients will be materially limited due to their own personal financial interests, i.e., a reduction in pay rate to perform the same legal services. If the lawyer determines that there is a significant risk that their representation of one or more clients will be materially limited because of their own personal interests, then the lawyer has a concurrent conflict of interest."[41] The writing on the walls indicates the state should expect a very chaotic situation in which many defense lawyers will be attempting to withdraw from various representations, courts will be struggling to react, and individuals facing criminal charges will be left holding the bag.

In short, there is nothing about the current lived experience of public defenders in Idaho that suggests any reason to suppose that the new system will rapidly solve the serious systemic deficiencies that have plagued the state for years. To the contrary, the real-world observations demonstrate that, in many ways, the upcoming transition will exacerbate those deficiencies. If

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[39] Idaho State Bar, Formal Ethics Opinion No. 137, (Sept. 18, 2024), available at https://isb.idaho.gov/wp-content/uploads/Formal-Ethics-Opinion-137.pdf.
[40] *See id.*
[41] *Id.*

anything, today is the most critical time in which to maintain sustained judicial engagement with the appellants' claims. This is not the moment to wait and see, but to address the constitutional violations that have taken place, are taking place, and will without question continue to take place in the provision of public defense in Idaho.

VI. Conclusion

Like the trial court, *Amici* hope positive changes are coming to Idaho. We hope the SPD will follow the lead of other state public defense organizations and develop meaningful standards of practice.[42] We hope that the state will apply robust workload standards that ensure every case gets the time, resources, and expertise it is constitutionally guaranteed; and we have no reason to doubt that the new SPD will do his best to work earnestly and doggedly to bring about excellence in representation. But public defense systems and public defense lawyers cannot operate on hope and determination alone. They require staffing, resources, training, and funding to meet the ever-increasing demands placed upon them and while the new system may be heavy on hope and desire, it is still short on resources and staffing. Much like rearranging the deck chairs on the Titanic, the new state public defense system may look hopeful and promising, but that alone will not stop the ship from sinking. Without an indication of an increase in staffing or funding, it is all

[42] See e.g., Michigan Indigent Defense Commission, Minimum Standards for Indigent Criminal Defense Services (Oct. 2023), https://www.michiganidc.gov (last visited Sept. 22, 2024); North Dakota Commission on Legal Counsel for Indigents, Minimum Attorney Performance Standards in Criminal Matters, https://www.nd.gov/indigents (last visited Sept. 22, 2024); and Virginia Indigent Defense Commission, Standards of Practice for Indigent Defense Counsel (2024), https://www.vadefenders.org (last visited Sept. 22, 2024).

but impossible to imagine the new system will redress the ongoing, systemic harm facing Idahoans charged with criminal offenses.

The proven deficiencies in the state's public defense system present a substantial and ongoing risk of depriving indigent defendants of their constitutional right to counsel. This denial of counsel undermines the very foundation of a fair justice system and exposes countless individuals to the risk of constitutionally deficient representation. *Amici* therefore urge this Court to reverse the District Court's dismissal of Plaintiffs' case as prudentially moot, grant summary judgment in Plaintiffs' favor and remand for further proceedings.[43]

Dated: September 23, 2024

Respectfully submitted,

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On behalf of National Association of Criminal Defense Lawyers

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[43] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2024, a true and correct copy of the foregoing document was sent to the following persons:

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