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June 1, 2021

RE: ACLU comments

Director Elliott and members of the Idaho Public Defense Commission,

The American Civil Liberties Union and the American Civil Liberties Union of Idaho (collectively, "ACLU") ask the Idaho Public Defense Commission ("PDC") to consider the following comments as part of the ongoing negotiated rulemakings proceeding under docket nos. 61-0101-2101 and 61-0102-2101, as announced in the May 5, 2021, Idaho Administrative Bulletin.

As we have noted before, the PDC has had a duty for nearly half a decade to promulgate rules related to the provision of indigent defense in Idaho, including establishing comprehensive caseload and reporting standards. The draft rules circulated as part of these negotiated rulemakings, like those they would replace, fail to meet that duty. These new drafts—even more so than rules the PDC proposed last year—lack specificity and are often permissive rather than mandatory. This approach continues to fail to ensure that indigent Idahoans receive the defense to which they are constitutionally entitled. Accordingly, many of the ACLU's comments herein reiterate comments we have provided in the past.

Negotiated Rulemaking Meetings

During the PDC's negotiated rulemaking meetings on May 18, 2021, stakeholders raised serious, urgent problems that neither these rule drafts nor other PDC actions appear to address. The chief public defenders in two of Idaho's top three most populous counties, as well as a county commissioner from one of those counties, all reported problems with recruiting or retaining attorneys. The commissioner reported a shortage of attorneys, and the chief public defenders reported that they are unable to offer salaries sufficient to attract attorneys or keep up with the market. Lack of parity between prosecution and public defense alone is a constitutional failure of Idaho's public defense system, but these reports evince even worse news. Attorney shortages and inability to recruit attorneys gravely exacerbate other deficiencies, including excessive workloads, lack of adequate training and supervision, and—as these stakeholders seemed to flag—lack of continuous vertical representation.

During the same meetings, PDC staff reported that mandatory language was changed to permissive language in draft rules regarding independence because counties felt the responsibility was foisted upon them. The PDC's prior proposed rules regarding independence were insufficient and too vague to achieve the independence from political and judicial influence prescribed by Idaho Code § 19-850(a)(vii)(1), called for by the ABA Ten Principles of a Public Defense Delivery System, and necessary to remedy Idaho's unconstitutional system. Further weakening those proposals because counties feel the responsibility would be "foisted upon them" without adequate State support is no

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solution. It is, instead, only more evidence that the State asks counties (just like public defenders) to do an impossible job—and that Idaho is unwilling to pay the costs and face the consequences of its addiction to excessive prosecution and mass incarceration.

Also during the May 18 meetings, a chief public defender and a judge both expressed concern that the draft minimum requirements for defending attorneys would permit guilty pleas at initial appearance only when "constitutionally appropriate." Guilty pleas on the first appearance calendar should be extraordinary. At this stage in a criminal proceeding, public defenders likely have little to no discovery or relevant *Brady* material, and rarely will an attorney have had an opportunity to investigate, consult with experts, or build rapport with their client. For all these reasons, in all but extraordinary circumstances, public defenders should be counseling against pleading guilty on the first appearance calendar. In all cases, courts and defending attorneys must comply with constitutional requirements and their ethical obligations to ensure that their client is knowingly and voluntarily entering the plea, and that the client is fully advised as to why a guilty plea may not be in the client's best interest in this very early stage in the case. The ACLU applauds and encourages client-centered advocacy, but representation must be within the constitutional and ethical bounds when a client chooses to plead guilty.

During the May 18 meetings, PDC staff also emphasized that the PDC would only be considering comments directed at certain and specific draft rules. Negotiated rulemaking is meant to facilitate a negotiation among all interested persons, to seek consensus on the content of rules, drawing upon shared information, knowledge, expertise, and technical abilities of all those involved. Idaho Code § 67-5220. Those participating in this negotiated rulemaking have already raised concerns—such as attorney shortages, resources so limited that some of Idaho's largest public defender offices cannot recruit and retain attorneys, and the immediate need for a new, valid workload study—that the PDC does not propose to address in these draft rules, but must. The PDC should take actions, including promulgating appropriate rules, to address those major issues. The PDC's stated intent to consider only comments on particular sections also ignores that the draft rules propose wholesale changes to Idaho Administrative Code (IDAPA) 61.01.01 and 61.01.02. Although the PDC proposed much of this language last year as well, those rules are not now in effect. The PDC should negotiate the full scope of these draft rules in good faith, and solicit comments on all of the rules proposed in the drafts.

Enforceable Standards

Throughout the draft rules, the PDC continues to use language now so permissive and vague that some rules are effectively unenforceable and therefore meaningless (i.e., proposed IDAPA 61.01.02.030.05 – "The county should consider engaging independent legal counsel to review and negotiate Defending Attorney Contracts"). Such amorphous terminology fails to ensure that the counties will comply with the standards or that their non-compliance will be actionable. Whenever prescribing standards, the proposed rules should use mandatory terms, such as "shall" or "must," to provide clarity and certainty to all stakeholders. To do otherwise is an abdication of the PDC's responsibilities to the state and to its indigent defendants.

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Vertical Representation (draft IDAPA 61.01.01.010.22)

The draft revisions to the former proposed rule appear intended to weaken the vertical representation requirement. To the extent vertical representation is not feasible anywhere in Idaho, the proper response is to ameliorate excessive workloads, lack of independence, or court-imposed and other barriers to vertical representation—not to lessen the standards requiring it.

Independence (draft IDAPA 61.01.02.030)

The ABA Ten Principles of a Public Defense Delivery System, and Idaho Code 19-850(a)(vii)(1) in turn, make clear that public defense should be independent from political and judicial influence. As the Ten Principles explicate, a public defense system should be subject to judicial supervision only in the same manner and extent as retained counsel.

Yet the draft rules would still give county commissioners ultimate authority to manage key aspects of the public defense system, despite the fact that these commissioners are partisan politicians who seldom have any legal training, much less any experience in criminal defense. Moreover, the proposed rules regarding the involvement of prosecuting attorneys (draft IDAPA 61.01.02.030.04–05) are too vague to ensure their defense counterparts are independent of even their influence. The rules only require that counties "limit" prosecutors' involvement when it "may jeopardize" independence or undermine the delivery of public defense, and only encourage counties to "consider" engaging independent counsel to negotiate public defender contracts. Involvement of prosecuting attorneys in selecting defending attorneys, or making decisions about defending attorneys' budgets and operations, *always* creates a power imbalance between prosecution and defense services, jeopardizes the independence of defending attorneys, and engenders the appearance (at least) of impropriety, which inevitably undermines the delivery of public defense. Much as it would be inappropriate for defending attorneys to advise the counties about prosecutor selection, budgeting, or operations, the proposed rules should remove prosecuting attorneys from any involvement in decision-making about public defender selection, budgeting, or operations.

Equity and Parity (draft IDAPA 61.01.02.040.02)

Draft IDAPA 61.01.02.040.02 simply weakens and softens the former proposed rule regarding the critical need to ensure that indigent defense services are equitably balanced with prosecutorial services, which was already problematic and ineffectual. More generally—and as we said last year—in light of the constitutional crisis created by the deficiencies in Idaho's public defense system, the PDC should encourage all counties, through its proposed rules and legislative recommendations, to reduce the budgets for and scope and volume of prosecution and incarceration in order to address this urgent (and yet longstanding) crisis.

Workload (draft IDAPA 61.01.02.060.05)

Though the PDC has not invited comments on this draft rule, it is so significant that we must reiterate what we have said before:

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The counties have control over public defense caseloads, because it is the counties, through their prosecuting attorneys, that determine whether and when to bring criminal charges. These draft rules imply that excessive defending attorney workloads are a problem for defending attorneys alone to address, under threat of PDC action against public defense offices and individual defending attorneys. However, the true causes of the unmanageable caseloads are the prosecuting attorneys' offices who bring an excessive number of juvenile and criminal charges, despite limited county resources, and the State's failure to either discourage this unbridled prosecutorial behavior or to provide funding for an adequate number of defending attorneys to respond to it.

Furthermore, the workload standards that the PDC adopts in these rules are not well-founded. These numerical standards were based on a number of dubious sources, including (1) the 2018 Idaho Workload Study, the reliability of which both the State and the report's own authors have called into question, (2) data collected by the Ada County Public Defender's office, which has long refused to acknowledge any significant deficiencies in the delivery of public defense services in Idaho, and (3) conversations with selected stakeholders—not including indigent defendants or those who have received public defense services in the past. Indeed, the sunset provision built into the rules suggest that even the State recognizes the need to revisit the workload standard. For all of these reasons, the PDC must complete a thorough and reliable workload study expeditiously, rather than waiting until 2023 (or later) to create evidence-based workload standards that allow defending attorneys in Idaho to provide constitutionally-sufficient representation to *all* of their indigent clients. In the meantime, the PDC should use the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") standards, with the caveat that even the NAC numbers have been determined by experts in the field to be too lenient.

The assumptions upon which the numerical standards were based are not accurately reflected in the workload rules, to the harm of indigent defendants' constitutional rights. While the rules expressly assume cases of average complexity, the numerical caseload limits are based on the assumption that all cases would involve minimal work (low-level charges only, with no trial and minimal investigation): just 4 hours per misdemeanor case and 10 hours per felony case. Though the workload standards prescribe that caseloads should be adjusted to account for more complex cases, the proposed rules provide no instructions for making those adjustments. The rules must include specific guidance for making those adjustments.

The numerical workload standards are also expressly based on a number of faulty assumptions, including (1) that defending attorneys always have adequate support staff, (2) that defending attorneys have no supervisory duties outside of their docket, and (3) that defending attorney caseloads are reasonably distributed throughout the year. But the proposed rules do not specify—as they must—what level of support staff is adequate, or how caseload expectations should be adjusted to compensate for inadequate support staffing.

The numerical standards should also require downward caseload adjustments for defending attorneys that have supervisory or other administrative duties, and specify how such adjustments should be made. Many public defenders have supervisory duties and also handle cases. The rules do not take into account time that many public defenders are required to expend on these roles. The standards also fail to include any process or adjustment for defending attorneys or offices whose caseloads are significantly uneven throughout a given year. Also, in a departure from the existing standards, the draft

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rules fail to include any consideration of time defending attorneys spend handling clients in problem-solving courts. The rules must specify the appropriate adjustments for any such workloads.

In the event that defending attorneys or offices are unable to meet the workload standards, the proposed rules only require that the attorneys "request resources" and "notify the court" that caseload maximums are, or might be, exceeded. Moreover, the rules expressly permit defending attorneys to continue representing indigent defendants and to take on additional cases, even when they have indicated that their workloads are too high and acknowledged the inherent conflicts of interest present in carrying an excessive caseload. This "request," "notify," and carry on approach simply does not meet constitutional muster. The rules must not permit defenders to take on any representation beyond the maximum workload limits, as adjusted to account for case complexity, support staffing, supervisory duties, and case distribution across time.

Of course, empowering public defenders to decline cases that exceed caseload standards is not, alone, enough to resolve the constitutional deficiencies of the current public defense system. Refusing to take on cases in excess of the limits of adequate representation may resolve ethical issues for Idaho's defending attorneys. But it will leave many indigent defendants unrepresented in the current system, often while still in custody, until a less overstretched defender becomes available. Placing the burden on defenders to regulate their own caseloads by pleading for help and ultimately refusing to take on new cases when help does not arrive, to the detriment of the very constituency they seek to serve, clearly is not an adequate answer. The State and the PDC bear the responsibility to solve this constitutional problem, rather than just to push it off onto committed but overstretched defenders.

Because the draft rules require substantial revision, we urge the PDC to continue negotiated rulemaking to seek consensus, centering and uplifting most of all the opinions and experiences of Idahoans facing criminal and juvenile charges and those who have experience as former clients in Idaho's public defense system.

We appreciate the ongoing opportunity to participate in the PDC's rulemakings.

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