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May 28, 2021

VIA EMAIL Kathleen.Elliott@pdc.idaho.gov

Kathleen J. Elliott
Executive Director
Idaho State Public Defense Commission
816 W. Bannock Street
Suite 201
Boise, ID 83720

Re: Comments on Proposed and Pending Rule IDAPA 61.01.02

Ms. Elliot,

The Board of Commissioners of Twin Falls County appreciates that the Public Defense Commission has incorporated some of our prior input in the Public Defense Commission rules. However, the proposed and pending rules in IDAPA 61.01.02 continue to have glaring flaws that will interfere with Twin Falls County's ability to provide quality representation to indigent defendants.

One of the conceptual problems in the rules is the definition of "capital case" and the near-immediate ramifications of that classification. Rule 61.01.02.060.05.c.v states, "A case is counted as a Capital Case if, in any part of the reporting period, the State is legally entitled to seek the death penalty under Section 18-4004A, Idaho Code(.)"

The rules also require that two qualified Capital Defending Attorneys be appointed at or before Initial Appearance (IDAPA 61.01.02.060.04.h.i). This premature appointment can lead to our public or conflict defenders maxing out their case allotment, depleting county resources on cases that do not progress to the capital stage. This requirement is coupled with the requirement of the "(i)mmediate assembly of a team" that includes, at minimum, a fact investigator, mitigation specialist, a person trained and professionally qualified to screen for mental and psychological screenings, and other persons needed to provide effective and zealous representation (IDAPA 61.01.02.060.04.h.ii).

It may not be possible to assemble this required entourage so quickly, and it certainly doesn't make fiscal or procedural sense to do so. Until the State has made the decision to seek the death penalty, defending as if it has is not necessary. Alarming for the accused, it may actually encourage an increase in requests for the death penalty. That's because a prosecutor faced with a bevy of capital experts would have to prepare every capital-punishment-eligible case as if it is a capital case from the beginning, and, of course, would have no fiscal incentive not to.

Furthermore, counties are not compensated for these expenses by the Capital Crimes Defense Fund until a declaration has been made by the State that the death penalty is being sought. While the Twin Falls County Commissioners are very interested in continuing our tradition of providing a thorough and competent defense to indigent defendants, we have no interest in wasting the tax dollars that we have been entrusted with.

Please modify the rules so that counties are not required to defend every murder case as if it is a capital case. Two simple changes of the wording should accomplish this. First, "A case is counted as a Capital Case if, ~~in any part of the reporting period,~~ the State ~~is legally entitled to~~ seek(s) the death penalty under Section 18-4004A, Idaho Code(.)" Second, please strike the word "immediate" in the discussion of assembly of a Capital Case defense team.

The other problem with the pending rules is the repeated comparison of public defense salaries with prosecutors' salaries in section 61.01.02.040. The definition of the word "equity" usually implies "fairness" and "justness." We certainly support those. However, as applied in this section, "equity" is used to suggest that the salary of a public defender should be set by comparison with the salary of a prosecutor. And not just any prosecutor, but a "properly funded prosecutor." We, as a board, are left to try to determine how much this theoretical and properly-funded prosecutor should earn. That number may be larger than the actual amount of our county prosecutor's salary. Then we are to somehow apply that calculation to an evaluation of whether a defending attorney is properly funded.

The comparison is unnecessary and difficult because, as the proposed rules themselves acknowledge, attorneys have differences in experience and duties. There is no need for the criteria for properly funding of defending attorneys in these rules to be different from the language in Idaho Code § 19-860(1), which states that "so far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law." The language in 61.01.02.060.01 is also helpful here. It ensures that defending attorneys be provided with sufficient time, investigation, experts, private space, and other resources in order to preserve their clients' constitutional and statutory rights. Listing the resources that are actually necessary to present a proper defense is much more helpful than comparing apples (defender salaries) to theoretical oranges (properly-funded prosecutor salaries).

Thank you for considering our comments.

Best regards,
Twin Falls County Board of Commissioners



Jack Johnson
Chairman, Twin Falls County Board of Commissioners



Don Hall
Twin Falls County Board of Commissioners



Brent Reinke
Twin Falls County Board of Commissioners