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Mr. Chair and Members of the Committee:

The American Civil Liberties Union and the American Civil Liberties Union of Idaho (collectively, "ACLU") urge the Committee to reject a number of the Public Defense Commission's pending rules.

The PDC has a duty to promulgate rules related to the provision of indigent defense in Idaho, including establishing comprehensive caseload and reporting standards. These rules, like those they replace, fail to meet that duty. The proposed rules 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.

Enforceable Standards

The PDC continues to use language 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 negotiate Defending Attorney Contracts"). These terms fail 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.

Vertical Representation (IDAPA 61.01.01.010.22)

The 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 (IDAPA 61.01.02.030)

The rules would still give ultimate authority to county commissioners, who are partisan politicians who seldom have legal training, especially in criminal defense (much less public defense). 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.

The proposed rules regarding the involvement of prosecuting attorneys (IDAPA 61.01.02.030.04–05) are too vague to ensure independence. 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* jeopardizes the independence of defending attorneys and, at the very least, creates the appearance of impropriety, which inevitably undermines the delivery of public defense. Much as it would be inappropriate for defending attorneys

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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 (IDAPA 61.01.02.040.02)

IDAPA 61.01.02.040.02 simply weakens and softens the former proposed rule, which was already problematic and ineffectual. The proposed rule is again plagued with vague and amorphous terms that make non-compliance non-actionable (i.e., "*So far as is possible*, Defending Attorneys and their staff will not be compensated less than a properly funded prosecutor and staff with similar experience and performing similar duties").

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.

Defending Attorney Minimum Requirements (IDAPA 61.01.02.060.03.i (iv))

Previously, his rule provided that defenders were to encourage the entry of a not guilty plea at Initial Appearance except in *extraordinary* circumstances where a guilty plea is *constitutionally appropriate*. The word "extraordinary" has since been stricken at the expense of indigent clients.

Guilty pleas on the first appearance calendar should absolutely be extraordinary. At this stage in a criminal proceeding, public defenders may not have all of discovery or relevant Brady material, nor has the attorney had an opportunity to investigate, consult with experts, or built rapport with their client. For all these reasons, public defenders should be counseling against pleading guilty on the first appearance calendar unless there in the circumstances where a client may be facing felony exposure or a harsher filing if not for the plea. Absent this circumstance, there may instances where a defendant wishes to plead on the first appearance calendar; however, in those cases, the defense attorney 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 his or her best interest in this very early stage in the case. The ACLU of Idaho applauds client-centered advocacy, but representation must be within the constitutional and ethical bounds required of defense attorneys when a client chooses to plead guilty.

Workload (IDAPA 61.01.02.060.05)

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

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 rules imply that excessive defending attorney workloads are a problem for defending attorneys alone to address, at pain of PDC action against public defense offices and individual defending attorneys. However, the

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true causes of excessive workloads 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 provide funding for a sufficient number of additional defending attorneys.

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 authors have called into question, (2) data collected by the Ada County Public Defender's office, which has consistently denied the existence of any significant deficiencies in the delivery of public defense services in Idaho, and (3) conversations with various 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. But 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 caveat that even the NAC numbers have been determined by experts in the field to be too high.

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 Standards expressly assume cases of average complexity, the numerical standards 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 define what level of support staff is adequate. The rules should specify what support staff of each type is adequate, as well as how to adjust caseload expectations to compensate for inadequate support staffing. The numerical standards should also require and specify how to adjust for defending attorneys that have supervisory or other administrative duties. 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 proposed 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. The rules permit defending attorneys to continue representing indigent defendants and take on additional cases, despite their acknowledgment that their workloads

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are too high and the inherent conflicts of interest present in carrying an excessive caseload. The rules must not allow 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.

However, declining cases is not, alone, enough to resolve the constitutional deficiencies of the current public defense system. While case refusal may resolve ethical issues for defending attorneys, many indigent defendants will remain unrepresented, often while still in custody, until a defender becomes available. The State and the PDC must address excessive caseloads with more than just notification, requests for additional resources, or case refusal.

The comments above highlight some of our main concerns about the proposed rules. But to end Idaho's criminal legal system and public defense crises, the State and the PDC both have substantial additional work to do beyond improving these rules. Even if that additional work came immediately, it would be decades too late. These crises are daily devastating Idaho families' lives, young Idahoans' futures, and Idaho communities' economies and well-being.

Because the proposed rules require substantial revision, we urge the legislature to reject the rules as identified in this letter.

Respectfully,

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