Chairman Chaney

Committee Members

House Judiciary, Rules and Administration Committee

**RE:  Public Defense Commission (PDC) IDAPA Rules (Rules)**

Mr. Chairman and Committee Members:

I am a career public defender in my twenty-third year of practice. I am currently the chief of the Capital Litigation Unit at the Office of State Appellate Public Defender (SAPD), where I have practiced since 2007. I represent capital clients on appeal and in state district court post-conviction proceedings challenging their death sentences. Before the SAPD, I was trial-level public defender with the Salt Lake Legal Defender Association (LDA)─the public defender office for Salt Lake County. I am writing to express my strong support for the PDC’s proposed Rules generally, but will focus my comments on the Rules governing the minimum qualifications for counsel and defense teams in capital cases.

I attended the February 14th hearing on these Rules before the Senate Judiciary and Rules Committee, and am familiar with the narrative offered by those in opposition. I have also seen the comments submitted by the lobbyist for the Idaho Association of Criminal Defense Lawyers (IdACDL), as well as comments offered in-person and by written testimony, surprisingly offered by a handful of county chief public defenders opposed to these Rules. The Rules governing qualifications for counsel and defense teams in capital cases are based on national standards that have been in place since 2003,[[1]](#footnote-1) as set forth in the ABA Guidelines. The Rules were originally discussed and ultimately adopted by the PDC in late 2017 following negotiated rulemaking. At that time, the same arguments and opposition were voiced by some of the same people. Yet here we are again, and here this Committee is again, being told it is unfair to require appointed counsel to meet minimum standards and qualifications in their representation of individuals whose very lives depend on it. What is missing─and has always been missing from these arguments─is consideration of whether these standards and qualifications benefit capital clients. They do.

The Rules essentially adopt the 2003 ABA Guidelines as the standards and qualifications for capital counsel and capital defense teams in Idaho. The ABA Guidelines are not aspirational but “embody the current consensus about what is required to provide effective defense representation in capital cases.”[[2]](#footnote-2) Even the United States Supreme Court recognizes the ABA Guidelines and the ABA Standards for Criminal Justice as established professional norms.[[3]](#footnote-3)

I urge this Committee to maintain the Rules as they are, **requiring** lead counsel in a capital case to meet minimal qualifications and assemble a capital defense team consisting of co-counsel, an investigator, a mitigation specialist, and a mental health professional, as soon as a client makes his or her first court appearance on a death-eligible offense.[[4]](#footnote-4) These team members, and in particular the mitigation specialist, are indispensable, and their early involvement is essential to the competent defense of any client accused of a capital offense. The best way to describe why team representation is necessary in capital cases is this: capital defense teams have to simultaneously prepare for trial[[5]](#footnote-5) and do everything in their power to prevent a trial. Good defense representation in a capital case means the client gets a sentence less than death, and often times the only way to accomplish that is through pre-trial resolution. But capital defense teams have to be ready for trial in case that offer never comes.

But those opposing the Rules want to vest lead counsel with the discretion to delay hiring or using the services of co-counsel, an investigator, a mitigation specialist and mental health expert until **after** a death notice has been filed,[[6]](#footnote-6) and the case is already speeding toward trial. This discretionary approach is contrary to the prevailing professional norms of practice, it undermines good defense representation and puts a capital client at a significant disadvantage. Giving lead counsel discretion to decide if and when to enlist the help of co-counsel, retain an investigator, mitigation specialist and mental health professional, because no one really knows if the case will be death-noticed, is akin to waiting to appoint counsel until a few days before trial because no one really knows until then whether a case will actually go to trial or resolve with a plea. At that point, the defense is already at a disadvantage, and has lost significant, crucial time to investigate and prepare the defense case.

The Rules don’t exist for the sake of existing. They exist and have been adopted because they are the tried and true standards of competent capital representation. By requiring team representation from day one and improving the quality of representation a capital defendant receives, the likelihood of a death sentence being imposed decreases significantly. That is because it is hard for anyone tasked with the life or death decision to take the life of a human being. Good team representation helps shape the complete picture of who a client is, and helps to show that like all of us, the client is a human being who is more than the sum total of his or her worst act or acts. A mitigation specialist is indispensable to help lead counsel, and the defense team, meet this goal. Mitigation specialists appointed at the outset have spared the later expenditure of precious resources by gathering and developing mitigating evidence before a prosecutor has decided whether to file a death notice. Indeed, the early work of mitigation specialists has been used in countless cases to persuade prosecutors not to seek the death penalty at all.

When I was a trial public defender at LDA, I actively worked on one capital case and witnessed several others. In all of those cases, the early work done by our mitigation specialist, mental health experts, and investigators, who began working on our capital cases the minute we were appointed, resulted in state prosecutors agreeing to take death off the table in exchange for our clients entering guilty pleas, long before a trial date was even contemplated. In my experience, the work of non-attorney professionals at the outset of a capital case is just as important as the work of counsel. The benefits of the early involvement of a mitigation specialist, mental health professional and investigator, inure not only to the capital defendant, but to the justice system as a whole. Early involvement of a mitigation specialist, mental health professionals and an investigator, helps ensure that the state’s decision to seek death is based on the most complete factual and legal picture available, enabling reliable decision-making by all stakeholders.

Indigent capital clients bear the life and death consequences of inadequate representation every day. Ensuring that individuals facing a potential death sentence have the benefit of the guiding hand of qualified, competent counsel, and qualified capital defense teams at the outset, is the only way to ensure capital clients receive due process. The best chance a capital client has to avoid the death penalty is at the trial level. That opportunity should not be thwarted by well-intentioned lead counsel who doesn’t assemble a defense team at the outset because he or she does not believe the case will be death-noticed, but turns out to be wrong. For these reasons, I would urge the Committee to adopt the PDC’s rules governing the minimum qualifications for capital defense counsel and capital defense teams. A discretionary standard is contrary to best practices and competent representation under the Sixth Amendment.

Thank you for your consideration, and if you have any questions, please don’t hesitate to contact me.

Sincerely,

/s/

Shannon Romero

1. *See* American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L.Rev. 913 (2003) (ABA Guidelines). [↑](#footnote-ref-1)
2. *Id.* at 920-21. [↑](#footnote-ref-2)
3. *See* *Padilla v. Kentucky,* 559 U.S. 356, 367–68 (2010)*;* *Bobby v. Van Hook,* 558 U.S. 4, 8 (2009) (per curiam);*Rompilla v. Beard,* 545 U.S. 374, 387–89 & nn.6–7 (2005); *Florida v. Nixon,* 543 U.S. 175 (2004); *Wiggins v. Smith,* 539 U.S. 510, 524 (2003);*Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland v. Washington,* 466 U.S. 668, 688 (1984). [↑](#footnote-ref-3)
4. In Idaho, first degree murder and first degree kidnapping are punishable by death. *See* I.C. § 18-4004 (first degree murder penalties); I.C. § 18-4504(1) (first degree kidnapping penalties). Willful perjury or subornation of perjury that results in the conviction and execution of an innocent person is also punishable by death in Idaho. I.C. § 18-5411. The constitutionality of the death penalty as punishment for a crime that does not result in death is questionable. *See Kennedy v. Louisiana,* 554 U.S. 407 (2008). [↑](#footnote-ref-4)
5. This includes significant resources devoted to the defense investigation of the charged offense. [↑](#footnote-ref-5)
6. Generally, within 30 days of the filing of an indictment or information alleging a death-eligible offense in district court, a defendant must be arraigned and enter a plea of guilty or not guilty. *See* Idaho Criminal Rule 10. A prosecutor has 60 days from the entry of plea in a first degree murder case, and 30 days from the entry of plea in a first degree kidnapping case, to file a notice of intent to seek death. *See* I.C. § 18-4004A; I.C. §18-4504A. [↑](#footnote-ref-6)