

TESTIMONY OF ZACHARY L. HEIDEN, ESQ.

LD 221—Ought to Pass As Amended

An Act Making Unified Appropriations and Allocations for the Expenditures of State Government, General Fund and Other Funds and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2021, June 30, 2022 and June 30, 2023

Joint Standing Committee on Appropriations and Financial Affairs

March 1, 2021

Senator Breen, Representative Pierce and distinguished members of the Joint Standing Committee on Appropriations and Financial Affairs, greetings. My name is Zachary Heiden, and I am Chief Counsel of the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, I am here to testify in support of amending the budget as it pertains to the appropriation for the Maine Commission on Indigent Legal Services.

Nobody who is accused of a crime should have to wonder whether the lawyer appointed for them by the government is competent. Nobody facing the potential of having their child taken away should have to wonder whether the lawyer provided to them by the government is being adequately compensated and has the necessary support to devote themselves fully to the task of counselor and advocate. Nobody at risk of losing their liberty, their job, their access to credit or an education, and in some cases their life,¹ should have to wonder whether the lawyer assigned to them by the government has the skills and the experience necessary to provide a constitutionally-adequate defense.

¹ Although we do not have the death penalty, people in congregate settings, which includes people in prison and jail, are at an increased risk of contracting and dying of COVID-19. Moreover, multiple people have died in the custody of our corrections system.

Maine is not living up to its constitutional obligation to guarantee the assistance of counsel to people who have been accused of crimes but who cannot afford an attorney. While there is much room for respectful disagreement among people of good will on a wide range of public policy questions, there is no room for disagreement about the state's obligation to follow the constitution. Every member of this committee took an oath to follow the constitution when you took office, as did every other member of the legislature, as did the Governor. Following the constitution is not up for debate.

The Sixth Amendment Center, a national organization with expertise on the right to counsel, was hired by the legislature to do an investigation. It issued its findings nearly two years ago. These findings made it clear that Maine is not meeting its constitutional obligation to guarantee the assistance of counsel to people who are accused of crimes and who cannot afford an attorney. The Sixth Amendment Center found that the attorney qualification standards are too lenient, that training is inadequate, and that oversight is practically nonexistent. And, the Sixth Amendment Center provided a list of recommendations for the state to pursue to come into compliance with the law and the constitution. After nearly two years, none of the most important substantive recommendations have been adopted. None. In no other area of government would we think it appropriate to outsource a critical public function to private contractors with no supervision or accountability. Yet for the constitutionally-required government function of ensuring fair trials for people at risk of losing liberty or property, we are doing just that.

In *United States v. Cronin*, the Supreme Court held that the right to the assistance of counsel means the right to the *effective* assistance of counsel. Fundamentally, that means ensuring that only qualified attorneys are permitted to represent defendants, that those attorneys are well trained, that they are appropriately compensated, and that they are supervised. No other state in the country relies entirely on private attorneys to fulfill this important public role, and for good reason: it is much more challenging to supervise private attorneys scattered throughout the state as compared to public defenders housed in a few well-resourced offices.

Many lawyers in Maine who serve as appointed counsel do in fact provide excellent assistance—despite the absence of support, adequate compensation, oversight, and training from

the state. But too many lawyers are unable to overcome these system-wide challenge. What's worse—the state has no mechanism in place for evaluating whether lawyers are doing everything they are supposed to do, or for ensuring adequate performance across the board. And, Maine is not going to be able to keep the excellent attorneys, or to attract new excellent attorneys to join their ranks (particularly in underserved parts of the state) because the rate of compensation is so low and because Maine does not contribute to overhead expenses for defense attorneys, as it does for prosecutors.

Last year, the Maine Commission on Indigent Legal Services requested money in the biennial budget to expand its office staff to allow it to provide meaningful training and supervision. It also requested money in the biennial budget to add a statewide public defender appellate office, to provide high-quality representation and to help keep lawyers updated on the many developing areas of the law. And, it requested money in the biennial budget to establish the state's first trial-level public defender office right down the street from the statehouse in Kennebec County. Reasonable people can disagree about the details of these requests—for example, only establishing one public defender's office over the course of the biennium does not seem like enough, especially when there is a chronic lawyer shortage in some of our rural counties, which could be mitigated by the establishment of appropriately funded public defender offices with respectable salaries, benefits, and staff support.

But the MCILS budget included in the Governor's budget is not reasonable. It included none of the funding that MCILS had said was necessary to provide adequate supervision, training, and compensation for Maine's public defense system. Nothing for the central office. Nothing for the appellate office. Nothing for the Kennebec County trial-level public defender office. Perhaps the problem is that, for years, MCILS told the legislature that everything was working just fine, and now when MCILS is finally acknowledging how deeply and fatally broken Maine's system is, some in the government are slow to believe them.

In addition to the Sixth Amendment Center Report, we have also had a report from OPEGA pointing out that MCILS has not adopted the rules and standards mandated in statute. We have heard MCILS commissioners and staff acknowledge in public meetings that its existing

standards and rules have not been enforced. It is not clear what else should be necessary. In New York, Montana, Michigan, Washington, Pennsylvania, Idaho, Missouri, Nevada, Indiana, California, and Utah, the ACLU had no choice but to take the state to court in order to force it to comply with the Sixth Amendment. But we do have a choice here. Long, protracted class-action litigation, and long protracted court-ordered consent decrees, are time-consuming and expensive. At the end of seven years of indigent defense reform litigation in New York, the state wrote a check to the ACLU for \$5.5 million in attorney fees. That is money that would be far better spent on improvements to the system.

The most important thing that you can do is to ensure that MCILS has the funding to do what it recognizes is necessary. It will save the state money in the long run, but it will also do something far more important, which is to ensure that our state is living up to its ideals and that our government is upholding its oath to defend the constitution. The ACLU of Maine urges you to add MCILS's request to the biennial budget and to pass the budget as amended.