



## MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Senator Anne Carney, Chair  
Representative Amy Kuhn, Chair  
Joint Committee on Judiciary  
5 State House Station, Room 438  
Augusta, ME 04333

### **RE: LD 1802: An Act to Implement the Recommendations of the Maine Commission on Public Defense Services to Clarify When an Indigent Criminal Defendant Is Entitled to Counsel at State Expense**

Dear Senator Carney, Representative Kuhn, and Honorable Members of the Judiciary Committee:

The Maine Association of Criminal Defense Lawyers is a non-profit organization that has nearly 300 member attorneys who practice criminal defense across the state. Since 1992, MACDL has advocated for its members and the people we are fortunate to represent in courtrooms throughout Maine and at the State House.

MACDL presents this testimony **in support of** LD 1802.

Under our current system, the sole system actor who determines whether a “risk of jail” exists is the prosecutor (they check a box or write in “Risk of Jail” on the initial complaint). Because of this, it is the prosecutor who, by and large, determines whether an accused person is eligible for court-appointed counsel. As we are all aware, or should be aware, of the enormous power that comes from having counsel appointed to represent a person, putting the decision about when a poor person gets a lawyer in the hands of the prosecuting attorney is unwise. We can do better.

This bill attempts to do that. It includes, pursuant to subsection 1, the current practice regarding prosecutors’ assessment of “risk of jail,” but it also includes whether someone is being held in custody at the initial appearance (i.e. they are literally, actually *in* jail); they have been held for more than 24 hours; and the court has determined that if the accused has other pending cases that include a risk of jail. This last subsection would authorize the court to appoint counsel in this technically “non-risk of jail” matter because the client is facing jailtime otherwise. This is typically the practice of judges currently, but it is not expressly authorized by statute. It should be.

We believe, if this Committee is inclined to adopt this proposal, that additional, stronger language should be included in this bill.

In practice, when a person is deemed “no risk of jail” and then they are luckily able to retain the services of private counsel at great personal expense, prosecutors can turn

around and request jailtime should the person plead guilty or be convicted after trial. This is a slippery practice that should be discouraged.

We would recommend adding a subsection 5 to this proposed statute that reads:

(5) If the accused is determined to be ineligible for court-appointed counsel under this section, then the court is prohibited from imposing a sentencing alternative that includes a suspended or unsuspended term of incarceration or the possibility of such a sentence.

As a broader issue, we are very concerned that “risk of jail” is inherent in any criminal charge being brought whatsoever—the true risk of jail is what makes a violation an actual criminal offense. A person can be arrested on a warrant on a “no risk of jail” case. They can be subject to arrest for alleged bail violations on a “no risk of jail” case. A prior conviction on a “no risk of jail” case can be used to elevate a future allegation to mandatory jail time or even to a felony. This also says nothing of the thousands of collateral consequences that befall a person should they be convicted of a crime—including convictions won by pleas from desperate, uncounseled people.

In other states, anyone who is deemed indigent and who is charged with a crime is eligible to receive court-appointed counsel. We believe Maine should adopt this broad approach—taking the determination of “risk of jail” out of the hands of prosecutors and judges completely. Again, the threat of incarceration is what makes an infraction a crime—if you are charged with a crime, there is a risk of jail.

For these reasons, with the proposed addition in mind, we urge this Committee to vote **ought to pass** on LD 1802.

Thank you for your consideration, for your attention to this important matter, and for allowing me to present this testimony on this bill to you all today.

Sincerely,



Tina Heather Nadeau, Esq.  
MACDL Executive Director