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## TESTIMONY OF CAROL J. GARVAN AND ZACHARY L. HEIDEN

### LD 258—Ought To Pass As Amended

#### **An Act Making Unified Appropriations and Allocations from the General Fund and Other Funds for the Expenditures of State Government and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2023, June 30, 2024 and June 30, 2025**

Joint Standing Committee on Appropriations and Financial Affairs

February 27, 2023

Senator Rotundo, Representative Sachs and distinguished members of the Joint Standing Committee on Appropriations and Financial Affairs, greetings. We are the Legal Director (Carol Garvan) and Chief Counsel (Zachary Heiden) of the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving the civil liberties guaranteed by the Maine and U.S. Constitutions. Along with our colleagues, we currently represent a class of plaintiffs comprised of all individuals who are or will be eligible for the appointment of competent defense counsel because they have been indicted for a crime punishable by imprisonment and they lack sufficient means to retain counsel. Our case, *Robbins v. Maine Commission on Indigent Legal Services*, was filed one year ago this week.

On behalf of our members, we are here to testify in support of amending the budget as it pertains to the appropriation for the Maine Commission on Indigent Legal Services. The ACLU of Maine urges this committee to add sufficient funds to the budget to ensure that the lawyers assigned to people facing criminal charges have been appropriately screened, trained, evaluated, supervised, and supported. This includes funding for public defender offices in each of Maine's eight prosecutorial districts (approximately \$3 million/office); funding for two statewide defense units to handle appeals and post-conviction review cases (approximately \$900k and \$1.35 million, respectively); funding to increase the MCILS capacity to provide training, oversight, attorney evaluation, and supervision (approximately \$3 million); funding to increase the hourly

rate for appointed counsel to \$150/hour (approximately \$16 million); and funding for meaningful in-person trainings and IT support (approximately \$330,000).

A hybrid public defense system like this will be both more effective and more cost-efficient than continuing to rely almost entirely on appointed counsel at an increased hourly rate. And, a hybrid system will give the state maximum flexibility both to quickly respond to the current constitutional crisis and to make long-term structural reforms to address changing economics and demographics in the state. We recognize that this system cannot be instituted overnight and will take time to build, but that's all the more reason to start the process now: we cannot wait another two years to start building a stable foundation for the system, and we cannot continue building on a foundation of sand. Raising the hourly rate for lawyers is important as a matter of basic fairness, but it is—at best—a band aid fix for the larger public defense crisis. The best time to begin the process of making substantial structural reforms is five years ago, but the second-best time is right now.

These investments represent considerably more than this State is accustomed to spending on indigent defense, but they should not be mistaken for luxury. This is the bare minimum funding required to have a functioning indigent defense system, and, by extension, a functioning criminal justice system. This is the cost of bringing Maine into compliance with the United States Constitution.

As you are all aware, Maine is organized into eight prosecutorial districts. In addition, certain crimes are prosecuted at the state level by the Attorney General's office. You have before you a budget proposal for funding for 97 District Attorneys and Assistant District Attorneys across the state, as well as funding for the criminal division prosecutors and staff in the Office of the Attorney General. For each prosecutorial district, and for the state-level prosecutors, there are multiple staffed offices, with technology, support, insurance, desks, chairs, printers, and copying machines. In fact, you have before you a proposal to upgrade those printers and copying machines for the prosecutors of this state. And, every lawyer who carries out the state's interest in prosecuting people accused of crimes has someone watching over them to make sure they are doing a good job. For District Attorneys, that's the voters. For the Attorney General, that's you

and your colleagues. For the more than 100 other prosecutors, it is a supervisor. They are all paid to attend regular trainings, and they all have someone in the office to consult with on a difficult issue. They have the police to help with investigations, and they never have any difficulty tracking down their clients.

Maine currently has four public defenders, working out of an office across the street from the statehouse, but vested with a mandate to provide representation in any rural underserved areas of the state. The budget before you proposes to increase that number to 15 public defenders, working out of one small office in Augusta, to serve the 1.3 million people across Maine's 35,000 square miles. That is plainly inadequate. It is not a long-term solution to the current indigent defense crisis; it is not a short-term solution either.

One proposal under consideration is raising the rate of compensation for private lawyers who take court-appointed cases to \$150/hour, which will provide sufficient funding for those lawyers to afford their own offices, office staff, printers, copiers, desks, chairs, computers, and insurance. Lawyers performing the difficult and critical task of representing people accused of crimes or facing involuntary commitment or loss of custody of their children deserve to be fairly paid for their work. Last year, Maine was required to pay for approximately 265,000 hours of attorney time, for the 20,000 criminal cases brought by prosecutors seeking jail time. That's a cost of approximately \$40 million for private lawyers to handle public defense per year.

In the Maine Commission on Indigent Legal Defense's budget proposal, it estimated that a fully-staffed public defender office costs approximately \$3 million, which means that the state could fund a public defender office in each of Maine's eight prosecutorial districts for \$24 million. This would reduce the demand for private attorneys by 160,000 hours per year, leaving a cost of approximately \$16 million for private attorneys to provide the additional 105,000 hours of attorney time. In other words, the same \$40 million that some would have you spend on a purely private system, could instead be spent on a hybrid private/public defender system that is better able to guarantee sufficient lawyers in all parts of the state, and better able to ensure that those lawyers are trained and prepared. Not every defense lawyer is going to want to be a public defender, and a hybrid system would leave open the option for lawyers to include indigent

defense as part of their private practices. But many lawyers will find the prospect of being able to focus on their clients and their jobs, rather than on paying the rent or the support staff or the insurance bills, appealing. Some have suggested that it will be difficult to fill those public defender positions, but for the 97 prosecutor positions across the state there are currently only three vacancies.

Every day, the court clerks in this state send out lists of 20 or 30 people who are in need of a lawyer, asking for some lawyer somewhere to agree to take their case. Some counties only have two or three lawyers who are agreeing to take new cases, and some counties have none. This is a crisis. 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, 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.

On March 18, we will mark the 60th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, in which the Court recognized that competent, trained, prepared lawyers for people accused of crimes is a necessity not a luxury. In *Gideon*, the Supreme Court announced that it is the state's obligation to ensure that the accused is provided with the "assistance of counsel" as required by the Sixth Amendment. 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. You will hear and read compelling testimony from many different people and groups over the course of your weeks of budget hearings, asking you to support many positive and worthy programs, but you will not hear a stronger claim of the state's obligation to adequate funding than the right to counsel for individuals, presumed innocent, who are facing criminal charges without the able assistance of counsel.

Some have suggested that the current crisis is the result of COVID-related backlogs in the courts, but you all know better. The Maine legislature recognized the dangerous risk of system-wide failure more than six years ago. In 2017, you created the Working Group to Improve the Provision of Indigent Legal Services, because of a concern that MCILS did not supervise and evaluate the lawyers on its rosters and that MCILS needed stronger fiscal management; MCILS still does not supervise and evaluate the lawyers on its rosters. In 2018, the Legislative Counsel contracted with the Sixth Amendment Center, a national organization with expertise on the right to counsel, to conduct an investigation of Maine's indigent defense system, and the results of that investigation were issued in April 2019. That report made it clear that Maine was 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. All of this happened long before anyone had ever heard of COVID.

My colleagues and I have spent thousands of hours in litigation over the right to counsel, and we are prepared to spend thousands more putting the State of Maine on trial for its failure—our collective failure—to follow the constitution. We are prepared to ask the Court to order the state to fix the indigent defense system, and to keep the state under court supervision for as long as it takes to reach a solution. But, there is no reason to wait for that. You have the power, and the knowledge, and the commitment to put Maine on a different path right here, in this room, today. We urge you to amend the budget to begin that process of repair, and to pass the budget as amended.