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TESTIMONY OF ZACHARY HEIDEN

In Support of Part WW of LD 2214 As Amended

An Act to Make Supplemental Appropriations and Allocations for the Expenditures to State Government, General Fund and Other Funds and to Change Certain Provisions of the Law Necessary to the Proper Operations of State Government for the FYs Ending June 30, 2024 and June 30, 2025

Submitted to the
JOINT STANDING COMMITTEE ON APPROPRIATIONS AND FINANCIAL AFFAIRS &
JOINT STANDING COMMITTEE ON JUDICIARY

February 28, 2024

Senator Rotundo, Representative Sachs, and members of the Joint Standing Committee on Appropriations and Financial Affairs, and Senator Carney, Representative Moonen, and members of the Joint Standing Committee on Judiciary, greetings. My name is Zachary Heiden, and I am Chief Counsel for 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. Along with my colleagues, I 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 two years ago this week.

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. We urge you to vote in favor of Part WW's provisions authorizing a transfer in funds to allow the creation of two public defenders' offices in FY 2024-2025, and we further urge you to amend Part WW to authorize the creation of positions for four additional public defenders' offices to be hired in FY 2025, as outlined in MCILS's fall 2023 Supplemental Budget Request.¹

Access to effective counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). But as Chief Justice Stanfill underscored in her State of the Judiciary Report last week,

¹ https://www.maine.gov/mcils/sites/maine.gov/mcils/files/inline-files/commission_packet.20231011.pdf, at pp. 87-88.

Maine is failing to meet its obligations under *Gideon*: “We are in a constitutional crisis.... We have people sitting in jail every day—frequently a dozen or more in Aroostook County alone—without an attorney because there is no one to take their cases. Raising the pay to \$150 per hour last year has not solved the problem.”² Based on the courts’ own data, there are currently about 300 indigent defendants across the state who are entitled to counsel under the Sixth Amendment but who have not yet been assigned counsel.

Since time immemorial, Maine has nearly entirely relied on independent contractors to meet its critical Sixth Amendment obligation, but independent contractors have the ability to decide when and where they will take on new cases, as well as the ability to decide not to take new cases. Imagine trying to operate the legislature staffed entirely with independent contractors: all the analysts or clerks or editors or accountants might decide that they do not want to work in certain committees, or that they have too much work at the moment so cannot look at any more bills or schedule any more hearings. Imagine what would happen to the critical work of this committee, if the Chairs had to call through lists every day to see if you could find someone to come help with your work.

Like the legislature, the courts need a stable and predictable work force so that they can ensure that everyone who is entitled to a lawyer gets a lawyer. To meet that need, the ACLU of Maine strongly supports the swift build-out of public defenders’ offices in each prosecutorial district across the state. Establishing a hybrid public defense system—with both private counsel and employed public defenders—will be both more effective and more cost-efficient. And a hybrid system will give the state maximum flexibility to quickly respond to this constitutional crisis while making long-term structural reforms. We cannot wait any longer to start funding and implementing structural reform.

The success of public defenders’ offices is not merely theoretical: the Kennebec County public defender office you funded last year has already proven successful. The Kennebec County office is now fully staffed and handling a significant percentage of the region’s caseload. As a result, unlike almost every other county in Maine, Kennebec County currently has no indigent defendants sitting in jail waiting for the appointment of counsel. Moreover, because employed defense counsel work within the established structure of a public defenders’ office, they can receive the supervision, training, evaluation, and support they need to provide *effective* assistance of counsel. The Constitution demands no less.

Section WW would authorize a one-time transfer of available balances of appropriations between the Personal Services and All Other categories in MCILS’s budget, to open two staffed public defenders’ offices: one for Aroostook County, and one for Penobscot and Piscataquis Counties.³ Prosecutors in Aroostook and Penobscot counties bring a greater proportion of cases against their residents than any other counties in the state, and for most of those prosecutions the state needs to make sure there is a qualified defense attorney who is available. Opening these offices will help begin to address the catastrophic delays in appointment of counsel for indigent defendants

² <https://www.courts.maine.gov/courts/sjc/soj/soj-2024.pdf>.

³ <https://legislature.maine.gov/doc/10741> at p.88-89.

awaiting trial in these counties. According to court data, as of last week, there were over 100 cases in which defendants were awaiting appointment of counsel in Aroostook County, and over 120 cases in which defendants were without counsel in Penobscot County. Many of these indigent defendants have been jailed for weeks, and sometimes even months, waiting for the state to meet its constitutional obligation to appoint counsel. For these reasons, we urge you to support Section WW authorizing a transfer of funds to create and staff two new public defenders' offices in Aroostook and Penobscot and Piscataquis Counties.

However, two new offices is not nearly enough. The current constitutional crisis is not limited to Aroostook, Penobscot, and Piscataquis Counties. The more than 300 indigent defendants currently waiting for appointment of counsel are spread across the state. According to court data, as of last week, there were over 50 cases in which defendants were awaiting appointment of counsel in York County, over 40 cases in which defendants were awaiting appointment of counsel in Androscoggin County, over 35 cases where defendants were without counsel in Cumberland County, and over 20 cases where defendants were without counsel in Knox County. Every one of these cases represents a failure of the State of Maine to meet its fundamental constitutional obligations.

To help meet this urgent need, MCILS's supplemental budget request outlines a thoughtful and pragmatic phased-in plan to open new public defenders' offices across the state, and we fully support MCILS's request. We urge you to amend Part WW to authorize the creation of four additional public defenders' offices to be staffed in FY 2025, as requested in MCILS's fall 2023 Supplemental Budget Request. Together, the opening of these four additional regional public defenders' offices in FY 2025 will make significant strides toward addressing the constitutional crisis in Maine.

Alongside the fundamental right to effective assistance of counsel, the constitution guarantees defendants the right to a speedy trial. But Maine is one of just 9 states that has no speedy trial act, and many defendants in Maine are waiting years for their day in court. We further urge you to amend LD 2214 to appropriate the additional funding required to implement LD 1771, An Act Regarding Speedy Trials.

For these reasons, we urge you to vote in favor of Part WW's provisions authorizing a transfer in funds to allow the creation of two public defenders' offices in 2024-2025, and we further urge you to amend Part WW to authorize the creation of positions for four additional public defenders' offices to be hired in 2025, as outlined in MCILS's supplemental budget request. In addition, we urge you to amend LD 2214 to appropriate funding to implement An Act Regarding Speedy Trials.