



TESTIMONY OF ZACHARY L. HEIDEN
LD 1101—OTP/NFNA

**An Act to Address the Limited Availability of Counsel
in Courts to Represent Indigent Parties in Matters
Affecting Their Fundamental Rights**

Joint Standing Committee on Judiciary
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Senator Carney, Representative Kuhn 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 through advocacy, education, and litigation.

Funding of Public Defense

On behalf of our members, I am here to testify in support of the proposed funding for additional MCPDS offices and staff, which is necessary (but unlikely sufficient) to address Maine's constitutional crisis. The legislature should provide more funding for indigent defense so that the State of Maine can come into compliance with the state and federal constitutions.

Last year, the legislature authorized the creation of public defender offices across the state. To say that Maine was late to recognize and accept the value of public defender offices would be an understatement; in fact, Maine was the last state in the country to establish public defender offices as a part of its strategy for satisfying the constitution.

Though these offices are still getting up and running, they are showing remarkable promise for bringing Maine's egregiously outdated system into compliance. Some of the best defense lawyers in the state have signed on to lead those offices, and they are attracting a new generation of smart committed lawyers to do this important work.

Public defender offices help ensure quality control. The District Defenders who lead them can make sure that their lawyers have the training to handle all the various types of criminal cases that come their way; they can supervise and evaluate their performance to ensure improvement; and they can provide lawyers with the support they need so that they can focus on the important, constitutionally-required task at hand.

Our criminal legal system exists to free the innocent and punish the guilty, but it cannot work without effective defense lawyers. Public defender offices are



the most efficient and effective tool anyone has been able to develop for ensuring access to counsel. During those months when people are waiting for counsel to be appointed, nothing is happening with those criminal cases—the state is spending money on court time and jail time, all while nothing is happening to move the case forward.

But in places like Kennebec County, where Maine's first public defender office is located, there are far fewer people waiting for counsel, and they are waiting for less time. And, the costs for these offices are largely fixed, so each year when you and your colleagues have to figure out how much to spend on indigent defense, you won't have to worry about how much to pay hundreds of independent contractors, who may spend 10 or 50 hours on a case, and may handle 50 or 200 different cases.

Access to effective counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution.¹ 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.

We have eight fully-staffed District Attorney offices in this state, along with a well-staffed, well-funded Attorney General's office. They have the assistance of local and state police, as well as the crime lab and state forensic services, to aid in the research and prosecution of crimes. We have only five public defender offices. Establishing one public defender office for each prosecutorial district, and staffing those offices to be able to handle at least half the criminal cases in those districts, would be more likely to solve the current crisis. Otherwise, courts are going to have no choice but to release people from jail and dismiss the charges against them until counsel can be found.

Appointment of Private Attorneys

The Sixth Amendment guarantees not only the right to counsel, but the right to *effective* assistance of counsel. The constitutional right to a lawyer can't be separated from the right to effective assistance: having a lawyer who cannot provide effective advocacy is equivalent to having no lawyer at all. In some cases, an ineffective lawyer might be worse than having no lawyer at all.

¹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).



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Section 1807's proposal for court appointment of private attorneys raises significant questions about how the state will ensure that these newly appointed attorneys can provide the constitutionally required *effective* assistance.

Section 1807 of this bill would permit court appointment of private attorneys if the court finds that "[t]he private attorney is qualified to represent the person..." But the bill does not define the term "qualified," nor does it explain who will assess whether an attorney is "qualified" or against what standards.

We have concerns about Section 3 of this bill, and cannot support it without additional clarification about what "qualified" means in this context.

Being a lawyer in good standing is clearly not sufficient. Nearly a century ago, the U.S. Supreme Court held in *Powell v. Alabama* that appointing an attorney who is inexperienced in criminal law, or unprepared to handle a particular case, is the same as appointing no lawyer at all. See *Powell v. State of Ala.*, 287 U.S. 45, 53-57 (1932). There is, to put it bluntly, a right to the effective assistance of counsel—not a right to counsel in name only.

We believe that the best way to ensure that a defense attorney is "qualified" is employing them in a public defender office. Lawyers in public defender offices are supervised, their work has been evaluated, and they receive rigorous training. Another method for identifying "qualified" attorneys is through the processes established by MCPDS, which requires lawyers to document their experience, attend regular trainings, track hours and conflicts of interest, and report any misconduct. There may be other sound methods for the state to use to determine whether an attorney is qualified, but we do not know what they are. Prior to the establishment of MCILS, judges would rely on their own intuition about lawyers to decide whether they could handle a particular case. Sometimes they got it right, and sometimes they did not. But it was not a reliable system—it was not a "system" at all—and (at a minimum) it undermined the appearance of independence of the judiciary.

There are many tools at the state's disposal to address the current constitutional crisis, but there are no shortcuts. If the state believes that appointing willing and qualified private attorneys to handle some portion of the current list of individuals being denied counsel is a valuable approach, then you have the responsibility to make sure those appointments will actually comply with the constitution.

We applaud the legislature's interest in solving Maine's sixth amendment crisis. New public defender funding is both necessary and valuable. We urge you to find a way to make ensure not only attorneys but qualified attorneys.