To: Senator Anne Carney
Representative Amy Kuhn
Joint Standing Committee on Judiciary

From: Chris Guillory, Director of Supervision, Maine Commission on Public Defense Services

RE: LD1101 "An Act to Address the Limited Availability of Counsel in Courts to Represent Indigent Parties in Matters Affecting Their Fundamental Rights"

Date: March 19, 2025

The Maine Commission on Public Defense Services, Supervision Director Christopher Guillory submits the following testimony neither for nor against LD 1101.

I support LD 1101 in so far as the bill provides additional headcount and appropriations to support PDS. I appreciate the efforts of this committee to secure further resources to allow us to continue our mission and serve the people of Maine. They are desperately needed.

The amendments proposed to 4 MRSA §1807 are deeply concerning to me for several reasons.

This bill does not address the true cause of the indigent defense crisis in this state. The real nature of this crisis is much more complex and difficult to solve. Maine finds itself in this present crisis because the Maine courts lack the capacity to process cases entering the justice system at anywhere near the rate they are filed by the prosecution. This results in the "backlogs" that the courts have been fighting in one way or another since the beginning of my legal career. This problem has been brewing for many years and has been only grown worse by the chronic underfunding and under resourcing across the Courts, the prosecution, and the defense sides of the system. This committee heard recently on another bill from prosecutors about the excessive caseloads they are carrying. This too is a byproduct of too many cases entering and too few cases leaving the justice system. Because cases cannot be resolved in a timely manner the number of pending cases continues to grow; this puts additional pressures on the system that make it operate less efficiently thus perpetuating the problem and fueling its growth. This systemic failure is not due to the number of attorneys present in the system. Rather the shortage of Defense counsel is itself a symptom of the imbalance. If we could magically triple the number of defense lawyers currently practicing in this state it would not solve this problem. It would only be a matter of time before the case imbalance would lead to an overflow of the capacity of the defense bar and we would find ourselves back in this exact same situation.

Even in the face of this imbalance PDS has made significant strides in the recent years addressing some of the factors contributing to this crisis. Recruitment of new attorneys into the PDS program have significantly increased. The establishment of the regional public defenders offices have given reinforcement to the defense structure in the counties where they are located. The Defender Offices, along with the recent externship pilot project authorized by the Law Court, have resulted in a new and much broader regional pipeline for bringing new attorneys from out of state to Maine. If PDS can continue to support and grow these recruitment efforts it is foreseeable that we can increase the supply of attorneys doing this work to a point where the

instant crisis ceases to be as acute as it presently is. This will not be an instant fix, but it does show that the system is presently trending in the right direction.

This success in recruitment is despite PDS seeing a wave of retirements among some of its most experienced practitioners. By the best estimate of PDS staff upwards of 1/3 of the members of the Maine bar in resident active status are at or imminently approaching retirement age. This will naturally create a vacuum in the private market which results in increased competition for new attorneys and increased opportunities for existing contractors to enter more lucrative fields of work.

Granting additional powers to the judiciary to circumvent PDS in the assignment of court appointed counsel will not do anything to address this systemic issue, if anything it will speed the collapse of the defense function.

§1807 would create an alternative process for the determination of what attorneys are qualified to handle cases of any type, severity, or consequence in any of the subject matter areas currently serviced by MCPDS attorneys. This process would consist solely of the subjective and individual determination of a sitting jurist that any given attorney is qualified to receive any given appointment from the Court.

There is no requirement that there be any underlying structure or standard to these determinations. This is dangerous because it means that any judge at any time can determine that any person is qualified for any case for any reason. These determinations must then necessarily bind all other courts to follow suit as any contrary determination will become instant grounds for defendants to challenge the effectiveness of counsel appointed to them via this method. Even without inconsistency amongst judges it should be expected that the number of challenges brought in criminal cases based on ineffective assistance of counsel will rise astronomically in an environment completely devoid of any oversight of attorney performance.

Mitigating this risk will require that the Judicial Branch track which case types any attorney has been determined qualified to handle to prevent these contradictory findings from occurring. In short to avert the absolute chaos that very easily could arise from this practice being implemented in a disorganized fashion the Court will find it necessary to reinvent the very system this amendment circumvents.

This amendment will dismantle the current PDS rosters and system. By creating an alternative method for attorneys to receive case assignments that is categorically exempt from all PDS rules, oversight, training requirements, and standards this amendment serves as an absolute disincentive for any attorney to ever roster with PDS ever again in favor of taking cases only through this proposed mechanism. What business when presented with an option to operate under regulations or completely deregulated with no difference in the work/compensation/or processes at play would voluntarily choose to be regulated? Because of this it is entirely possible that the alternative method implemented in this bill will rapidly become the only method by which counsel will seek to participate in indigent defense work in Maine.

Additionally, commanding PDS to pay attorneys not subject to its rules leaves PDS staff, if any remain after the passage of this amendment, with no authority to investigate, audit, or even correct simple obvious errors on bills received from counsel assigned under 1807.

1807.1.C also presents at least two significant issues. Firstly, it contemplates some sort of limited representation in court appointed cases. This could be achievable in certain case types governed by the Maine Rules of Civil Procedure, although extremely inadvisable. However there currently is no mechanism under the rules of procedure to permit limited representation in criminal matters. This would also run afoul of the provisions of Maine Rule of Criminal Procedure 44B which is crafted to ensure continuity of counsel for criminal defendants.

Additionally, 1807.1.C offers an open invitation for members of the judiciary to begin applying pressure to any licensed attorney in this state to begin taking indigent legal cases. Where will the line be drawn between well-meaning efforts by judicial officers trying to recruit new attorneys to take court appointments and undue influence. Given the massive difference in the power dynamic between sitting judges and practicing attorneys how will any effort at convincing counsel be perceived now that judges can simply deem and appoint cases at will. With PDS no longer serving as the gatekeeper of that process attorneys who could previously demur such advances or cite PDS "rules" as a convenient excuse to not do something they simply were not inclined towards, are not trained for, and have no economic incentive to do may find themselves in increasingly awkward situations. The reality is that even the unfounded perception or fear that acquiescing to a judge's request to take court appointments may either result in favorable treatment, or that not acquiescing will result in unfavorable treatment will create a real and persistent ethical dilemma in every courtroom across this State.

In essence the amendments contained in section 1807 of this bill will erase the positive achievements PDS has managed to make in the past years, throw the practice of indigent legal work in this state into un-regulated chaos, create a system with no way of ascertaining the quality of services provided by counsel, no way to detect potential fraudulent activity, and foreseeably lead to a complete exodus of the PDS central staff which would be in theory responsible for keeping what remains of Maine's indigent defense system functioning under this new model.

I briefly also want to touch on the Governor's Office proposed amendment to this bill. PDS staff can easily identify the author of this document and it is increasingly frustrating and demoralizing to the central office staff that one of our commissioners, a person who rightfully should be a champion for this program, is continuing to knowingly spread disinformation about the operation of this program. I am beyond certain this individual based on the text amendments to section 1804 of the commission rules will testify about our chapter 4 caseload standards. Their belief and continued insistence that those standards are based on the recent Rand Corporation National Public Defense Workload Study are demonstrably false. The PDS commission voted to establish caseload standards on July 17, 2023 after many months of research development and undergoing the formal regulatory rulemaking process. The Rand Study was published on July 27, 2023 ten days after the Commissioners adopted the Commissions present standards and well after any drafting or redrafting of the rules was possible.

These amendments, kindly put, make no sense. "Maine based experience and practice" is a term that would be impossible to enforce. Additionally, Maine is presently and has been building towards a constitutional crisis for many years with a system that was desperately underfunded and until recently underdeveloped. A system existing under those conditions cannot possibly be the lodestone for "the right way to do things" while dismissing out of hand the legal scholarship of entities like the American Bar Association which have invested massive amounts of time and money into studying these exact issues across the country.