

# The Right to Criminal Legal Defense in Maine



A Report of the  
Maine Advisory Committee to the  
U.S. Commission on Civil Rights

November 2023

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

## **Acknowledgments**

The Maine Advisory Committee (Committee) deeply appreciates the contributions of each of the speakers who presented to the Committee during their public meetings in connection with this topic. The Committee is also grateful to members of the public who spoke during the selected periods of public comment, and those who shared testimony in writing. The Committee sincerely appreciates and recognizes the work of U.S. Commission on Civil Rights intern Jennifer Randall for her work on our report.

**Maine Advisory Committee to the  
U.S. Commission on Civil Rights**

The Maine Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding indigent legal services in Maine. The Committee submits this report as part of its responsibility to study and report on civil rights issues in the state. The contents of this report are primarily based on testimony the Committee heard during public meetings held via videoconference on October 20, 2022; November 15, 2022; and December 15, 2022. The Committee also includes related testimony submitted in writing during the relevant period of public comment.

This report begins with a brief background of the issues to be considered by the Committee. It then presents primary findings as they emerged from this testimony, as well as recommendations for addressing areas of civil rights concerns. This report is intended to focus on civil rights concerns regarding the right to legal defense for indigent persons. While additional important topics may have surfaced throughout the Committee’s inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion.

**Maine Advisory Committee to the  
U.S. Commission on Civil Rights**

Samantha Le, *Chair*, Bangor

Diane A. Khiel, *Vice Chair*, Orono

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## **Overview**

On June 22, 2022, the Maine Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) adopted a proposal to undertake a study of indigent legal services for criminal defense in Maine. The focus of the Committee’s inquiry was to examine the right to legal defense for indigent persons facing imprisonment, referring to individuals who are unable to afford a private attorney.<sup>1</sup> From a civil rights perspective, the Committee sought to consider whether Maine’s current system of providing legal services for indigent persons has a disproportionate impact on people in the federally protected classes.

As part of this inquiry, the Committee heard testimony via videoconferences held on October 20, 2022; November 15, 2022; and December 15, 2022.<sup>2</sup> The following report results from a review of testimony provided at these meetings, combined with written testimony submitted during this timeframe. It begins with a brief background of the issues to be considered by the Committee. It then identifies primary findings as they emerged from this testimony. Finally, it makes recommendations for addressing related civil rights concerns. This report focuses on indigent legal services in Maine. While other important topics may have surfaced throughout the Committee’s inquiry, matters that are outside the scope of this specific civil rights mandate are left for another discussion. This report and the recommendations included within it were adopted unanimously by the Committee on September 14, 2023.

## **Background**

The Committee took up this study to examine whether certain laws, policies, or practices in Maine restrict the right to criminal legal defense. Specifically, the Committee studied whether Maine’s lack of a public criminal defender office impacts the civil rights of indigent criminal defendants under federal and Maine state criminal laws. This particular topic on indigent legal services is only one part of Maine’s legal system and does not address Maine’s court system, bail system, and other legal proceedings. The Committee conducted this study under the authority of the following federal civil rights and Maine state protections:

The right to counsel derives from:

- The Sixth Amendment of the U.S. Constitution

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<sup>1</sup> U.S. DEP’T OF JUST., NCJ 250249, SPECIAL REPORT: STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS (May 3, 2013).

<sup>2</sup> Meeting records and transcripts are available in Appendix.

Briefing before the Maine Advisory Committee to the U.S. Commission on Civil Rights, October 20, 2022, (web-based), Transcript (hereinafter cited as “October 20, 2022 Briefing”).

Briefing before the Maine Advisory Committee to the U.S. Commission on Civil Rights, November 15, 2022, (web-based), Transcript (hereinafter cited as “November 15, 2022 Briefing”).

Briefing before the Maine Advisory Committee to the U.S. Commission on Civil Rights, December 15, 2022, (web-based), Transcript (hereinafter cited as “December 15, 2022 Briefing”).

- Article 1, Section 6 of the Maine Constitution
- *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963)
- *State v. Cook*, 1998 ME 40, ¶6, 70 A2d 603

The right to effective assistance of counsel derives from:

- *U.S. v. Cronin*, 466 U.S. 648, 659-660 (1984)
- *Strickland v. Washington*, 466 U.S. 668, (1984)
- *Therhault v. State*, 125 A.3d 1163 (Me. 2015)

The right to counsel before trial derives from:

- *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008)

Maine is required by statute to establish standards governing the delivery of indigent legal services via the Maine Commission on Indigent Legal Services (MCILS):

Title 4 M.S.R.A. §1801 et. seq.<sup>3</sup>

The establishment of the Sixth Amendment in the U.S. Constitution guaranteed the constitutional right to the assistance of counsel and representation for the accused facing incarceration.<sup>4</sup> If an accused individual cannot afford counsel, the state government is obligated to appoint legal counsel, at no cost to the defendant in order to ensure a fair and speedy trial.<sup>5</sup> This right to legal counsel was further detailed in the *Gideon v. Wainwright* case, where defendant Clarence Earl Gideon, who was being charged in Florida with breaking and entering, was denied counsel by the state due to the minor nature of his crime. Gideon appealed to the Supreme Court, stating his Sixth Amendment right to representation was violated. The Supreme Court ruled in favor of Gideon and amended that regardless of the severity of the crime, all state courts must provide defendants with counsel.<sup>6</sup>

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<sup>3</sup> Title 4 M.R.S.A. §1802(4) defines “indigent legal services” as legal representation provided to: “A. An indigent defendant in a criminal case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation; B. An indigent party in a civil case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation; C. Juvenile defendants; and D. An indigent defendant or party or a juvenile for the purpose of filing, on behalf of that indigent defendant or party or juvenile, a petition for certiorari to the Supreme Court of the United States from an adverse decision of the Law Court on a case for which services were previously provided to that defendant or party or juvenile pursuant to paragraph A, B or C.” 4 M.R.S.A. §1802(4).

<sup>4</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Not only is the state obligated to provide counsel, but the counsel must be deemed effective at supporting the defendant. In the U.S. Supreme Court case of *U.S. v. Cronin*, defendant Gary Cronin argued his attorney was ill-prepared for his trial and unable to provide proper and effective representation; therefore, violating his Sixth Amendment rights.<sup>7</sup> This case pushed the U.S. Supreme Court to expand the scope of the Sixth Amendment and acknowledge legally when cases with poor representation hinder a defendant’s ability to a fair and speedy trial.<sup>8</sup> *Rothgery v. Gillespie County* is another key case that extended the definition of the Sixth Amendment right to counsel. In this case, the Supreme Court established that a defendant’s right to representation begins immediately upon a defendant being charged with a crime. This clarification ensures that in every step of the legal proceedings, even before facing a judge, defendants have access to attorney support.<sup>9</sup>

Maine’s own Constitution, under *State v. Cook*,<sup>10</sup> guarantees that all indigent persons will be provided with effective criminal defense by the state. The Maine Commission on Indigent Legal Services (MCILS) was established by the Maine Legislature with the mandate to provide “high-quality representation to indigent criminal defendants, juvenile defendants, and children and parents in child protective cases” and the funding must be “managed in a fiscally responsible manner, free from undue political interference and conflicts of interest.”<sup>11</sup> MCILS oversees “a system of assigned private counsel and contract counsel to provide quality and efficient indigent legal services.”<sup>12</sup>

Yet, Maine is the only state that relies mostly on private contracted attorneys to provide indigent public defense instead of a public defender’s office established by the state.

There is public concern that MCILS has not met its constitutional obligations. According to a 2019 report conducted by the non-profit organization, the Sixth Amendment Center,<sup>13</sup> the services provided by MCILS are not adequately meeting the standards of the Sixth Amendment. The key findings of the report highlighted that MCILS lacks proper supervision and training for attorneys, fails to eliminate underqualified attorneys, encourages gaps in representation instead of comprehensive legal counsel from one attorney, and is unable to address excessive attorney caseloads.<sup>14</sup> Another report, “Maine Commission on Indigent Legal Services (MCILS) – An evaluation of MCILS’s structure of oversight and the adequacy of its systems and procedures to

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<sup>7</sup> *U.S. v. Cronin*, 466 U.S. 648, 659-660 (1984).

<sup>8</sup> *Id.*

<sup>9</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

<sup>10</sup> *State v. Cook*, 706 A.2d 603, 605 (Sup. Ct. Me.1998)

<sup>11</sup> ME. REV. STAT. ANN. tit. 4, § 1801 (2018)

<sup>12</sup> “About Us,” Maine Commission on Indigent Legal Services,” <https://www.maine.gov/mcils/about> (accessed July 31, 2023).

<sup>13</sup> Sixth Amendment Center, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services* (Boston, MA: 2019), 25-85, [https://sixthamendment.org/6AC/6AC\\_me\\_report\\_2019.pdf](https://sixthamendment.org/6AC/6AC_me_report_2019.pdf).

<sup>14</sup> *Ibid.*

administer payments and expenditures,” conducted by the Office of Program Evaluation & Government Accountability of the Maine State Legislature in 2020 for the Government Oversight Committee,<sup>15</sup> also found issues with MCILS. The report identified that MCILS provides unclear policies and guidelines, lacks sufficient defender data, poorly monitors attorney vouchers, is understaffed, and does not provide enough financial support.<sup>16</sup>

In July 2022, the American Civil Liberties Union (ACLU) of Maine sued MCILS on behalf of low-income defendants in the case of *Robbins v. MCILS*.<sup>17</sup> The lawsuit alleges that MCILS is failing to provide constitutionally adequate and effective legal indigent criminal representation in Maine.<sup>18</sup> On August 21, 2023, MCILS and its Commissioners and the ACLU entered a proposed settlement agreement in *Robbins* which outlines specific recommendations for ensuring appropriate provision of indigent legal services.<sup>19</sup> On September 13, 2023, Justice Michaela Murphy of the Maine Superior Court rejected the agreement, noting that it amounted to a four year stay of the proceedings during which the State and ACLU would work on a list of reforms which they “agreed to advocate for over the next four years.” The concern, expressed by Justice Murphy, was that during the four year stay, the agreement precluded an individual who suffered due process violations, due to a failure of Maine’s criminal defense system, from seeking redress by claiming systemic failure.<sup>20</sup> The ACLU of Maine is also actively engaging with the state legislature to pass legislation that allows for speedier trials.<sup>21</sup> This call to action is meant to set clearer guidelines and timelines and to address the growing problem of court back log, all which may impact timely appointment of counsel.

In short, there is legitimate concern and evidence via the reports, current lawsuit, and legislative action that MCILS is not meeting its mandate stated in the state constitution and in the Sixth Amendment to provide effective indigent legal counsel. To address these problems, the Maine legislature in April 2022 created a pilot program: the Rural Defender Unit, consisting of five

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<sup>15</sup> Office of Program Evaluation & Government Accountability of the Maine State Legislature, Maine Commission on Indigent Legal Services (MCILS) – An Evaluation of MCILS’s Structure of Oversight and the Adequacy of its Systems and Procedures to Administer Payments and Expenditures., Report No. SR-MCILS-19 (Nov. 2020).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Robbins v. MCILS*, No. KENSC-CV-22-54 (Me. Super. Jun. 2, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> See Joint Motion, Exhibit 1 (August 21, 2023) in *Robbins et. al v. MCILS et. al*, Docket No. KENSC-CV-22-54, <https://themainemonitor.org/wp-content/uploads/2023/08/Robbins-MCILS-23.08.21-Joint-Motion.pdf>; Samantha Hogan. “Settlement Reached by Maine and ACLU to Overhaul Indigent Legal Services.” *The Maine Monitor*. August 29, 2023. <https://themainemonitor.org/settlement-reached-by-maine-and-aclu-to-overhaul-indigent-legal-services/> (accessed August 30, 2023).

<sup>20</sup> Samantha Hogan, “Justice rejects settlement to overhaul indigent defense in Maine.” *The Maine Monitor*, September 13, 2023. <https://themainemonitor.org/justice-rejects-settlement-to-overhaul-indigent-defense-in-maine/>. (accessed September 14, 2023).

<sup>21</sup> “Maine Lawmakers Must Act to Guarantee Constitutional Right to Speedy Trial,” ACLU Maine, April 5, 2023, <https://www.aclumaine.org/en/press-releases/maine-lawmakers-must-act-guarantee-constitutional-right-speedy-trial> (accessed July 31, 2023); 15 M.R.S.A §§1491-1493.

lawyers, at the cost of a little less than \$1 million.<sup>22</sup> However, according to then executive director of MCILS, this is “not a solution, it’s a patch” and an estimated \$51 million is needed to open public defender offices in all 16 counties in Maine.<sup>23</sup> Without adequate funding and clear guidelines for MCILS, it is possible that indigent defendants may receive subpar legal representation compared to those who can afford an attorney. Because of potential subpar legal representation, indigent legal defendants may face the possibility of losing their liberties, which may result in barriers such as in obtaining housing and employment, that often follows a criminal conviction.<sup>24</sup> Due to these reasons, the Committee sought to investigate if the lack of proper defense in Maine for its indigent population is a denial of equal protection of the laws under the Constitution and in the administration of justice.

## **Methodology**

As a matter of historical precedent, and in order to achieve transparency, Committee studies involve a collection of public, testimonial evidence and written comments from individuals directly impacted by the civil rights topic at hand; researchers and experts that have rigorously studied and reported on the topic; community organizations and advocates representing a broad range of backgrounds and perspectives related to the topic; and government officials tasked with related policy decisions and the administration of those policies.

Committee studies require Committee members to utilize their expertise in selecting a sample of panelists that is the most useful to the purposes of the study and will result in a broad and diverse understanding of the issue. This method of (non-probability) judgment sampling requires Committee members to draw from their own experiences, knowledge, opinions, and views to gain understanding of the issue and possible policy solutions. Committees are composed of volunteer professionals that are familiar with civil rights issues in their state or territory. Members represent a variety of political viewpoints, occupations, races, ages, and gender identities, as well as a variety of backgrounds, skills, and experiences. The intentional diversity of each Committee promotes vigorous debate and full exploration of the issues. It also serves to assist in offsetting biases that can result in oversight of nuances in the testimony.

In fulfillment of Committees’ responsibility to advise the Commission of civil rights matters in their locales, Committees conduct an in-depth review and thematic analysis of the testimony received and other data gathered throughout the course of their inquiry. Committee members use this publicly collected information, often from those directly impacted by the civil rights topic of study, or others with direct expert knowledge of such matters, to identify findings and

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<sup>22</sup> Samantha Hogan. “Lawmakers Approve Funding to Hire Maine’s First Public Defenders.” The Maine Monitor. April 25, 2022. <https://www.themainemonitor.org/lawmakers-approve-funding-to-hire-maines-first-public-defenders/> (accessed July 31, 2023).

<sup>23</sup> Ibid.

<sup>24</sup> “ACLU of Maine Files Lawsuit Challenging Maine’s Inadequate Indigent Defense System,” ACLU Maine, March 1, 2022. <https://www.aclumaine.org/en/press-releases/aclu-maine-files-lawsuit-challenging-maines-inadequate-indigent-defense-system> (accessed July 31, 2023).



recommendations to report to the Commission. Drafts of the Committee’s report are publicly available and shared with panelists and other contributors to ensure that their testimony was accurately captured. Reports are also shared with affected agencies to request for clarification regarding allegations noted in testimony.

For the purposes of this study, **Findings** are defined as what the testimony and other data *suggested, revealed, or indicated* based upon the data collected by the Committee. Findings refer to a synthesis of observations confirmed by majority vote of members, rather than conclusions drawn by any one member. **Recommendations** are specific actions or proposed policy interventions intended to address or alleviate the civil rights concerns raised in the related finding(s). Where findings indicate a lack of sufficient knowledge or available data to fully understand the civil rights issues at hand, recommendations may also target specific directed areas in need of further, more rigorous study. Recommendations are directed to the Commission; they request that the Commission itself take a specific action, or that the Commission forward recommendations to other federal or state agencies, policy makers, or stakeholders.

## **Findings**

In keeping with their duty to inform the Commission of (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress,<sup>25</sup> the Maine Advisory Committee submits the following findings to the Commission regarding indigent legal services in Maine. This report seeks to highlight the most salient civil rights themes as they emerged from the Committee’s inquiry. The complete meeting transcripts and written testimony received are included in Appendix A for further reference.

### **Finding I: Maine’s indigent public defense system is underfunded and unable to meet the state’s current legal representation demands for indigent clients.**<sup>26</sup>

#### *A Stuck and Underfunded System*

A lack of sufficient funding, structure, and administrative support negatively impacts those providing and receiving indigent legal services in Maine.<sup>27</sup> Sarah E. Branch, director of the

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<sup>25</sup> 45 C.F.R. § 703.2

<sup>26</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 6; Nadeau Testimony, *October 20, 2022 Briefing*, p. 5; Andrus Testimony, *November 15, 2022 Briefing*, p. 4; Nadeau Testimony, *October 20, 2022 Briefing*, p. 5; Andrus Testimony, *November 15, 2022 Briefing*, pp. 3-4; Anderson Testimony, *October 20, 2022 Briefing*, p. 17; Keim Testimony, *December 15, 2022 Briefing*, p. 5.

<sup>27</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 6.

Youth Justice Clinic and visiting professor at the University of Maine School of Law, speaking in a personal capacity, described Maine’s current criminal justice system as chronically underfunded and limited.<sup>28</sup> Tina Nadeau, executive director of the Maine Association of Criminal Defense Lawyers, testifying in a personal capacity, shared that alongside a lack of funding for current public defense services, there is low motivation for political change to create a centralized or hybrid public defense system that is adequately funded.<sup>29</sup> Panelists shared that insufficient funding is largely due to a lack of political will to enact necessary legislation and provide adequate funding.<sup>30</sup> Justin Andrus, executive director of MCILS at the time of the Committee’s study, stressed that the lack of political will to address necessary changes results in a criminal justice system that relies on far too few attorneys to provide constitutionally mandated services.<sup>31</sup> Over 400 rostered attorneys that were providing indigent legal services in Maine are down to 190, and only about 140 of those are taking cases as of December 2022.<sup>32</sup>

#### *A Design Never Intended to Support the Current Justice System*

Mr. Andrus shared that Maine’s current criminal justice system was not designed to meet current demands; therefore, it perpetuates an outdated system with limited capacity.<sup>33</sup> The original function of Maine’s indigent legal services relied on a group of attorneys assigned by the state.<sup>34</sup> The current demand for indigent services far outweighs the capacity of available attorneys. Without a legal system that can adapt to the changing needs of its population, the state is often excluding those with lower incomes from receiving quality legal representation.<sup>35</sup>

#### *A Hybrid Public Defense System Consisting of Private and Public Defenders*

The current system in Maine consists of a combination of public defender employees and private attorneys. Ms. Nadeau testified that the upside to the current system is to preserve attorney independence, flexibility, and choice between retained and appointed cases.<sup>36</sup> To improve the system of criminal defense, Prof. Branch testified that input should be sought from those who use indigent legal services, from legislators, from those who control the funding, from the courts, and from Maine’s law school.<sup>37</sup>

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<sup>28</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 6.

<sup>29</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 5; Andrus Testimony, *November 15, 2022 Briefing*, p. 4.

<sup>30</sup> *Ibid.*

<sup>31</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 4.

<sup>32</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 3.

<sup>33</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 3.

<sup>34</sup> *Ibid.*

<sup>35</sup> Anderson Testimony, *October 20, 2022 Briefing*, p. 17; Keim Testimony, *December 15, 2022 Briefing*, p. 5.

<sup>36</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 4.

<sup>37</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 15.

Ms. Nadeau testified that an increase in funding for private attorneys would give those attorneys more flexibility in their schedule and allow them to take more cases.<sup>38</sup> Mr. Andrus testified in support of a hybrid system:

I believe, from my position as executive director, that a hybrid system relying on both employee defenders and assigned defenders who are present in every district, with a district defender who has the same sorts of authorities and influences and access to the courts as a district defender, is absolutely necessary to allow us to evolve to a place where we're able to ensure not only that an individual client gets an attorney and that the attorney provides good service, but that all of that is happening in the context of a system where there is parity in the political dynamic and allows that indigent defense system to support defendants, practitioners, parents and child protective cases....<sup>39</sup>

**Finding II: People of color, individuals with disabilities, and non-English speakers are disproportionately impacted by Maine's current system for providing indigent legal defense.<sup>40</sup>**

According to Mr. Andrus, those who are in federally protected classes are most likely to be disproportionately impacted by the lack of quality and capacity of indigent legal services in Maine.<sup>41</sup> Wendy Allen, an advocate with Restorative Justice Institute with personal experience with Maine's public defense system, testified that in her experience, people who are historically marginalized often cannot pay for lawyers, and they are in turn assigned to court appointed attorneys that are overburdened with heavy caseloads.<sup>42</sup>

Professor Branch highlighted the connection for the Committee, noting, "nationally, individuals of color and individuals with disabilities are disproportionately represented in the justice system. By the data alone, that's not up for debate. It is therefore safe to assume that in Maine those same individuals are impacted by the way we deliver justice here in our state."<sup>43</sup>

Ms. Nadeau remarked that in her own work, she saw a disproportionately high number of clients who were Black, immigrants, youth, survivors of trauma, or individuals who were struggling

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<sup>38</sup> Nadeau Testimony, *October 20, 2022 Briefing*, pp. 4-5.

<sup>39</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 4.

<sup>40</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 4-5, 7; Nadeau Testimony, *October 20, 2022 Briefing*, p. 7; Davis Testimony, *November 15, 2022 Briefing*, pp. 10, 13; Branch Testimony, *December 15, 2022 Briefing*, pp. 7-8; Allen Testimony, *October 20, 2022 Briefing*, p. 13; Anderson Testimony, *October 20, 2022 Briefing*, p. 15.

<sup>41</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 4-5.

<sup>42</sup> Allen Testimony, *October 20, 2022 Briefing*, p. 13.

<sup>43</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 7.

with disabilities, mental health, or substance use.<sup>44</sup> She said “[t]his is purely anecdotal, because the Judiciary DA’s Office and the Commission are terrible at data keeping around these issues...we need data.”<sup>45</sup> Professor Branch noted her particular concern for youth and adults with mental health diagnoses who are charged with a crime, as their cases require the time and attention that attorneys currently providing indigent defense simply do not have.<sup>46</sup>

### *Disproportionate Representation of and Disproportionate Impact for People of Color*

People of color are disproportionately represented in the justice system and are therefore disproportionately impacted by Maine’s lack of effective and meaningful public defense. Zachary Heiden, chief counsel for the American Civil Liberties Union of Maine, shared testimony with the Committee regarding the right to counsel for indigent individuals.<sup>47</sup> He noted that in March 2022, the ACLU of Maine filed a lawsuit against the State of Maine and MCILS for its failure in complying with constitutional obligations to provide effective counsel to indigent individuals.<sup>48</sup> In his testimony, Mr. Heiden discussed the disproportional impacts on people of color through the *Powell v. Alabama* case,<sup>49</sup> where nine Black men were denied the right to counsel and sentenced to death after being accused of rape by two White women. The Supreme court later ruled they did not receive due process and fair representation; therefore, creating law requiring states to provide counsel.<sup>50</sup>

Melissa Davis, professor and director of the Criminal Practice Clinic at the University of New Hampshire Franklin Pierce School of Law, discussed overrepresentation of people of color in the justice system.<sup>51</sup> Professor Davis highlighted that many statistics struggle to track the representation of people of color, and that it would be worth tracking since communities of color continue to be disproportionately represented in and affected by the administration of justice.<sup>52</sup> Marion Anderson, an advocate with the National Council for Incarcerated and Formerly Incarcerated Women and Girls who has direct experience with Maine’s public defense system, stated that in their opinion, Maine’s current criminal system ensures social control and oppression, especially in the marginalization of Black and Brown people.<sup>53</sup>

Professor Davis noted that the more an individual has contact with the criminal justice system, particularly people of color who are disproportionately more impacted, the lower their future

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<sup>44</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 7.

<sup>45</sup> *Ibid.*

<sup>46</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 8.

<sup>47</sup> Heiden Testimony, *October 20, 2022 Briefing*, p. 8.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Powell v. Alabama*, 287 U.S. 45 (1932)

<sup>50</sup> Heiden Testimony, *October 20, 2022 Briefing*, p 10-11.

<sup>51</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 10.

<sup>52</sup> *Ibid.*

<sup>53</sup> Anderson Testimony, *October 20, 2022 Briefing*, p. 15.

earning potential will be.<sup>54</sup> This earning potential impacts an individual's ability to provide for themselves and their own long-term wealth.<sup>55</sup> Mr. Andrus emphasized concerns he has around what he perceives as institutionalized racism in charging and bail decisions for men of color:

It's couched in terms of people being from away and being flight risks. But the reality is that if you're a person of color, especially a man of color, charged with a crime in Maine, you're much more likely to have a high bail or no bail, and you're much more likely to face a State wishing to prosecute you for top-level offenses on indictment, or to face, at least in my experience, greater prison times.<sup>56</sup>

### *Inadequate Representation for Individuals with Disabilities*

Individuals with disabilities are severely impacted by a lack of appropriate time and attention to their cases.<sup>57</sup> Nationally, clients with disabilities are more likely to be overrepresented in the justice system.<sup>58</sup> Professor Davis testified to the Committee that nationally, 38% of those who are currently incarcerated have at least one disability.<sup>59</sup> Professor Branch stated a client's disability may manifest more intensely while incarcerated, and could impact their understanding of why they are incarcerated and hinder their ability to receive treatment: "I have represented individuals whose disability has meant that they do not even know why they're in jail. They are terrified. Their disabilities are manifesting in the extreme while they're held in these cells."<sup>60</sup> Ms. Nadeau testified that "...incarceration is the most extreme de-stabilizer for my clients. It can completely derail their lives...[w]ithout counsel being promptly appointed, clients are not able to get back in court and fight for release on bail."<sup>61</sup>

### *Access to Quality Representation for Non-English Speakers is Hard*

Language barriers impact access to quality services and representation. Mr. Andrus highlighted that protected classes with language barriers often struggle to access social service resources which may play a role in criminal charge outcomes.<sup>62</sup> Mitigative services more specifically are less likely to be available and accessible to those with language barriers.<sup>63</sup> Mr. Andrus discussed

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<sup>54</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 13.

<sup>55</sup> *Ibid.*

<sup>56</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 5.

<sup>57</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 5; Branch Testimony, *December 15, 2022 Briefing*, p. 7; Davis Testimony, *November 15, 2022 Briefing*, p. 10.

<sup>58</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 7.

<sup>59</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 10.

<sup>60</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 7.

<sup>61</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 7.

<sup>62</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 5.

<sup>63</sup> *Ibid.*

that it is the duty of the defense counsel to accommodate clients, regardless of whether they have language challenges or other barriers.<sup>64</sup>

**Finding III: Attorneys assigned as public defenders need the same resources as prosecutors in order to effectively and meaningfully represent their indigent criminal defendants.<sup>65</sup>**

Public defense attorneys are not provided with technical knowledge or financial resources in the same manner as prosecutors, putting their clients at risk of sub-par representation.<sup>66</sup> Eligibility to become an attorney who accepts indigent clients mainly involves watching a six-hour training video on minimal standards, a bar card, and an email address.<sup>67</sup>

Attorneys who are assigned as public defenders in Maine do not usually receive salaries, paid holidays, sick days, health insurance, or other benefits to support their full attention towards obtaining appropriate training and devoting substantial time to cases.<sup>68</sup> None of the overhead costs incurred by court appointed counsel is covered, unlike for state prosecutors.<sup>69</sup> Payment for their work is dependent on the number of cases closed and the amount of time spent on each case.<sup>70</sup> Mr. Heiden, Ms. Nadeau, and Professor Branch highlighted that the unequal financial burden for public defense attorneys is significant and should not be overlooked.<sup>71</sup>

*Defining Parity*

Professor Branch testified that currently in Maine, there is a lack of parity between the resources available to public defense and those available to the prosecutors, creating disparities that are affecting defense representation.<sup>72</sup> Several factors in the current system lead to these disparities in resources. In addition to receiving funds from the state, prosecutors also receive funds from their respective counties; the MCILS receives only state funding.<sup>73</sup> Moreover, the MCILS must budget to provide representation for a wider array of indigent legal services than county prosecutors: the MCILS not only provides indigent legal services for criminal defendants (including juvenile defendants), but it also provides counsel for children and parents in protective

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<sup>64</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 7.

<sup>65</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 1, 16-17; Branch Testimony, *December 15, 2022 Briefing*, pp. 6, 9; Maloney Testimony, *November 15, 2022 Briefing*, p. 15; Nadeau Testimony, *October 20, 2022 Briefing*, pp. 3-4.

<sup>66</sup> Heiden Testimony, *October 20, 2022 Briefing*, p. 18; Nadeau Testimony, *October 20, 2022 Briefing*, pp. 3-4, 18; Branch Testimony, *December 15, 2022 Briefing*, p. 14; Andrus Testimony, *November 15, 2022 Briefing*, p. 21.

<sup>67</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 4.

<sup>68</sup> *Ibid.*, 3.

<sup>69</sup> *Ibid.*, pp.3- 4.

<sup>70</sup> *Ibid.*, p. 4.

<sup>71</sup> Heiden Testimony, *October 20, 2022 Briefing*, p. 18; Nadeau Testimony, *October 20, 2022 Briefing*, pp. 3-4; Branch Testimony, *December 15, 2022 Briefing*, p. 14.

<sup>72</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 6.

<sup>73</sup> *Ibid.*, p. 9.

custody cases, patients in involuntary (civil) commitment cases, and defendants in other civil cases, representation for which MCILS has to budget.<sup>74</sup> Thus, a comparison of funding does not capture these variables. Maeghan Maloney, district attorney for Maine’s Kennebec and Somerset Counties, described the need for parallel numbers of positions, similar salaries, trainings, and benefits for public defenders and prosecutors in order to achieve parity between the two roles.<sup>75</sup>

Mr. Andrus described parity at its most basic level as matching public defense resources to that of a prosecutor’s office.<sup>76</sup> He highlighted the implications of what true parity means for the Committee, noting it starts with standing and respect for the defense function.<sup>77</sup> Robert Ruffner, an attorney who started the Maine Indigent Defense Center specifically to speak on the issue of public defense for the indigent, highlighted that the lack of anyone serving specifically as a public defender leads to an absence in representing the defense perspective and role in policy-making decisions within the state.<sup>78</sup> He shared that Vermont’s Defender General was able to advocate successfully for raising the age of majority for when an individual would be prosecuted in adult vs. juvenile court, as an example of what can result from having a seat in developing and informing policy.<sup>79</sup>

The structure, support, caseload number and training of public defense attorneys needs to completely change beyond just financial resources to achieve true parity.<sup>80</sup> Mr. Andrus stated:

I think the most important thing to recognize when we're talking about parity is that numerical equality does not constitute equity. And the reality is that parity means much, much, much more than budget and head count. But I'll turn to that in a moment. Parity starts with standing. It starts with respect for the defense function. It starts with authority in the defense function equivalent to that of the prosecution function. It starts with statutory inclusion in every commission, in every arena in which the Office of the Attorney General has statutory inclusion, and starts with the seats on the Criminal Rules Advisory Committee. We're talking about criminal

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<sup>74</sup> Title 4 M.R.S.A. §1802(4) defines “indigent legal services” as legal representation provided to: “A. An indigent defendant in a criminal case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation; B. An indigent party in a civil case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation; C. Juvenile defendants; and D. An indigent defendant or party or a juvenile for the purpose of filing, on behalf of that indigent defendant or party or juvenile, a petition for certiorari to the Supreme Court of the United States from an adverse decision of the Law Court on a case for which services were previously provided to that defendant or party or juvenile pursuant to paragraph A, B or C.”

<sup>75</sup>Maloney Testimony, *November 15, 2022 Briefing*, p. 15; Nadeau Testimony, *October 20, 2022 Briefing*, pp. 3-4.

<sup>76</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 16.

<sup>77</sup> *Ibid.*

<sup>78</sup> Ruffner Testimony *November 15, 2022 Briefing*, p. 26.

<sup>79</sup> *Ibid.*, pp. 26-27.

<sup>80</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 9; Andrus Testimony, *November 15, 2022 Briefing*, pp. 1, 17.

stuff here, but also the Civil Rules Advisory Committee, because it impacts the civil folks we represent.

It starts with a seat on the Board of Overseers, because the rules of professional conduct, for example, constrain my ability to oversee the provision of adequate services. It starts with a permanent seat in the Criminal Rules Advisory Commission. It starts with seats at every table where a prosecutor is welcome...Prosecutors can eliminate all the cases they want on any given day. Tying defense caseloads to a number that is within the control of the prosecution to determine, I think, doesn't get you to a place of parity.<sup>81</sup>

### *Balance in the Criminal Justice System*

Lisa Keim, Maine State Senator and formerly the chair of the Joint Standing Committee on Judiciary, stated that an increase in defense payment is one way to provide balance in the criminal justice system.<sup>82</sup> Professor Branch also testified that “the core aspect of the justice system, for it to function properly, is in fact an adversarial process.”<sup>83</sup> Assigning defendants to attorneys with high caseloads or who are under-compensated is like “sending unarmed individuals into a ring to fight against gladiators.”<sup>84</sup> She went on to say, “[p]arity is more complicated than mere money...it’s about the quality of that representation, the structure, the support, the training.”<sup>85</sup>

### *Lack of Incentives to Become Public Defenders in Maine*

Nat Jordan, a law student at the University of Michigan originally from Maine, joined a Committee briefing to share testimony regarding challenges facing law students wanting to enter public defense as a profession.<sup>86</sup> He shared that he would like to return to Maine and pursue a career as a public defender for indigent clients in the state, however, under Maine’s current system he would be ineligible for public service loan forgiveness.<sup>87</sup>

Law schools are becoming more and more expensive. I personally will graduate with probably over \$150,000 in debt, so I can't make moving back to Maine work because I plan to depend on something called Public Service Loan Forgiveness, or PSLF. For those who don't know, PSLF is a federal government program that forgives student loans after a person works in public service for 10 years.

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<sup>81</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 16-17.

<sup>82</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 3.

<sup>83</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 9.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Jordan Testimony, *November 15, 2022 Briefing*, pp. 27-28.

<sup>87</sup> *Ibid.*



I'm in a group for future public defenders at my law school, and almost all of us plan to rely on Public Service Loan Forgiveness, that is, we will only ever pay a small portion of our giant student loan balance because the federal government will forgive the balance of our loans after 10 years in public service. But the key problem for me as a law student who wants to move back to Maine is that, as I understand it, PSLF only applies to government and non-profit jobs. Under the current system, if I was to become a court appointed attorney and contract for the government, that wouldn't be covered under PSLF, so my loans would not be forgivable.

**Finding IV: There is greater need for indigent representation than there are attorneys available in Maine.<sup>88</sup>**

Public defenders must choose between their goals of supporting indigent clients and the reality of being in an overworked and overburdened system.<sup>89</sup> Professor Branch stated that although defense attorneys may enter the public defense profession wanting to do good work for indigent clients in a functional justice system, current caseload demands are demoralizing.<sup>90</sup> Public defenders are put in the position of choosing more efficient case options to lighten their caseload over prioritizing the needs of the client.<sup>91</sup> Ms. Allen highlighted that quality representation comes from attorneys collaborating with their clients, not from choosing the most efficient plea to lighten their caseload.<sup>92</sup>

Cases are increasing at a faster rate than available attorneys.<sup>93</sup> Senator Keim shared that despite the increase in cases, the number of attorneys has dropped from 400 to only 140 attorneys who are taking on active cases.<sup>94</sup> The current available attorneys cannot meet the current demand of cases.<sup>95</sup> With attorneys deciding to leave the field of public defense, the burden of the caseload falls heavily on the remaining attorneys, leading to an increased rate of burnout.<sup>96</sup>

Caseload standards need to be updated with national standards in mind.<sup>97</sup> Mr. Heiden discussed the importance of monitoring the number of cases an attorney has and comparing it against other

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<sup>88</sup> Branch Testimony, *December 15, 2022 Briefing*, pp. 7-9; Allen Testimony, *October 20, 2022 Briefing*, p. 14; Keim Testimony, *December 15, 2022 Briefing*, p. 3; Heiden Testimony, *October 20, 2022 Briefing*, pp. 10, 19; Nadeau Testimony, *November 15, 2022 Briefing*, p. 28.

<sup>89</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 7.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Allen Testimony, *October 20, 2022, Briefing*, p. 14.

<sup>93</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 8.

<sup>96</sup> *Ibid.*, p. 9.

<sup>97</sup> Heiden Testimony, *October 20, 2022 Briefing*, p. 19.

states' caseload standards in order to find appropriate caseload goals.<sup>98</sup> Currently the state of Maine is using caseload standards established from the 1970s.<sup>99</sup> These state standards also do not represent the impacts of COVID-19 which increased caseloads to 60% higher levels than pre-pandemic times.<sup>100</sup>

Mr. Andrus shared context on what is impacting the situation:

First, I have to say that I don't like to talk about a deficit of attorneys, because it implies that that default lies on the attorney's side. It is an imbalance, and a lot of it can be resolved with prosecutorial discretions and filings or other things. But putting that aside, in March of 2019...there were 410 attorneys accepting assignments in Maine. ...Last Thursday, there were 165. During that same period, the rate of new filings and new assignments we are required to help make has gone through the roof. The five-year historical average prior to the pandemic was 26,600 cases a year. That's criminal, child protective, mental health, juvenile. Some ones that are relatively small in account, like emancipation.

In fiscal year '21, that number was up to 28,000-and-a-half. In fiscal year '22, that number was almost 32,000. In fiscal year '[2]3, we're running, at the moment, at about a 32, 33,000-case-a-year rolling limit. We've seen it as high 35,000 annualized two weeks ago. Of course, it is really not just the overall count that matters, but rather also the rate at which we need to staff cases.... So we've seen a dramatic, dramatic decrease in the number of attorneys who are willing to subjugate their personal and professional lives to vitiate the state's ... obligation, without the support of the state to say to these attorneys, "please keep doing it," while the state itself continues to boost the number of cases being charged, and the rate at which cases are being cleared is not anywhere near what it needs to be in order to address that.<sup>101</sup>

Mr. Andrus also stressed that the Committee understand that the process for assigning clients typically depends on the court first making a determination regarding indigency, then reaching out to MCILS to make an assignment.<sup>102</sup> However, the court does not always have the resources necessary to make those assignments, leading to delays.<sup>103</sup> He noted that delays in assignment to

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Nadeau Testimony, *November 15, 2022 Briefing*, p. 28.

<sup>101</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 22-23.

<sup>102</sup> Ibid., p. 21.

<sup>103</sup> Ibid.

attorneys would be decreased by allowing MCILS access to data immediately when someone who might need indigent defense enters the criminal justice system.<sup>104</sup>

### *Weakening the Sixth Amendment*

Professor Branch cautions against weakening the Sixth Amendment as a solution to providing representation: “I am going to beg the people who are making the decisions to not answer our current challenges by watering down the Sixth Amendment...We need to lower barriers to representation but not the quality of that representation.”<sup>105</sup> Mr. Heiden testified that the Sixth Amendment not only enforces the right to counsel, but ensures the right to assistance through counsel.<sup>106</sup> If a lawyer is getting in the way of assistance, they are going against the Sixth Amendment.<sup>107</sup>

**Finding V: Justice is often delayed for those receiving indigent legal services because the parameters for determining indigency are not clear and consistent.<sup>108</sup> This results in life-altering consequences.**

*The current parameters for determining indigency and partial indigency should be streamlined, updated, and made clear, consistent, and uniform, which in turn would expedite assignment of attorneys.*

Mr. Andrus noted that the court determines indigency in most cases, although MCILS can occasionally make a direct assignment of an attorney to a client if they determine the client is indigent.<sup>109</sup> He shared the following information in explaining how indigency is determined:

We have indigent and partially-indigent. Indigent is related to the federal poverty rate, and I think it's 110% at the moment, and then there's a very low cash component that somebody can have. Really, that should look more like social security disability or some other more generally-accepted provision. Also, it should be the case that if somebody qualifies for a means-tested benefits program, they don't need to be further screened. That's repeating work [that] doesn't need to be done.

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<sup>104</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 21.

<sup>105</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 10.

<sup>106</sup> Heiden Testimony, *October 20, 2022 Briefing*, p.10.

<sup>107</sup> Ibid.

<sup>108</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 15; Allen Testimony, *October 20, 2022 Briefing*, p. 14; Nadeau Testimony, *October 20, 2022 Briefing*, p. 8; Branch Testimony, *December 15, 2022 Briefing*, p. 6; Andrus Testimony, *November 15, 2022 Briefing*, p. 6.

<sup>109</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 21.

Partially-indigent means that a judge has decided that the person doesn't have the present ability to retain counsel. Some judges set that ceiling very low. Some people set [it] very high. I've seen people with very large incomes, but not a lot of money in the bank, who are stuck in jail, qualify. That's probably right. Then I've seen other people who I thought would qualify, not qualify. So I think that establishing some real parameters around what does partially-indigent mean and who qualifies for that would be appropriate, in addition to raising the actual indigency level.<sup>110</sup>

If the court does not have the proper resources to determine indigency, there will be delays in assigning an attorney to an indigent client.<sup>111</sup> When assignments are made and attorneys are pushed beyond their limits, the client's representation is impacted.<sup>112</sup>

*Effective and meaningful representation for indigent individuals is not a state priority.*

Senator Keim shared that the required urgency of providing effective and meaningful defense is not widely shared among Maine's legislators, meaning that justice is not only delayed but often denied while people wait in jail or receive low quality representation.<sup>113</sup> Ms. Allen reflected on the impact of delayed justice as she waited for representation in prison. Days spent waiting for an attorney influenced her ability to be with family, keep her housing, and even impacted Ms. Allen's sense of self.<sup>114</sup> Ms. Nadeau remarks that if clients are not advised well, they may be forfeiting their own rights within the justice system.<sup>115</sup> There are current delays in processing cases due to a lack of attorneys, and COVID-19 has added another layer of setback within the system.<sup>116</sup> Mr. Andrus suggested that centralizing indigent services may help in getting clients better access and identify resources.<sup>117</sup>

*The Court System is Backlogged*

Senator Keim testified, "you can't just look at indigent legal services in Maine and not consider that it's part of a broader system, which is the court system. Terribly backlogged, a lot of difficulty there with scheduling."<sup>118</sup> Professor Branch echoed the statements of Chief Justice of the Maine Supreme Judicial Court Valerie Stanfill, that Maine essentially has a convergence of a perfect storm of three things: a chronically underfunded justice system, the COVID-19

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<sup>110</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 22.

<sup>111</sup> *Ibid.* p. 21.

<sup>112</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 18.

<sup>113</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 15.

<sup>114</sup> Allen Testimony, *October 20, 2022 Briefing*, p. 14.

<sup>115</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 8.

<sup>116</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 6.

<sup>117</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 6.

<sup>118</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 3.

pandemic, and the state’s inability to find enough qualified attorneys to appoint to individuals accused of crimes.<sup>119</sup> Senator Keim stated, “justice delayed is justice denied.”<sup>120</sup>

**Finding VI: Low-quality representation impacts case outcomes for indigent clients.<sup>121</sup>**

Ms. Nadeau remarked about the power dynamic between attorneys and clients and how a client’s access to representation falls solely in the hands of the attorney and their capacity to provide high-quality representation.<sup>122</sup> Without the security of salary, benefits, services, mentorship, and resources, it is hard to determine the quality of representation a client may receive from an attorney.<sup>123</sup> Quality representation should not be affected by attorneys’ caseloads or their abilities to represent criminal defendants.<sup>124</sup>

*Appropriate and effective representation of clients is not possible when attorneys are overburdened.*

Attorneys with the capacity to take on new cases and to properly collaborate with their clients would provide better representation, which in turn may reduce incarceration rates.<sup>125</sup> Poor quality legal representation can lead to clients being misinformed about their rights, or taking plea deals they later regret.<sup>126</sup>

Ms. Allen reflected on the legal representation she received and questioned that maybe if she had the financial means to pay for her own lawyer, her outcome would have been different.<sup>127</sup> Ms. Allen stated that taking a plea deal came from a place of intimidation and fear:<sup>128</sup>

I sat in jail for almost nine months waiting for court, which kept getting continued. I didn't get to meet with my lawyer until the day before court. During that time, going over the case in less than an hour, a lot of talk was about plea deals. "Well, plea out. You have a criminal history. They're going to nail you with double of what they're asking for." Although I had ample evidence that I wasn't at the place that they said I was at during this alleged incident, I wanted to take it to trial.

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<sup>119</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 6-7.

<sup>120</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 15, echoing Dr. Martin Luther King Jr.’s “Letter from a Birmingham Jail” in which he states, “justice too long delayed is justice denied.”

<sup>121</sup> Nadeau Testimony, *November 15, 2022 Briefing*, p. 28; Nadeau Testimony, *October 20, 2022 Briefing*, pp. 3, 5-6, 8, 18; Allen Testimony, *October 20, 2022, Briefing*, p. 14; Davis Testimony, *November 15, 2022 Briefing*, p. 10.

<sup>122</sup> Nadeau Testimony, *November 15, 2022 Briefing*, p. 28.

<sup>123</sup> *Ibid.*, pp. 3, 6.

<sup>124</sup> *Ibid.*, p. 5.

<sup>125</sup> Allen Testimony, *October 20, 2022, Briefing*, p. 14.

<sup>126</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 8.

<sup>127</sup> Allen Testimony, *October 20, 2022 Briefing*, pp. 13-14.

<sup>128</sup> *Ibid.*

But I almost felt forced to take a plea deal because I had a criminal history. So, it was instilled by fear, which happens to a lot of court-appointed representation. People that can't afford to pay lawyers, people that are minorities and are more or less have to go with the court-appointed attorneys, I feel a lot of times the attorneys are overloaded with cases, and so they don't put their whole heart into representing their clients....So, I sat in prison for six years, taking a plea deal, having to admit something that I wasn't guilty for. Had I been able to pay for a lawyer or maybe a public defender, where they are committed to working for their client, maybe things would've turned out a little bit different for me.<sup>129</sup>

*Indigent individuals who do receive legal representation have very little control over the quality of their representation.*<sup>130</sup>

Senator Keim discussed the importance of recognizing client autonomy over their access to quality representation and decision making regardless of their income.<sup>131</sup> She testified that it is important for defendants to have some choice and more say in how they are being defended:<sup>132</sup>

So that's one plug I put in there as you consider things is that you think about the bias that's built into the system of an assumption that these people, because they're low income and accused of a crime, that somehow they are not capable of making sound decisions on what their defense looks like or how could we introduce into our systems, in the state of Maine or across the United States where we are respecting people more and trying to give them a greater choice and advocacy over their own situation. I feel like we could have good outcomes for people if they were respected more through the process.<sup>133</sup>

Assigning attorneys without proper communication by the state throughout the process may send a message that clients are unable to make decisions in their own best interests.<sup>134</sup> Ms. Nadeau articulated that in the current system, a client's autonomy in making decisions is often based on luck and whether they happen to be assigned to a qualified attorney.<sup>135</sup>

*The impacts of delayed or poor-quality representation are far reaching and lifelong.*

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<sup>129</sup> Allen Testimony, *October 20, 2022 Briefing*, p. 13.

<sup>130</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 5; Branch Testimony, *December 15, 2022 Briefing*, p. 8; Nadeau Testimony, *October 20, 2022 Briefing*, p. 5; Allen Testimony, *October 20, 2022 Briefing*, p. 13; Anderson Testimony, *October 20, 2022 Briefing*, p. 16.

<sup>131</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 5.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Keim Testimony, *December 15, 2022 Briefing*, p. 5, Branch Testimony, *December 15, 2022 Briefing*, p. 8.

<sup>135</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p. 5.

Delayed or poor-quality representation may lead to unfair and unsupported convictions and to unjust or longer incarceration than warranted. Panelists described the lifelong impacts of deficient legal representation. Conviction history impacts a client far beyond the time they spend in jail.<sup>136</sup> Ms. Allen shared the far-reaching impacts incarceration had on her family and personal life:

The court-appointed representation affects the clients in a lot of ways, especially sitting in jail. Every day you're sitting in jail, you are being pushed away from your family, the impacts that it has on your children.... I was unable to be there as a mother, but not only that. You walk out with your housing gone, your employment gone, everything gone. And then being almost misrepresented, your hope and your purpose gone as well.<sup>137</sup>

Mx. Anderson stated that fines and incarceration impacted their ability to pay for housing, employment, transportation, and education, and continues to affect them now.<sup>138</sup>

It impacts everything from housing to employment to families, transportation. And of course, coming out of jail or prison, you now have this label that follows you wherever you go.... This system was created to perpetuate harm. And without proper funding for legal defense, that agenda becomes easier for the state. The [prosecution is] properly equipped with all of the things, as everyone before me has stated, all of the benefits, all of the pay, all of the resources, all of the support. And meanwhile, I'm lucky to see my attorney three times in seven months, six months that I was waiting to be sentenced for a crime that I didn't commit. And I think it is a disservice to the folks like me in the State of Maine to continue on a system that does not grant the same opportunity to those without money, that it grants to those with money and that's really what it boils down to.<sup>139</sup>

**Finding VII: Poor representation harms a client's ability to trust that their attorney will provide effective and meaningful representation.<sup>140</sup>**

*Trust and Case Outcomes*

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<sup>136</sup> Anderson Testimony, *October 20, 2022 Briefing*, p. 17.

<sup>137</sup> Allen Testimony, *October 20, 2022 Briefing*, p. 14.

<sup>138</sup> Anderson Testimony, *October 20, 2022 Briefing*, p. 17.

<sup>139</sup> *Ibid.*

<sup>140</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 11; Andrus Testimony, *November 15, 2022 Briefing*, p. 7; Nadeau Testimony, *November 15, 2022 Briefing*, p. 28; Branch Testimony, *December 15, 2022 Briefing*, p. 16; Allen Testimony, *October 20, 2022 Briefing*, pp. 13-14; Anderson Testimony, *October 20, 2022 Briefing*, p. 17.

Professor Davis highlighted the importance of a trusting relationship between an attorney and client throughout the court process. She advocated for vertical representation, where the same lawyer would represent the client from start to finish.<sup>141</sup> A decision made by the attorney and client may have ramifications for which a client may have to abide, pay, or serve time in prison. Knowing a decision was carefully thought out and having an attorney willing to properly advise a client based on their individual needs may empower the client to make a well-informed decision.<sup>142</sup>

Trusting relationships not only help clients make better decisions, but they may also assist in resolving cases more quickly because clients may understand their options more clearly and spend less time questioning and delaying trials in court because of confusion.<sup>143</sup> Mr. Andrus stated that understanding a client and their needs can assist in their overall current and future wellbeing.<sup>144</sup> This understanding may help the attorneys look into the issues that led to criminality in the first place and provide services to assist their clients after they leave the court system to prevent recidivism.<sup>145</sup>

Ms. Nadeau testified that high-quality representation was based on trust. Clients feel very acutely when they are not getting quality representation:

The trust in our current system, if ever any existed, has been broken and I fear that is irrevocably broken. Our clients do not trust us to work for them, to try hard, to fight, to listen to them. And we have to work hard to convince them each time that we do care and that we do try. They know the system is against them and they think we are part of that system...without that foundation of trust and respect, how can we effectively connect with much less represent our clients?<sup>146</sup>

#### *Power Dynamics Between Client and Attorney*

Attorneys have the authority and knowledge to inform clients about case options and assist in determining a client's potential sentencing.<sup>147</sup> Professor Branch stressed the importance of including clients using indigent legal services and including those who are impacted by the current system to inform the Committee's work.<sup>148</sup> Not only does the attorney and client relationship impact access to resources and sentencing, it can also destroy a client's sense of self

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<sup>141</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 11.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 7.

<sup>145</sup> *Ibid.*

<sup>146</sup> Nadeau Testimony, *October 20, 2022 Briefing*, p.7.

<sup>147</sup> *Ibid.*, p. 28.

<sup>148</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 16.



and hope furthering their distrust for those working in the system and the system itself.<sup>149</sup> Mr. Andrus noted that attorneys need to accept clients as they are. This acceptance may allow attorneys to hear the needs of the client and have a candid conversation.<sup>150</sup>

**Finding VIII: Public defenders need mentorship and supervision to provide effective and meaningful representation to their indigent clients.<sup>151</sup>**

*Influence of Mentorship and Supervision*

Professor Davis informed the Committee that access to mentorship played a key role in forming a trusting relationship with clients.<sup>152</sup> Mentors also help by providing feedback and training to attorneys in order to best support their clients.<sup>153</sup> Supervisors provide support for the overall function of the office and help bring in committed counsel who will provide quality representation.<sup>154</sup> Mr. Heiden testified to the Committee that there are too many lawyers in the current system who are failing to provide quality representation and should not be working on behalf of the public.<sup>155</sup> When things go wrong in a case, which is common, there is nobody there to help them figure it out.<sup>156</sup> Mentorship is needed among lawyers. In the current system, there is no ongoing supervision, mentorship, or training.<sup>157</sup> In order to provide high quality representation, defense attorneys need the same support of any other state office.<sup>158</sup>

**Finding IX: There is disagreement between Maine prosecutors and criminal defense attorneys' positions regarding who is deciding, what criteria is being used to decide, and which defendants get court-appointed counsel.**

Prosecutors maintain that this determination is made strictly by law, and that they do not have any discretion in this determination.<sup>159</sup>

Ms. Nadeau noted:

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<sup>149</sup> Allen Testimony, *October 20, 2022 Briefing*, p. 14.

<sup>150</sup> Andrus Testimony, *November 15, 2022 Briefing*, p. 7.

<sup>151</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 12; Heiden Testimony, *October 20, 2022 Briefing*, p. 12; Nadeau Testimony, *October 20, 2022 Briefing*, p. 3; Maloney Testimony, *November 15, 2022 Briefing*, p. 8; Branch Testimony, *December 15, 2022 Briefing*, p. 13.

<sup>152</sup> Davis Testimony, *November 15, 2022 Briefing*, p. 12.

<sup>153</sup> Heiden Testimony, *October 20, 2022 Briefing*, p. 12; Nadeau Testimony, *October 20, 2022 Briefing*, p. 3.

<sup>154</sup> Maloney Testimony, *November 15, 2022 Briefing*, p. 8.

<sup>155</sup> Heiden Testimony, *October 20, 2022 Briefing*, pp. 9, 12.

<sup>156</sup> *Ibid.*, p. 12.

<sup>157</sup> Heiden Testimony, *October 20, 2022 Briefing*, pp. 9, 12.

<sup>158</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 13.

<sup>159</sup> Nadeau Testimony, *November 15, 2022 Briefing*, p. 28.

[I]t is in the hands of prosecutors, largely, that people are determined in the criminal realm to be eligible for court appointed counsel because it is prosecutors who check a box or write on the complaint whether they are seeking jail. Without that determination by prosecutors, somebody does not qualify for court appointed representation. These are criminal offenses. By their nature, there is an inherent risk of jail. That's what makes them criminal. In Maine, we've somehow delegated that initial authority to prosecutors to determine who gets representation and who is left to the wolves, so I think those two points needed to be clarified for the committee.<sup>160</sup>

Mr. Andrus shared that the process for determining indigency is generally in the hands of the court, with indigency determinations sometimes coming at the discretion of a judge:

In almost all instances, the court makes that determination. We [MCILS] do occasionally make a direct assignment. We're going to have to make a couple of other decisions, but we make our own determination. But in broad, you're correct. It happens with the court. The numbers are up-to-date and accurate in that they're correct under the existing schema, but they're not what they should be, which is how I really hear the question.<sup>161</sup>

Defense counsel, on the other hand, contend that a comprehensive evaluation of an individual defendants' potential criminal charges and their criminal history are factors that are often ignored in determining eligibility in court appointment; these factors may increase risk of incarceration which, in turn, should dictate appointment of counsel.<sup>162</sup>

Guidance from the MCILS website states the following for the public in response to the question: "How do I apply for a commission assigned attorney?"

The judge will decide if you are eligible for an attorney paid for by the state based on your financial situation and based on the nature of your case. At the court, you will have to fill out a motion for assignment of counsel and a financial affidavit. This affidavit should be filled out with the assistance of a MCILS Financial Screener if your court has one. Then a judge will review your request. The judge or the clerk will tell you whether or not you qualify and if you qualify whether or not you will be ordered to repay some or all of the attorney fees. If you do, the judge or the clerk will give you the name of an attorney assigned to your case. It is possible, but

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<sup>160</sup> Ibid.

<sup>161</sup> Andrus Testimony, *November 15, 2022 Briefing*, pp. 21-22.

<sup>162</sup> Branch Testimony, *December 15, 2022 Briefing*, p. 7-8.

unlikely, that later on the Commission will decide that a different attorney should represent you.<sup>163</sup>

Further, guidance on the MCILS website for attorneys includes the following response to the question, “Who will decide if an individual is indigent and entitled to assigned counsel?”

The court. Whether a person is indigent and whether the nature of the case mandates that an indigent person receive representation at state expense are generally issues of constitutional dimension that are appropriately decided by the court. Accordingly, you should advise clients seeking assigned counsel to file an application with the court.<sup>164</sup>

### **Recommendations**

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws, and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>165</sup> In keeping with these responsibilities, and given the testimony heard on this topic, the Committee submits the following recommendations to the Commission:

#### **The U.S. Commission on Civil Rights should issue the following recommendation to the United States Department of Justice and Maine’s Congressional Delegation:**

1. Request an investigation by the U.S. Department of Justice as to whether Maine is providing effective and meaningful representation to indigent clients facing actual incarceration.

#### **The U.S. Commission on Civil Rights should issue the following recommendations to the Maine Legislature’s leadership, the Committee on Judiciary, the Committee on Appropriations and Financial Affairs, and the Legislative Budget Subcommittee; to Governor Mills; to the Chief Justice of the Maine Supreme Judicial Court; and to the Maine Commission on Indigent Legal Services:**

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<sup>163</sup> “FAQs for the Public,” Maine Commission on Indigent Legal Services, accessed July 31, 2023, [https://www.maine.gov/mcils/information\\_for\\_the\\_public/faq-public](https://www.maine.gov/mcils/information_for_the_public/faq-public).

<sup>164</sup> Ibid.

<sup>165</sup> 45 C.F.R. § 703.2 (2018).

2. Urge the Maine Legislature and Governor Mills to provide adequate funding to indigent legal services for criminal defendants at the minimum recommended by MCILS, which would promote parity between defense counsel and prosecutors. **Until the Maine legislature adequately funds Maine's indigent legal defense system, this issue will not be solved.**
3. Research appropriate ratios to balance the number of defense cases to the number of cases per prosecutor by looking at other state examples and structures.
4. Develop a robust and well-structured hybrid public defender system, one that includes public defenders as well as private attorneys, and one that incentivizes attorneys to provide quality public defense services and is fully funded and well-staffed with well-trained counsel which could ensure more effective representation for clients.
5. Increase the number of criminal defense attorneys in order to reduce pressure on defendants who may feel pressure to take plea deals when they have genuine defenses and want to be heard in court. Workload and caseload standards should be updated accordingly.
6. Urge the governor to appoint a task force of relevant stakeholders to meet and create a system of public defense that has the capacity to provide effective and meaningful defense to indigent clients that includes a process for ensuring and monitoring that members of federally protected classes are not receiving delayed, sub-par, or inadequate legal services. Ensure the taskforce includes at least one member who is designated to represent public defense perspectives.
7. Allow individuals providing public defense services to qualify for student loan forgiveness.
8. Fund and monitor a hybrid system in every prosecutorial district to ensure clients are assigned an attorney in a timely manner and that the attorney provides effective and meaningful counsel.
9. Develop a record keeping system by MCILS that provides updated data regarding general indigent legal services and impacted federal protected classes in order to keep attorneys accountable, to increase data collection, and to ensure quality services are being provided for clients uniformly across the state. Provide a portal for indigent clients to voluntarily give feedback to services they have received as indigent clients. Include in data collection case outcomes for court-appointed counsel versus hired counsel.

10. Develop a system that enables the courts to track which counsel is available and promotes vertical representation (one attorney who can be with clients throughout their whole case) to save time and other efficiencies. Streamline information sharing between the Administrative Office of the Courts and MCILS to enable communication with MCILS on a real-time basis.
11. Clarify and streamline the parameters for indigency to make them uniform, fair, and consistent throughout the state.
12. Follow through with all additional recommendations provided by the Sixth Amendment Center, who identified multiple issues with the right to counsel in Maine's indigent defense system, to fulfill the state's constitutional obligations.
13. Ensure the Maine legislature provides all supports necessary to the Maine court system to alleviate the backlog, including consideration of proposed legislation to speed up criminal trials by establishing timelines for the commencement of a defendant's criminal trial, and providing remedies for when time limits have been violated.
14. Fund provision of supervision, mentorship, and training for attorneys to ensure quality representation. Develop trainings that emphasize the importance of client autonomy and of trusting relationships between attorneys and their clients when providing public defense legal services.
15. Encourage diversion programs (e.g. mental health, substance abuse, domestic violence) developed by prosecutors and public defenders, to lighten attorney caseloads and to provide support for clients before they enter the criminal justice system. Seek a funding source for cases involving mental health clients as these cases require more time and support than the average case.
16. Consider decriminalizing certain offenses in order to reduce delays in assigning public defense services.
17. Appoint an entity independent of MCILS to handle attorney timesheets and payments.

**The U.S. Commission on Civil Rights should issue the following recommendation to Maine's Attorney General and District Attorneys:**

18. Develop a public defense system that increases parity between prosecution and defense counsel, using a combination of public defenders and private attorneys for defense.

19. Ensure the public defense system is funded in parity with prosecutors' offices.

**The U.S. Commission on Civil Rights should issue the following recommendation to the State of Maine Board of Overseers of the Bar and Maine Bar Association to:**

20. Develop trainings emphasizing the importance of client autonomy and trusting relationships between attorneys and their clients when providing public defense legal services.
21. Support the development of a hybrid system that relies on both employee defenders and assigned defenders who are present in every prosecutorial district to ensure clients get an attorney and that the attorney provides good service.
22. Examine current policies and procedures to determine how to increase the number of attorneys that could provide public defense services. Examples for increasing Maine's attorney pool include expanding bar reciprocity to other states and countries, researching and addressing low pass rates for the Maine Bar Exam, and exploring how to provide loan forgiveness to individuals providing public defense services.

**The U.S. Commission on Civil Rights should issue the following recommendation to the University of Maine School of Law:**

23. Develop externship programs and clinics for law students and develop career pathways for legal support staff through the University of Maine School of Law and MCILS to provide indigent legal services to clients.
24. Develop part-time or night school programs that would train interested individuals appropriately in providing public defense.

## **Appendix**

Materials related to the Committee's study are available at the following link:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L01FL0luZGlnZW50lFNlcnZpY2Vz](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L01FL0luZGlnZW50lFNlcnZpY2Vz)

### A. Briefing materials

- a. Transcripts
- b. Agendas
- c. Minutes
- d. Panelist Presentations (slides)

### B. Written Testimony

- a. David Beaulieu
- b. Larry Dansinger

**Maine Advisory Committee to the  
United States Commission on Civil Rights**



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