

MAINE COMMITTEE ON THE JUDICIARY

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Testimony of David Carroll

Sixth Amendment Center, Executive Director

(Participating Remotely)

SLIDE 1 (Title Page): Thank you. I am David Carroll, the Executive Director of the Sixth Amendment Center (6AC). The 6AC is a non-partisan, non-profit organization dedicated solely to ensuring that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. We do so by measuring public defense systems against Sixth Amendment case law and established standards of justice. When shortcomings are identified, we help states make their courts fair in ways that promote public safety and fiscal responsibility. Since our founding, we have been an official right to counsel technical assistance provider for the United States Department of Justice, Bureau of Justice Assistance.

I want to accomplish three things in my presentation...

SLIDE 2:

- Establish the importance of the right to counsel;
- Give a brief history of the right to counsel in Maine, including the 6AC report; and,
- Propose a road map on remedying right to counsel deficiencies in your state.

Section I: Importance of the right to counsel

SLIDE 3: Without the aid of an effective lawyer, almost anyone stands the risk of going to jail when charged with a crime. The majority of us would not know, for example, what is and is not admissible in a court of law, let alone how to procedurally convince twelve jurors that the government has not proven its charges beyond a reasonable doubt. If this is true of even the most affluent and educated among us, how can it be fair to let someone who has fallen on hard times or who has been let down by our country's educational system face these criminal charges alone? How can we accept those who are not yet an adult, or who are mentally-ill, or who is a veteran suffering from post-traumatic lose their liberty at the hands of government simply because they lack the guiding hand of counsel to navigate the complexities of our legal system? We cannot and never should accept this status quo.

SLIDE 4: One month from now, our country will celebrate the 58th anniversary of *Gideon v. Wainwright*. In *Gideon*, the U.S. Supreme Court said the right to a lawyer is "an obvious truth," in establishing that the Sixth and Fourteenth Amendments to the U.S. Constitution obligate states to provide effective representation to the indigent accused in cases that carry loss of

liberty as a potential punishment. Failing to properly implement *Gideon*, and its progeny, results in two problems: first, people often are adjudicated guilty and incarcerated without ever speaking to an attorney; or, second, the accused often is appointed an attorney who is unqualified, unsupervised, and/or financially conflicted, and who often carries an excessive number of cases such that the defendant receives little-to-no representation at all. Such systemic deficiencies impair the accused's ability to receive due process and a fair trial while frequently subjecting taxpayers to unnecessary expense caused by over-incarceration, wrongful conviction, and systemic litigation. There is no greater tyranny than state government taking a person's liberty without the process being fair.

Deficient indigent defense services produce a myriad of seemingly disconnected problems throughout the greater criminal justice system. For example, why do convicted persons have difficulty re-entering society upon release from prison? They do so, in part, because their public advocates are prevented from continuing to fight on their behalf for better conditions of confinement, and treatment and reentry programs after they are incarcerated. Why is the United States one of the few countries in the world that still relies on bail? The answer is that many states do not appoint counsel at bail hearings. Point to almost any criminal justice issue and the root problem will be a lack of true advocacy on the part of people of insufficient means charged with crime. Just as a doctor treating only the visible symptoms of an underlying ailment may fail the patient, attempting to address the countless issues plaguing criminal justice *without concurrently reforming indigent defense services* will result in half-measures and unsustainable policies.

Now let's turn to Maine specifically

Section II: The right to counsel in Maine

SLIDE 5: In the wake of the *Gideon* decision in 1963, Maine initially left the majority of funding and oversight of indigent defense services to its counties. And, since the moment of that decision, Maine has struggled to fulfill its constitutional mandate under *Gideon*.

Indeed, in study after study, independent evaluators questioned the manner in which Maine administered the right to counsel.

- In 1965, the Maine Judicial Council expressed “dissatisfaction” with the “functioning of the assigned counsel system,” noting the lack of uniformity between counties based on disparate funding levels. The level of justice one received was potentially based on which side of a county line the crime was alleged to have been committed.
- In 1971, the Institute of Judicial Administration conclude that there is not “much confidence that the assigned counsel system is working well.”
- In 1976, Maine finally took over 100% responsibility for funding indigent legal services, but left oversight of attorneys providing services as a court function, with judges maintaining lists of private attorneys willing to take cases and individually appointing lawyers to cases.

SLIDE 6: Such judicially-controlled systems are prohibited under national justice standards because they create a conflict of interests between the financial interests of the lawyer and the legal interests of his client, as the attorney may do what he thinks he needs to do to please the judge to secure future appointments rather than advocating in the interests of the defendant.

SLIDE 7: Studies continued to find fault until the creation of the Maine Commission for Indigent Legal Services (MCILS) in 2009. Since its inception, MCILS has never used governmentally employed attorneys to provide representation (commonly called “public defenders”). Instead, MCILS pays private attorneys \$60 per hour. Maine is the only state in the country that provides all indigent defense services through private attorneys.

There are two principal reasons why other states have moved away from using only private attorneys to provide all indigent defense services. Maine has struggled with both. First, it is difficult to predict and contain costs in a private attorney system. A system can estimate future caseloads based on prior-year trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. MCILS has historically had to come back for supplemental funding. Second, it simply is extremely difficult to supervise private attorneys to ensure they can and do provide effective representation.

In 2017, the Maine legislature created the Working Group to Improve the Provision of Indigent Legal Services to address such issues and found that MCILS “does not have systemic oversight and evaluation of attorneys” and is in need of “stronger fiscal management” and recommended undergoing “an outside, independent, nonpartisan study of Maine’s current system of providing indigent legal services.” That’s where we come in.

In March 2018, the Maine Legislative Council contracted with the Sixth Amendment Center to evaluate right to counsel services in five sample counties: Androscoggin, Aroostook, Cumberland, Somerset, and York. The 6AC analyzed data, conducted courtroom observations and interviewed criminal justice stakeholders. We produced an 105-page report with 355 footnotes documenting, in detail, the deficient provision of legal services to the state’s poor. We do this encyclopedic approach as a reference guide. Should future legislatures want to, for example, consider going back to the type of flat fee contract payment that was existing in Somerset County at the time of our study, all the evidence is there for why such a decision is unwise.

So I don’t want to make everyone read a 105- page report with 355 footnotes. So I boiled everything down to one single slide:

SLIDE 8: The State of Maine expects MCILS to maintain quality and financial oversight of nearly 600 attorneys, handling more than 30,000 cases in 47 courthouses presided over by approximately 90 justices, judges, and magistrates, with a staff of just three people.

Given this fact it should not be surprising that we found issues in both quality and financial

oversight.

For example:

SLIDE 9: MCILS attorney qualification standards are too lenient, resulting in an excessive number of attorneys taking cases. Those attorneys lack training and supervision.

Under MCILS' qualification requirements at the time of our study, an attorney who graduated from law school two years ago and hung out their shingle in a private practice, with no supervision or training, can have two jury trials and two judge trials and then be appointed to represent indigent defendants in every type of criminal case other than a homicide or a serious sex offense. More worrisome perhaps is that indigent defendants charged with Class E crimes, carrying up to six months in jail, can be represented by an attorney who just received their bar card and completed a single training course in criminal law, as long as the lawyer has an email address, telephone number, and a confidential space to meet with clients.

With limited exceptions, MCILS does not require attorneys appointed to represent the indigent to obtain training in the fields in which they provide indigent legal representation. Similarly, MCILS has not established any requirements for supervision of attorneys appointed to provide indigent legal representation.

We found that some prosecutors in some jurisdictions engage in plea discussions with uncounseled defendants, and some courts actively encourage such negotiations, resulting in the actual denial of counsel.

In every courtroom observed in all of the sample counties, the same video is played before the judge is on the bench enumerating defendants' rights. Yet, no one ensures that defendants have watched the video, understand the language spoken in the video, or have the mental capacity to understand the video, and it is often the case that tardy defendants enter without ever seeing the video at all. Moreover, under U.S. Supreme Court case law a plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant's right to counsel has been knowingly, voluntarily, and intelligently waived. Despite this, throughout the sample counties, prosecutors talk to uncounseled defendants to negotiate guilty pleas.

Interestingly, coming into this study I half-expected the major issues to occur in the most rural counties in the North. Instead, the actual denial of counsel problem was most prevalent in the South where larger court populations, and not enough assigned counsel lawyers, exacerbate the problems.

SLIDE 10: Despite there being many excellent assigned lawyers providing representation to the indigent accused throughout Maine, there are also too many attorneys throughout the state who do not perform adequately. And the State does not know the difference.

In one of the studied counties, the Sheriff estimated, due to the volume of prisoner complaints, that about 25% of assigned attorneys do not visit their clients in jail to prepare their cases. He was also concerned about attorneys not accepting calls from the jail. He said prisoners stop calling when their calls are not accepted. Consistent with that report, one judge estimated that 25% of assigned counsel have not met with their clients before the first dispositional conference date. She reported that up to 10% of attorneys withdraw or become a second chair if the case goes to trial.

MCILS data tends to confirm these observations of the sheriffs. For example, the 6AC requested three years of data on jail visits on cases billed out of Cumberland County. The data reveal a number of attorneys that often visit clients, but a concerning number of folks that do not. For example, in 2017, one attorney billed MCILS \$111,771 for cases arising in Cumberland County, including \$3,024 for 96 jail visits. By contrast, another attorney billed MCILS \$171,880, but did not bill any time for even a single jail visit. Certainly it is possible, though unlikely, that the attorney simply decided it was not worth the time to bill jail visits, but the point is that MCILS and the State of Maine do not know because of a lack of oversight.

SLIDE 11: What became even more troubling over the course of our study is the fact that MCILS does not exert adequate financial oversight of private attorneys. A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year.

“Over-billing” was a topic raised frequently throughout the state. At the time of our study, attorneys did not submit vouchers under penalty of perjury. No statutes or MCILS rules limit attorney hours by day or by year. MCILS conducts no audits. Not surprisingly, a review of MCILS vouchers over the past five years generated serious concerns in some instances about whether limited taxpayer resources are being used efficiently.

If an attorney works eight hours per day, five days per week, for 52 weeks a year, that attorney should make no more than \$124,800 at the current \$60 per hour MCILS rate.

In FY 2018, 25 attorneys billed MCILS in excess of 40 hours per week. The top biller in FY2018 billed more than 88 hours per week.

As part of this review, the 6AC reached out to the Federal Defender Services Division of the Administrative Office of the United States Courts. The Federal Defender Services confirmed that eight of these 25 lawyers also received federal court appointments during this same time period.

As I told previous committees, I may not be a tax-payer but I feel that I have contributed heavily to your economy sending my two girls to summer camp in Maine every year for the past seven years. It irritates me that Maine does not have the fiscal oversight that dollars are well spent on the state’s constitutional obligation.

To be clear, the 6AC was in receipt of MCILS data for one day when it became clear that there was not adequate financial oversight of the system. And, we used the “top earners” to more readily show the problem. But, MCILS – and therefore the state of Maine – also has no idea that the attorney who billed only \$20,000 per year also performed adequately and properly billed the state.

SLIDE 12: The 6AC did not have the ability, nor the authority, to go further than that. However, the Maine Office of Program Evaluation & Government Accountability (OPEGA) did. OPEGA confirmed the 6AC findings. They said, among other things:

- There are no established policies and procedures governing expenditures and payments;
- Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness;
- Auditor review procedures have not been established and current audit efforts are limited, inconsistent, of limited scope, depth and effectiveness; and
- MCILS is understaffed and receives insufficient support for necessary operations.

It is my understanding that OPEGA is still looking at “quality” oversight, but I can tell you it is inadequate when the state only funded three MCILS people to do all of the work.

Section III: Propose a road map

SLIDE 13: Although the 6AC made a number of recommendations - which I am more than happy to speak about with you in the future – there is one major deficiency in your right to counsel system that should be addressed:

- The State of Maine should authorize and fund MCILS at an appropriate level to employ state government attorneys and support staff to operate a statewide appellate defender office and a Cumberland County trial level public defender office.

Providing oversight of an all private attorney system is most extremely difficult. Creating public defender offices allows for built in supervision, much like in prosecutors’ offices. MCILS does not currently have the statutory authority to establish governmentally employed public defender offices. The relevant part of the statute says: “The commission shall [d]evelop and maintain a system that uses appointed private attorneys, contracts with individual attorneys or groups of attorneys *and consider other programs* necessary to provide quality and efficient indigent legal services.” The statute needs to be amended to give MCILS express authority to create staffed public defender offices where appropriate.

Now, the 6AC does not presume that Cumberland County is the *only* jurisdictions best served by a trial-level public defender office. It is just the one that will give the state financial and quality oversight of the greatest number of cases soonest. As a side note, the American Bar Association standards say a state should have a public defender number wherever the caseload justifies it – and that would be Cumberland County.

We recommended Cumberland County only because we did not directly study the other counties that appear from caseload data to justify a public defender office. MCILS and Maine policymakers should consider expanding public defender office to Kennebec and Penobscot counties once the state appellate defender and Cumberland County public defender offices are created and operating. Indeed, we were struck that, as far back as 1971, the Institute of Judicial Administration, the Supreme Judicial Court, and the Superior Court of the State of Maine recommended precisely this approach suggesting the state should fund a hybrid public defender/private attorney system with public defender offices in Portland, Augusta, and Bangor. That's right, your own State research came up with the answer in 1971.

Finally, let me state for the record that we struggled with the budget for an expanded MCILS, a state appellate defender, and a Cumberland County public defender office. Whenever we do such projections we often look to the prosecutors since the ABA calls for parity of salaries, etc., between the prosecution and the defense "assuming that the prosecution is adequately funded."

To be clear, the 6AC is not experts in the prosecution function. That said, we have travelled throughout the country and observed and spoken to many district attorneys. It appears to us that the prosecution function in Maine is under-resourced in regard to salaries. Several prosecutors spoke to us about their own low compensation (especially in regard to the payments some private attorneys receive) and their high caseloads. We were struck with the care in which many prosecutors spoke to us about the indigent defense problems in your state, and I promised that I would raise this observation where ever appropriate.

Creating a state appellate defender offices, as well as trial-level public defender offices in Cumberland, Kennebec and Penobscot counties, will decrease the reliance on private attorneys. MCILS could also increase the attorney qualification standards for private counsel, and significantly reduce the number of attorneys providing indigent defense services. The reduction of the private bar will then justify our next recommendation:

SLIDE 14:

- The State of Maine should fund MCILS at a level that allows private attorneys to be compensated for overhead expenses plus a reasonable fee (i.e., \$100 per hour). MCILS should be authorized to provide additional compensation of \$25 per hour for designated case types such as murder, sexual assaults, and postconviction review.

MCILS' \$60 per hour compensation rate is inadequate to both cover overhead and provide lawyers an adequate fee. As a comparison, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour in 2000. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature." Assigned counsel compensation in South Dakota now stands at \$99 per hour. For comparison purposes, a

\$99 hourly fee in South Dakota in 2019 is equivalent to a \$120 hourly fee in Maine (based on cost of living comparisons).

SLIDE 15: I have one more thought that was not expressly recommended in our report, but that has become abundantly clear since its publication. The Director of MCILS is a critical position to the overall health of Maine criminal justice system. Given the pandemic and Maine being viewed nationally as an ideal location to work and to live, many people have called me interested in the position. But, in my opinion, two things are reducing applications. The first is that the salary being offered is too low, especially given the deficiencies identified in our report. The second is that there have been media reports saying MCILS will not receive more funding until it fixes itself. If you want these deficiencies fixed, you are going to need a strong leader to assist you. You need to raise the profile of that position.

In conclusion, I do not want to leave the impression that the only answer to criminal justice reform in Maine is to simply throw money at the problem. The right to counsel is only required when there is a threat of jail. If the state looked to increase diversion options, and reclassify certain low-level crimes to violations, you could shrink the size of the criminal justice system all together thus reducing the need for indigent defense services and its costs.

Thank you. I am happy to take questions.