STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

ANDREW ROBBINS; BRANDY GROVER; RAY MACK; MALCOLM PEIRCE; and LANH DANH HUYNH, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES; JUSTIN ANDRUS, in his official capacity as Executive Director of the Maine Commission on Indigent Legal Services; JOSHUA TARDY, in his official capacity as Chair of the Maine Commission on Indigent Legal Services; and DONALD ALEXANDER, MEEGAN BURBANK, MICHAEL CAREY, ROBERT CUMMINS, ROGER KATZ, MATTHEW MORGAN, and RONALD SCHNEIDER, in their official capacities as Commissioners of the Maine Commission on Indigent Legal Services,

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF LAW

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MOTION FOR CLASS CERTIFICATION

This case is a challenge to Defendants' failure to comply with their constitutional and statutory obligations to implement a system that provides effective representation for individuals who are unable to afford counsel. Plaintiffs move this Court to certify and maintain this case as a class action pursuant to Rules 23(a) and 23(b)(2) of the Maine Rules of Civil Procedure, and to appoint undersigned counsel as class counsel. As set forth below in the incorporated memorandum of law, Plaintiffs meet all of the requirements for class certification in this case, and undersigned counsel are able to provide capable representation to the class.

INCORPORATED MEMORANDUM OF LAW

I. Background

This is a statewide class action on behalf of adults who are eligible for court-appointed "competent defense counsel" pursuant to the Sixth Amendment of the United States Constitution; Article I, Section 6 of the Maine Constitution; and 15 M.R.S. § 810. The defendants in this action—the Maine Commission on Indigent Legal Services ("MCILS" or "the Commission") and its executive director and commissioners—are charged with carrying out the State's constitutional and statutory responsibility to provide meaningful representation to members of the class. In particular, MCILS is responsible for "[d]evelop[ing] and maintain[ing] a system that uses appointed private attorneys . . . to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). But Defendants have failed to comply with those obligations to implement an effective system of indigent defense. And that failure, in turn, has created an unconstitutional risk that the class members will be denied effective assistance of counsel.

Defendants have failed to discharge their constitutional and statutory duties in several distinct ways. Perhaps most notably, Defendants have failed to promulgate standards governing the delivery of legal services—including standards for the minimum qualifications of counsel, maximum caseloads, evaluation of counsel, and conflicts of interest. *See* 4 M.R.S. § 1804(2); Complaint ¶¶ 46–55. Defendants are required to develop these standards—both constitutionally and by statute (*see id.*)—and uniform standards for delivery of indigent legal services are "critical for public defense services because all public defenders are required to meet the same constitutional standard of effectiveness."[1] Defendants have also failed to perform adequate oversight of rostered attorneys, including assessing whether attorneys are performing fundamental

[1] Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 Iowa L. Rev. 113, 163 (2020).

defense functions like visiting clients, returning client calls, filing appropriate motions, and retaining necessary expert support. *See* 4 M.R.S. §§ 1804(3)(G); 1805(3); Complaint ¶¶ 49–51. Defendants are again required by statute to perform this oversight, which is critical to evaluating whether defense counsel are providing effective assistance of counsel—including, for example, by filing appropriate motions,[2] and communicating with clients.[3] Still more, Defendants have failed to adequately compensate and train rostered attorneys. *See* 4 M.R.S. §§ 1804(2)(B), (3)(D), (3)(A), (3)(F); Complaint ¶¶ 58–66. Again, Defendants are required by the federal and statute constitutions and by statute to undertake this function, and a failure to properly train public defense attorneys poses a threat to an indigent defendant's constitutional rights.[4]

In light of these failures, Plaintiffs seek declaratory and injunctive relief under the Maine Administrative Procedure Act, 5 M.R.S. § 8058, the Maine Declaratory Judgments Act, 14 M.R.S. § 5951, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, to require Defendants to adopt and enforce rules, practices, and systems necessary to comply with their legal and constitutional obligations. The named Plaintiffs also seek certification of this case as a class action pursuant to Rule 23(b)(2) of the Maine Rules of Civil Procedure to pursue an efficient and just resolution of all class members' claims. The proposed class consists of:

> All individuals who are or will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. § 810 because they have been indicted for a crime punishable by imprisonment in the State Prison and they lack sufficient means to retain counsel.

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[2] *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *United States v. Wadsworth*, 830 F.2d 1500, 1510 (9th Cir. 1987).

[3] *Commonwealth v. Brooks*, 839 A.2d 245, 250 (Pa. 2003).

[4] *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir. 2003).

Because all elements for class certification are satisfied, and because counsel for Plaintiffs are able to capably represent the proposed class, the Plaintiffs respectfully request that this motion be granted.

II. Discussion

A class should be certified if it provides a superior vehicle for resolving a dispute, if class counsel is capable of adequately representing the interests of the class, and if the following conditions are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative party are typical of the claims or defenses of the class; and (4) the representative party will fairly and adequately protect the interests of the class. M.R. Civ. P. 23(a). Additionally, because Plaintiffs seek declaratory and injunctive relief, they must satisfy the requirements of Rule 23(b)(2) by demonstrating that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." M.R. Civ. P. 23(b)(2).

While plaintiffs bear the burden of establishing that class certification is warranted, they are not required at this stage of the litigation to prove that they will prevail on the merits. *See, e.g. Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Ret. Sys.*, No. 1:12-cv-59-GZS, 2012 WL 5874783, at *1 (D. Me. November 20, 2012) ("[A]t the class certification stage any inquiry into the merits is limited 'to the extent that the merits overlap the Rule 23 criteria.'" (*quoting Campbell v. First American Title Ins. Co.*, 269 F.R.D. 68, 71 (D. Me. 2010))); *see also Applegate v. Formed Fiber Tech., LLC*, No. 2:10-cv-00473-GZS, 2012 WL 3065542, at *2 (D. Me. July 27, 2012).[5] The

[5] "Reported cases brought as class actions in Maine are rare." *See* 2 Maine Civil Practice § 23:1, at 603 (2015–2016 ed.). Maine courts therefore commonly rely on decisions of federal courts interpreting Rule 23 of the Federal Rules of Civil Procedure for guidance. *See Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676 (stating that courts "value

question at this stage is "whether a class action is the most appropriate method of adjudicating Plaintiffs' claims." *Coffin v. Bowater Inc.*, 228 F.R.D. 397, 401 (D. Me. 2005). In making that determination, the requirements in Rule 23(a) "should be liberally construed [so as] not to undermine the policies underlying the class action rule." *Lessard v. Metro. Life Ins. Co.*, 103 F.R.D. 608, 610 (D. Me. 1984); *see also Nilsen v. York Co.*, 219 F.R.D. 19, 21 (D. Me. 2003).

Plaintiffs' action meets all the criteria for certification.

A. Joinder is impracticable.

The first requirement for class certification is satisfied when "the class is so numerous that joinder of all members is impracticable." M.R. Civ. P. 23(a)(1). While there is no minimum number of class members necessary to establish this element, one court has recognized "more than forty individuals" as a useful benchmark. *See Coffin*, 228 F.R.D. at 402; *see also Venegas v. Glob. Aircraft Serv., Inc.*, 159 F. Supp. 3d 93, 98; *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011).

Here, the class is so numerous that joinder of all its members is impracticable. The class may contain as many as 7,269 members, which is the number of currently pending felony cases in the Maine Unified Criminal Docket courts across the State, as of February 11, 2022. *See* "Pending UCD Cases as of February 11, 2022," attached as Exhibit A. Some portion of defendants in these cases have hired their own attorneys, but Plaintiffs believe that number to be less than 20%.[6]

In addition to the sheer number of cases—pending in every corner of the State—the composition of the class is constantly changing as new cases are filed and older cases are resolved,

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constructions and comments on the federal rule as aids in construing our parallel provision" (emphasis and quotation marks omitted)).

[6] *See* Caroline Wolf Harlow, Ph.D., U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Defense Counsel in Criminal Cases* tbl. 6 (Nov. 2000), *available at* https://bjs.ojp.gov/content/pub/pdf/dccc.pdf (documenting that only 17.6% of defendants in felony cases in the 76 largest counties in America were represented by privately retained attorneys).

compounding the difficulties any attempt at joinder of individual actions would create. *Risinger v. Concannon*, 201 F.R.D. 16, 19 (D. Me. 2001) (the "geographic dispersion" of the class and the likelihood of unidentified and future class members both demonstrate that joinder is impractical). Plaintiffs are also bringing this action for the benefit of individuals who have not yet been accused of crimes, which further demonstrates that joinder is impracticable. *See, e.g., Van Meter*, 272 F.R.D. at 282 (finding joinder impracticable where future class members have not yet been identified); *Bruce v. Christian*, 113 F.R.D. 554, 557 (S.D.N.Y. 1986) (finding joinder impracticable where class included individuals who would be affected in the future, and fluid nature of the class meant identity of individuals would change even as harm and basic parameters of the group affected would remain constant).

B. There are question of law and fact common to the class.

The second requirement for class certification is that "there are questions of law or fact common to the class." M.R. Civ. P. 23(a)(2). The commonality requirement is a "low bar." *Van Meter*, 272 F.R.D. at 282; *Applegate*, 2012 WL 3065542, at *10. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court clarified that the commonality requirement is satisfied when "class members have suffered the same injury" and the theory of the case rests on a "common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. 338, 349–350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id.* at 359 (cleaned up); *see, e.g., Curtis v. Scholarship Storage*, No. 2:14-cv-303-NT, 2016 WL 308779, at *2 (D. Me. Jan. 25, 2016) (applying *Dukes* to find the commonality requirement satisfied where all plaintiffs were "subjected to the same policies and practices").

As outlined in the complaint (¶ 93), this case rests on resolution of a set of common questions, including:

i. Whether Defendants have failed to comply with their constitutional and statutory obligations to implement an effective indigent-defense system, including their specific obligations to develop standards governing the delivery of indigent legal services; establish training programs and attorney qualifications; and monitor the indigent-defense system;

ii. Whether Defendants' failure to adequately fund the delivery of indigent-defense services, and, in particular, to ensure that attorneys are appropriately compensated, results in the provision of constitutionally deficient representation;

iii. Whether Defendants' implementation of the lawyer-of-the-day system fails to ensure the provision of effective representation at the start of a defendant's case; and

iv. Whether Defendants' failure to implement, administer, and oversee an adequate public-defense system results in a violation of the state and federal constitutions.

These questions are capable of classwide resolution and resolving them "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. To take just one example, the question of whether Defendants have failed to fulfill their statutory duty to promulgate rules and standards is fundamental to the issues and contentions underlying this suit. That question will be resolved independent of the facts of any particular case, and it has a single answer that will apply equally to all members of the class.

Applying these principles, courts in analogous cases around the country have granted class certification to plaintiffs challenging a state or locality's indigent-defense system. *See, e.g.*, Order Granting Motion for Class Certification, *Tucker v. Idaho*, No. CV-OC-2015-10240 (Idaho 4th Dist. Jan. 17, 2018), *available at* https://bit.ly/3st7Czo and attached as Exhibit B; *Wilbur v. City of*

Mount Vernon, 298 F.R.D. 665 (W.D. Wash. 2012); *Hurrell-Harring v. State*, 914 N.Y.S.2d 367 (2011); *Rivera v. Rowland*, No. CV-95545629, 1996 WL 677452 (Conn. Super. Ct. Nov. 8, 1996). In *Tucker*, for example, plaintiffs sought certification of a class containing all persons in Idaho eligible to use the services of the state public defender. Order Granting Motion for Class Certification at 2, *Tucker*, CV-OC-2015-10240. Like Plaintiffs here, the *Tucker* plaintiffs sought a judgment that Idaho's indigent-defense system was constitutionally deficient and failed to provide effective assistance of counsel. *Id.* In certifying the class, the court emphasized that the case would "examine [the defendants'] policies and practices concerning public defender services in the State of Idaho"—not a "multitudinous" set of individualized "decisions and answers." *Id.* at 16.

Here, too, "there are single answers to questions such as whether the State has violated the United States and [state] Constitutions by failing to implement, administer, and oversee adequate public defense." *Id.* at 16–17. In particular, as noted above, the question whether Defendants have failed to fulfill their statutory obligations—leading to an unconstitutional risk of the deprivation of effective assistance of counsel—will have a single answer that applies equally to all class members.

Similarly, in *Hurrell-Harring,* plaintiffs sought certification of a class consisting of all criminal defendants entitled to appointed representation in a set of New York counties. *Hurrell-Harring*, 81 A.D. 3d at 72. As in *Tucker*, the court emphasized that the case rested on the common question whether the localities had met "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages." *Id.* at 73. As the court explained, "[i]t is this concrete legal issue, and the constitutional right to counsel sought to be vindicated, that is common to all members of the class and transcends any individual questions." *Id.* That was true even though

"the class members may have suffered the deprivation of their constitutional right to counsel in varying manners." *Id.* Because "it is predominance, not identity or unanimity, that is the linchpin of commonality," it was not "fatal to the class action" that individualized questions might "remain after resolution" of the questions common to the class. *Id.* (quotation marks omitted).

Here, that reasoning applies with equal force. Before addressing any particular plaintiffs' experience with the State's indigent-defense system, the court must first decide whether Defendants have failed to fulfill their statutory obligations to create an effective indigent-defense system, thereby creating an unconstitutional risk of deprivation. The answer to that question will apply to all individual cases, regardless of the precise details of any individual defendant's interaction with the indigent-defense system.

Finally, in *Wilbur*, plaintiffs sought certification of a class consisting of all persons in two Washington State towns who had been or would be represented by a public defender. 298 F.R.D. at 666. In determining that certification of the class was proper, the court identified multiple common questions, including whether the relevant public defender systems provided constitutionally adequate representation and whether the relevant towns were obligated to monitor the public defenders. *Id.* at 667. The court emphasized, relying on *Dukes*, that these questions could be resolved with a uniform answer. *Id.*

The result should be the same here. This case hinges on whether "the basic constitutional mandate for the provision of counsel to indigent defendants . . . is at risk of being unmet because of systemic conditions." *Hurrell-Harring*, 914 N.Y.S.2d at 370. As described above, this question is both "capable of classwide resolution" and "central" to the claims of every putative class member. *Dukes*, U.S. at 349–350. Defendants' actions and inactions have caused the same injury to Plaintiffs and class members: a substantial risk of the denial of adequate assistance of counsel.

And Plaintiffs and class members seek the same relief: a declaration that Defendants are not fulfilling their statutory and constitutional obligation to ensure effective representation, and an injunction requiring Defendants to comply with their obligations.

C. Plaintiffs' claims are typical of those of the class.

The third element of class certification analysis is "typicality"—in other words, are the "claims or defenses of the representative parties . . . typical of the claims or defenses of the class." M.R. Civ. P. 23(a)(3). This requirement is satisfied when plaintiffs' injuries "arise from the same events or course of conduct as do the injuries of the class and when plaintiff's claims and those of the class are based on the same legal theory." *Applegate*, 2012 WL 3065542 at *6 (*quoting Campbell*, 269 F.R.D. at 75). The commonality and typicality analyses often overlap. *See, e.g.*, 1 Newberg on Class Actions § 3:31 (5th ed. 2021).

Here, Plaintiffs' claims are representative of the class members' claims because Plaintiffs, like the other class members, receive representation through the State's deficient indigent-defense system. MCILS has failed to promulgate any standards for evaluating caseloads, conflicts of interest, or attorneys' performance. In addition to violating the Commission's statutory obligations, MCILS's lax approach creates an unconstitutional risk that indigent defendants will be assigned an attorney who is ill-prepared and incapable of providing effective representation. *See* Complaint ¶¶ 76–80. Absent the required standards, MCILS has no baseline for establishing what effective representation requires—let alone mechanisms for measuring how appointed counsel are performing. And even where MCILS has ostensibly put standards in place—for example, with respect to attorney qualifications and training—the standards are far too low to ensure effective representation. Complaint ¶¶ 58–63. The result is both a statutory violation under the Maine Administrative Procedure Act and a constitutional violation through the resultant risk of deprivation of counsel. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1017–1018 (11th Cir. 1988);

Hurrell-Harring v. State, 15 N.Y.3d 8, 18 (2010); *Kuren v. Luzerne County*, 637 Pa. 33, 38, 146 A.3d 715, 718 (2016); *Tucker v. State*, 162 Idaho 11, 20, 394 P.3d 54, 63 (2017). Crucially, that risk exists for *both* the named Plaintiffs *and* the absent class members alike.

D. Plaintiffs and their counsel will fairly and adequately protect the interests of the class.

The fourth requirement for class certification is that the named plaintiffs and their counsel establish that they will "fairly and adequately protect the interests of the class." M.R. Civ. P. 23(a)(4). Plaintiffs must show that their personal interests will not conflict with the interests of other class members, and counsel must show that they are "qualified, experienced and able to vigorously conduct the proposed litigation." *Van Meter*, 272 F.R.D. at 283 (*quoting Andrews v. Bechel Power Corp.*, 780 F.2d 124 (1st Cir. 1985)).

In this case, the named Plaintiffs and their counsel will fairly represent and adequately protect the interests of the members of the class as a whole. The named plaintiffs do not have any interest antagonistic to those of other class members. By filing this action, the named plaintiffs have displayed an interest in vindicating their rights, as well as the rights of others who are similarly situated. The declaratory and injunctive relief sought by the named plaintiffs will benefit members of the class generally.

Furthermore, the named plaintiffs are represented by counsel who are skilled and knowledgeable about constitutional rights, civil rights litigation, criminal procedure, the prosecution and management of class action litigation, and practice and procedure in Maine state courts. The ACLU of Maine—an affiliate of the nationwide American Civil Liberties Union—has more than five decades of experience defending the civil liberties of the people of Maine, including through state and federal civil-rights actions. Counsel at Preti, Flaherty, Beliveau & Pachios, LLP, possess expertise in complex litigation, administrative law, and matters relating to Maine state

government. And counsel at Goodwin Procter LLP have extensive experience litigating complex actions in trial and appellate courts, including a significant track record of litigating civil-rights suits in conjunction with ACLU affiliates.

For these reasons, the requirements of Rule 23(a)(4) are therefore met.

E. Plaintiffs meet the requirements of Rule 23(b)(2).

In addition to satisfying the requirements of Rule 23(a), Plaintiffs must also establish that Defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class a whole." M.R. Civ. P. 23(b)(2); *see Nilson v. York County*, 219 F.R.D. 19, 21 (D. Me 2003) (noting that plaintiffs must satisfy one of the requirements from among the Rule 23(b) options in addition to all of the requirements in Rule 23(a)). Plaintiffs are not seeking an award of damages, which could necessitate individualized determinations of damages for each class member or category of class members. *Cf. Nilsen*, 219 F.R.D. at 23. Instead, Plaintiffs are seeking declaratory and injunctive relief to address Defendants' unlawful failure to adopt rules and standards and to otherwise ensure that Plaintiffs and those similarly situated are given adequate assistance of counsel. If a class is not certified, individual class members will have to bring the exact same claims as the named plaintiffs in order to obtain the same relief that would be available in a class action. Further, due to the speed with which criminal cases are often resolved, class members would need to seek preliminary injunctive relief in order to obtain review of their claims before they become moot.

Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole under Rule 23(b)(2). Although class members face different criminal charges, their claims raise common legal issues insofar as all class members have faced, or will face, an unconstitutional risk of denial of

the effective assistance of counsel at critical stages of the criminal proceeding because of the Defendants' failure to properly train, supervise, evaluate, or compensate the attorneys in its program. Class members share a common need for the prompt delivery of effective legal representation in the form of criminal defense attorneys who are reasonably likely, based on the systems put in place by the Defendants, to provide such assistance.

A class action is superior to individual lawsuits for resolving this controversy because determining whether the Defendants' failure to train, evaluate, supervise, and compensate the lawyers in its program violates the constitution for all individuals who are entitled to legal assistance in a class action will conserve judicial resources. While there are hundreds of lawyers handling thousands of individual cases in dozens of courts across Maine each year, each of those lawyers is meant to be overseen by the same named Defendants. *See Gratz v. Bollinger*, 539 U.S. 244, 267–268 (2003) (recognizing that Rule 23(b)(2) class certification saved resources for the parties and the courts); *McCray v. Standard Oil Co.*, 76 F.R.D. 490, 500 (N.D. Ill. 1977) (holding that Rule 23(b)(2) was "designed to encompass classes in which the members cannot be specifically enumerated, and to simplify 'across the board' demands for injunctive relief.")

III. Conclusion

For the reasons stated above, Plaintiffs move this Court to:

1) Certify this case as a class action under Rule 23(a) and (b)(2) of the Maine Rules of Civil Procedure;
2) Define the class as: "All individuals who currently are or in the future will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810 because they have been indicted for a crime punishable by imprisonment in the State Prison and they lack sufficient means to employ counsel;"

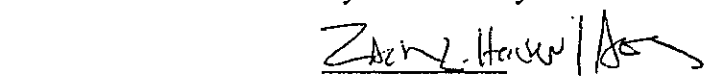
3) Appoint Zachary L. Heiden and Anahita Sotoohi of the American Civil Liberties Union of Maine Foundation; Matt Warner and Anne Sedlack of Preti Flaherty; and Kevin P. Martin, Gerard J. Cedrone, and Jordan Bock of Goodwin Procter as class counsel.

March 1, 2022

Respectfully submitted.

ANDREW ROBBINS, BRANDY GROVER, RAY MACK, MALCOLM PEIRCE, and LANH DANH HUYNH

By their attorneys:



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NOTE: Any matter in opposition to this motion must be filed not later than 21 days after the filing of this motion unless another time is provided by these Rules or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

ANDREW ROBBINS, *et al.*,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, *et al.*,

Defendants.

ORDER

Plaintiffs have filed suit seeking declaratory and injunctive relief under the Maine Administrative Procedures Act, 5 M.R.S. § 8058, the Maine Declaratory Judgments Act, 14 M.R.S. § 5951, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, to require Defendants to adopt and enforce rules, practices, and systems necessary to comply with their legal and constitutional obligations. Plaintiffs have moved this court to enter an order to certify and maintain this case as a class action pursuant to Rules 23(a) and 23(b)(2) of the Maine Rules of Civil Procedure, and to appoint undersigned counsel as class counsel. The Court finds that Plaintiffs meet all of the requirements for class certification in this case, and undersigned counsel are able to provide capable representation to the class. Specifically, the Court finds that the proposed class of "individuals who currently are or in the future will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810" are too numerous for joinder to be practicable; that there are questions of law and fact that are common to the members of the proposed class; that the claims of the proposed class representatives are typical of

those in the proposed class; and that plaintiffs and their counsel will fairly represent the interests of the proposed class. In addition, the Court finds that Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole.

Therefore, the Court ORDERS that this case is certified as a class action under Rule 23(a) and (b)(2) of the Maine Rules of Civil Procedure. The Plaintiff class shall be defined as, "All individuals who currently are or in the future will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810 because they have been indicted for a crime punishable by imprisonment in the State Prison and they lack sufficient means to employ counsel." The Court appoints the following counsel to serve as class counsel: Zachary L. Heiden and Anahita Sotoohi of the American Civil Liberties Union of Maine Foundation; Matt Warner and Anne Sedlack of Preti Flaherty; and Kevin P. Martin, Gerard J. Cedrone, and Jordan Bock of Goodwin Procter as class counsel.

It is so ordered.

Date:

Justice, Maine Superior Court

EXHIBIT A

Pending UCD Cases as of February 11, 2022

UCD	FELONY				MISDEMEANOR				CIVIL VIOLATION			ALL CASES			
	Pending	On DD	No IA	% No IA	Pending	On DD	No IA	% No IA	Pending	No IA	% No IA	Pending	On DD	No IA	% No IA
Androscoggin	**636**	**76**	**34**	**5.3%**	**2,075**	**245**	**375**	**18.1%**	**24**	**9**	**37.5%**	***2,735***	***321***	**418**	**15.3%**
Aroostook	**724**	**90**	**79**	**10.9%**	**1,091**	**217**	**217**	**19.9%**	**15**	**3**	**20.0%**	***1,830***	***307***	**299**	**16.3%**
Caribou	165	19	17	10.3%	231	68	26	11.3%	4	1	25.0%	*400*	*87*	44	11.0%
Fort Kent	87	10	10	11.5%	190	59	30	15.8%	1	0	0.0%	*278*	*69*	40	14.4%
Houlton	232	19	27	11.6%	364	44	83	22.8%	9	2	22.2%	*605*	*63*	112	18.5%
Presque Isle	240	42	25	10.4%	306	46	78	25.5%	1	0	0.0%	*547*	*88*	103	18.8%
Cumberland	**1,312**	**145**	**96**	**7.3%**	**3,795**	**368**	**700**	**18.4%**	**113**	**41**	**36.3%**	***5,220***	***513***	**837**	**16.0%**
Bridgton	19	1	4	21.1%	357	36	96	26.9%	38	24	63.2%	*414*	*37*	124	30.0%
Portland	1,268	138	89	7.0%	3,040	297	508	16.7%	58	14	24.1%	*4,366*	*435*	611	14.0%
West Bath	25	6	3	12.0%	398	35	96	24.1%	17	3	17.6%	*440*	*41*	102	23.2%
Franklin	**96**	**29**	**11**	**11.5%**	**260**	**96**	**52**	**20.0%**	**14**	**9**	**64.3%**	***370***	***125***	**72**	**19.5%**
Hancock	**288**	**33**	**18**	**6.3%**	**561**	**100**	**120**	**21.4%**	**45**	**15**	**33.3%**	***894***	***133***	**153**	**17.1%**
Kennbec	**589**	**70**	**48**	**8.1%**	**1,706**	**260**	**329**	**19.3%**	**42**	**15**	**35.7%**	***2,337***	***330***	**392**	**16.8%**
Augusta	569	67	43	7.6%	1,099	164	175	15.9%	27	12	44.4%	*1,695*	*231*	230	13.6%
Waterville	20	3	5	25.0%	607	96	154	25.4%	15	3	20.0%	*642*	*99*	162	25.2%
Knox	**195**	**40**	**13**	**6.7%**	**453**	**153**	**89**	**19.6%**	**16**	**0**	**0.0%**	***664***	***193***	**102**	**15.4%**
Lincoln	**133**	**45**	**20**	**15.0%**	**296**	**107**	**58**	**19.6%**	**7**	**0**	**0.0%**	***436***	***152***	**78**	**17.9%**
Oxford	**387**	**44**	**59**	**15.2%**	**926**	**147**	**231**	**24.9%**	**25**	**13**	**52.0%**	***1,338***	***191***	**303**	**22.6%**
Bridgton	32	6	2	6.3%	124	29	20	16.1%	3	1	33.3%	*159*	*35*	23	14.5%
Rumford	151	14	23	15.2%	371	50	105	28.3%	10	4	40.0%	*532*	*64*	132	24.8%
South Paris	204	24	34	16.7%	431	68	106	24.6%	12	8	66.7%	*647*	*92*	148	22.9%
Penobscot	**1,002**	**17**	**157**	**15.7%**	**2,168**	**56**	**796**	**36.7%**	**76**	**37**	**48.7%**	***3,246***	***73***	**990**	**30.5%**
Bangor	973	17	149	15.3%	1,692	39	568	33.6%	30	12	40.0%	*2,695*	*56*	729	27.1%
Lincoln	6	0	3	50.0%	245	4	142	58.0%	19	15	78.9%	*270*	*4*	160	59.3%
Newport	23	0	5	21.7%	231	13	86	37.2%	27	10	37.0%	*281*	*13*	101	35.9%
Piscataquis	**45**	**2**	**10**	**22.2%**	**113**	**0**	**52**	**46.0%**	**15**	**12**	**80.0%**	***173***	***2***	**74**	**42.8%**
Sagadahoc	**152**	**30**	**17**	**11.2%**	**449**	**107**	**132**	**29.4%**	**21**	**9**	**42.9%**	***622***	***137***	**158**	**25.4%**
Somerset	**194**	**47**	**10**	**5.2%**	**486**	**95**	**92**	**18.9%**	**13**	**2**	**15.4%**	***693***	***142***	**104**	**15.0%**
Waldo	**196**	**44**	**16**	**8.2%**	**327**	**123**	**61**	**18.7%**	**16**	**3**	**18.8%**	***539***	***167***	**80**	**14.8%**
Washington	**162**	**8**	**10**	**6.2%**	**311**	**28**	**69**	**22.2%**	**25**	**12**	**48.0%**	***498***	***36***	**91**	**18.3%**
Calais	75	5	7	9.3%	116	9	26	22.4%	8	2	25.0%	*199*	*14*	35	17.6%
Machias	87	3	3	3.4%	195	19	43	22.1%	17	10	58.8%	*299*	*22*	56	18.7%
York	**1,158**	**108**	**228**	**19.7%**	**4,235**	**709**	**1,228**	**29.0%**	**147**	**73**	**49.7%**	***5,540***	***817***	**1,529**	**27.6%**
Alfred	1,107	104	214	19.3%	92	17	17	18.5%	0	0	--	*1,199*	*121*	231	19.3%
Biddeford	25	1	10	40.0%	2,373	366	715	30.1%	111	54	48.6%	*2,509*	*367*	779	31.0%
Springvale	14	3	2	14.3%	1,177	203	386	32.8%	27	16	59.3%	*1,218*	*206*	404	33.2%
York	12	0	2	16.7%	593	123	110	18.5%	9	3	33.3%	*614*	*123*	115	18.7%
TOTAL	***7,269***	***828***	***826***	**11.4%**	***19,252***	***2,811***	***4,601***	**23.9%**	***614***	***253***	**41.2%**	***27,135***	***3,639***	***5,680***	**20.9%**

Columns

Pending	Number of cases having at least one charge without a disposition, and without a currently active warrant.
On DD	Number of pending cases with an Order of Deferred Disposition entered.
No IA	Number of pending cases with a complaint filed, but not having an initial appearance or arraignment held or waived.
% No IA	Percent of pending cases without an initial appearance/arraignment.

Cases are categorized based on the most serious offense charged. Local ordinance violations filed with the court are not included in the reported counts.

Change in Pending UCD Cases, February 2021 to February 2022

Pending cases as of February 11 of each year

UCD	FELONY			MISDEMEANOR			CIVIL VIOLATION			ALL CASES		
	2021	2022	% Diff	2021	2022	% Diff	2021	2022	% Diff	2021	2022	% Diff
Androscoggin	**551**	**636**	**15.4%**	**1,881**	**2,075**	**10.3%**	**38**	**24**	**-36.8%**	***2,470***	***2,735***	**10.7%**
Aroostook	**701**	**724**	**3.3%**	**1,189**	**1,091**	**-8.2%**	**55**	**15**	**-72.7%**	***1,945***	***1,830***	**-5.9%**
Caribou	170	165	-2.9%	293	231	-21.2%	17	4	-76.5%	*480*	*400*	-16.7%
Fort Kent	80	87	8.8%	240	190	-20.8%	10	1	-90.0%	*330*	*278*	-15.8%
Houlton	220	232	5.5%	338	364	7.7%	14	9	-35.7%	*572*	*605*	5.8%
Presque Isle	231	240	3.9%	318	306	-3.8%	14	1	-92.9%	*563*	*547*	-2.8%
Cumberland	**1,274**	**1,312**	**3.0%**	**4,036**	**3,795**	**-6.0%**	**129**	**113**	**-12.4%**	***5,439***	***5,220***	**-4.0%**
Bridgton	12	19	58.3%	379	357	-5.8%	30	38	26.7%	*421*	*414*	-1.7%
Portland	1,233	1,268	2.8%	3,251	3,040	-6.5%	81	58	-28.4%	*4,565*	*4,366*	-4.4%
West Bath	29	25	-13.8%	406	398	-2.0%	18	17	-5.6%	*453*	*440*	-2.9%
Franklin	**102**	**96**	**-5.9%**	**305**	**260**	**-14.8%**	**24**	**14**	**-41.7%**	***431***	***370***	**-14.2%**
Hancock	**241**	**288**	**19.5%**	**639**	**561**	**-12.2%**	**56**	**45**	**-19.6%**	***936***	***894***	**-4.5%**
Kennbec	**563**	**589**	**4.6%**	**1,674**	**1,706**	**1.9%**	**45**	**42**	**-6.7%**	***2,282***	***2,337***	**2.4%**
Augusta	542	569	5.0%	1,118	1,099	-1.7%	32	27	-15.6%	*1,692*	*1,695*	0.2%
Waterville	21	20	-4.8%	556	607	9.2%	13	15	15.4%	*590*	*642*	8.8%
Knox	**250**	**195**	**-22.0%**	**464**	**453**	**-2.4%**	**15**	**16**	**6.7%**	***729***	***664***	**-8.9%**
Lincoln	**119**	**133**	**11.8%**	**255**	**296**	**16.1%**	**11**	**7**	**-36.4%**	***385***	***436***	**13.2%**
Oxford	**318**	**387**	**21.7%**	**841**	**926**	**10.1%**	**44**	**25**	**-43.2%**	***1,203***	***1,338***	**11.2%**
Bridgton	28	32	14.3%	102	124	21.6%	2	3	50.0%	*132*	*159*	20.5%
Rumford	115	151	31.3%	347	371	6.9%	26	10	-61.5%	*488*	*532*	9.0%
South Paris	175	204	16.6%	392	431	9.9%	16	12	-25.0%	*583*	*647*	11.0%
Penobscot	**813**	**1,002**	**23.2%**	**2,419**	**2,168**	**-10.4%**	**93**	**76**	**-18.3%**	***3,325***	***3,246***	**-2.4%**
Bangor	788	973	23.5%	1,854	1,692	-8.7%	45	30	-33.3%	*2,687*	*2,695*	0.3%
Lincoln	10	6	-40.0%	279	245	-12.2%	22	19	-13.6%	*311*	*270*	-13.2%
Newport	15	23	53.3%	286	231	-19.2%	26	27	3.8%	*327*	*281*	-14.1%
Piscataquis	**49**	**45**	**-8.2%**	**111**	**113**	**1.8%**	**12**	**15**	**25.0%**	***172***	***173***	**0.6%**
Sagadahoc	**114**	**152**	**33.3%**	**317**	**449**	**41.6%**	**12**	**21**	**75.0%**	***443***	***622***	**40.4%**
Somerset	**196**	**194**	**-1.0%**	**480**	**486**	**1.3%**	**14**	**13**	**-7.1%**	***690***	***693***	**0.4%**
Waldo	**162**	**196**	**21.0%**	**353**	**327**	**-7.4%**	**11**	**16**	**45.5%**	***526***	***539***	**2.5%**
Washington	**129**	**162**	**25.6%**	**334**	**311**	**-6.9%**	**40**	**25**	**-37.5%**	***503***	***498***	**-1.0%**
Calais	61	75	23.0%	152	116	-23.7%	13	8	-38.5%	*226*	*199*	-11.9%
Machias	68	87	27.9%	182	195	7.1%	27	17	-37.0%	*277*	*299*	7.9%
York	**1,070**	**1,158**	**8.2%**	**4,931**	**4,235**	**-14.1%**	**272**	**147**	**-46.0%**	***6,273***	***5,540***	**-11.7%**
Alfred	1,013	1,107	9.3%	97	92	-5.2%	0	0	0.0%	*1,110*	*1,199*	8.0%
Biddeford	26	25	-3.8%	2,725	2,373	-12.9%	183	111	-39.3%	*2,934*	*2,509*	-14.5%
Springvale	20	14	-30.0%	1,416	1,177	-16.9%	64	27	-57.8%	*1,500*	*1,218*	-18.8%
York	11	12	9.1%	693	593	-14.4%	25	9	-64.0%	*729*	*614*	-15.8%
TOTAL	***6,652***	***7,269***	**9.3%**	***20,229***	***19,252***	**-4.8%**	***871***	***614***	**-29.5%**	***27,752***	***27,135***	**-2.2%**

Columns

2021	Number of cases having at least one charge without a disposition, and without a currently active warrant as of February 11, 2021
2022	Number of cases having at least one charge without a disposition, and without a currently active warrant as of February 11, 2022
% Diff	Percent change in pending cases from 2021 to 2022. Red percentages represent an increase, green percentages a decrease.

Cases are categorized based on the most serious offense charged. Local ordinance violations filed with the courts are not included in the reported counts.

Change in Pending UCD Cases, February 2019 to February 2022

Pending cases as of February 11 of each year

UCD	FELONY			MISDEMEANOR			CIVIL VIOLATION			ALL CASES		
	2019	2022	% Diff	2019	2022	% Diff	2019	2022	% Diff	2019	2022	% Diff
Androscoggin	**364**	**636**	**74.7%**	**1,205**	**2,075**	**72.2%**	**16**	**24**	**50.0%**	**1,585**	***2,735***	**72.6%**
Aroostook	**329**	**724**	**120.1%**	**585**	**1,091**	**86.5%**	**36**	**15**	**-58.3%**	***950***	***1,830***	**92.6%**
Caribou	62	165	166.1%	138	231	67.4%	10	4	-60.0%	*210*	*400*	90.5%
Fort Kent	34	87	155.9%	103	190	84.5%	3	1	-66.7%	*140*	*278*	98.6%
Houlton	99	232	134.3%	132	364	175.8%	5	9	80.0%	*236*	*605*	156.4%
Presque Isle	134	240	79.1%	212	306	44.3%	18	1	-94.4%	*364*	*547*	50.3%
Cumberland	**766**	**1,312**	**71.3%**	**2,386**	**3,795**	**59.1%**	**117**	**113**	**-3.4%**	***3,269***	***5,220***	**59.7%**
Bridgton	9	19	111.1%	202	357	76.7%	16	38	137.5%	*227*	*414*	82.4%
Portland	741	1,268	71.1%	1,865	3,040	63.0%	78	58	-25.6%	*2,684*	*4,366*	62.7%
West Bath	16	25	56.3%	319	398	24.8%	23	17	-26.1%	*358*	*440*	22.9%
Franklin	**86**	**96**	**11.6%**	**260**	**260**	**0.0%**	**15**	**14**	**-6.7%**	***361***	***370***	**2.5%**
Hancock	**204**	**288**	**41.2%**	**447**	**561**	**25.5%**	**34**	**45**	**32.4%**	***685***	***894***	**30.5%**
Kennbec	**314**	**589**	**87.6%**	**1,034**	**1,706**	**65.0%**	**46**	**42**	**-8.7%**	***1,394***	***2,337***	**67.6%**
Augusta	302	569	88.4%	550	1,099	99.8%	25	27	8.0%	*877*	*1,695*	93.3%
Waterville	12	20	66.7%	484	607	25.4%	21	15	-28.6%	*517*	*642*	24.2%
Knox	**126**	**195**	**54.8%**	**271**	**453**	**67.2%**	**2**	**16**	**700.0%**	***399***	***664***	**66.4%**
Lincoln	**92**	**133**	**44.6%**	**201**	**296**	**47.3%**	**3**	**7**	**133.3%**	***296***	***436***	**47.3%**
Oxford	**207**	**387**	**87.0%**	**499**	**926**	**85.6%**	**27**	**25**	**-7.4%**	***733***	***1,338***	**82.5%**
Bridgton	27	32	18.5%	84	124	47.6%	7	3	-57.1%	*118*	*159*	34.7%
Rumford	93	151	62.4%	180	371	106.1%	8	10	25.0%	*281*	*532*	89.3%
South Paris	87	204	134.5%	235	431	83.4%	12	12	0.0%	*334*	*647*	93.7%
Penobscot	**350**	**1,002**	**186.3%**	**1,022**	**2,168**	**112.1%**	**109**	**76**	**-30.3%**	***1,481***	***3,246***	**119.2%**
Bangor	338	973	187.9%	807	1,692	109.7%	72	30	-58.3%	*1,217*	*2,695*	121.4%
Lincoln	6	6	0.0%	58	245	322.4%	21	19	-9.5%	*85*	*270*	217.6%
Newport	6	23	283.3%	157	231	47.1%	16	27	68.8%	*179*	*281*	57.0%
Piscataquis	**15**	**45**	**200.0%**	**28**	**113**	**303.6%**	**19**	**15**	**-21.1%**	***62***	***173***	**179.0%**
Sagadahoc	**75**	**152**	**102.7%**	**229**	**449**	**96.1%**	**26**	**21**	**-19.2%**	***330***	***622***	**88.5%**
Somerset	**134**	**194**	**44.8%**	**504**	**486**	**-3.6%**	**58**	**13**	**-77.6%**	***696***	***693***	**-0.4%**
Waldo	**104**	**196**	**88.5%**	**219**	**327**	**49.3%**	**4**	**16**	**300.0%**	***327***	***539***	**64.8%**
Washington	**106**	**162**	**52.8%**	**180**	**311**	**72.8%**	**34**	**25**	**-26.5%**	***320***	***498***	**55.6%**
Calais	31	75	141.9%	79	116	46.8%	8	8	0.0%	*118*	*199*	68.6%
Machias	75	87	16.0%	101	195	93.1%	26	17	-34.6%	*202*	*299*	48.0%
York	**772**	**1,158**	**50.0%**	**2,569**	**4,235**	**64.9%**	**101**	**147**	**45.5%**	***3,442***	***5,540***	**61.0%**
Alfred	721	1,107	53.5%	70	92	31.4%	0	0	0.0%	*791*	*1,199*	51.6%
Biddeford	26	25	-3.8%	1,178	2,373	101.4%	38	111	192.1%	*1,242*	*2,509*	102.0%
Springvale	18	14	-22.2%	847	1,177	39.0%	43	27	-37.2%	*908*	*1,218*	34.1%
York	7	12	71.4%	474	593	25.1%	20	9	-55.0%	*501*	*614*	22.6%
TOTAL	***4,044***	***7,269***	**79.7%**	***11,639***	***19,252***	**65.4%**	***647***	***614***	**-5.1%**	***16,330***	***27,135***	**66.2%**

Columns

2019	Number of cases having at least one charge without a disposition, and without a currently active warrant as of February 11, 2019
2022	Number of cases having at least one charge without a disposition, and without a currently active warrant as of February 11, 2022
% Diff	Percent change in pending cases from 2019 to 2022. Red percentages represent an increase, green percentages a decrease.

Cases are categorized based on the most serious offense charged. Local ordinance violations filed with the courts are not included in the reported counts.

Source: MEJIS Data Warehouse

AOC D.Sorrells
2/14/22

EXHIBIT B

Signed: 1/17/2018 04:07 PM

FILED By: Stephanie Hardy Deputy Clerk
Fourth Judicial District, Ada County
CHRISTOPHER D. RICH, Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, and JEREMY PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF IDAHO; DARRELL G. BOLZ, in his official capacity as Chair of the Idaho State Public Defense Commission; REP. CHRISTY PERRY, in her official capacity as Vice-Chair of the Idaho State Public Defense Commission; ERIC FREDERICKSEN, in his official capacity as a member of the Idaho State Public Defense Commission; PAIGE NOLTA, in her official capacity as a member of the Idaho State Public Defense Commission; SHELLEE DANIELS, in her official capacity as a member of the Idaho State Public Defense Commission; SEN. CHUCK WINDER, in his official capacity as a member of the Idaho State Public Defense Commission; and HON. LINDA COPPLE TROUT, in her official capacity as a member of the Idaho State Public Defense Commission,

Defendants.

Case No. CV-OC-2015-10240

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

THIS MATTER comes before the Court on Plaintiffs' Motion for Class Certification, filed through counsel on June 17, 2015. A hearing was held on December 15, 2017, and the matter was taken under advisement. For the reasons stated herein, the Motion is GRANTED.

FINDINGS OF FACT

Plaintiffs' Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs") filed the instant suit on behalf of themselves and all others similarly situated alleging Idaho's public defense system is inadequate under state and federal constitutional standards. Plaintiffs have been represented by public defenders (or conflict counsel for the public defenders) in at least eight Idaho counties, including Bonner, Boundary, Kootenai, Shoshone, Ada, Gem, Payette, and Canyon Counties.[1] They allege numerous instances of their public defenders' inadequate representation of them in their respective cases.[2] They contend that "they exemplify the experiences of thousands of indigent defendants across the State, who have been denied their right to effective counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law."[3] Plaintiffs now seek to certify a class of plaintiffs defined as follows:

> all indigent persons who are now or who will be under formal charge before a state court in Idaho of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correction facility (regardless of whether actually imposed) and who are unable to provide for the full payment of an attorney and all other necessary expenses of representation in defending against the charge.[4]

[1] First Amended Class Action Compl. for Injunctive & Declaratory Relief & Suppl. Pleading ¶¶ 6—9 (filed Aug. 15, 2017) (hereafter, "Compl.").
[2] *Id.*
[3] *Id.* at ¶ 10.
[4] *Id.* at ¶ 100.

(1) Background

In Idaho, individual counties are tasked with the duty of administering and funding public defender services. I.C. §§ 19-859, 19-862. As a result the State has 44 different systems with different standards, resources, and varying quality of services. About 10 years ago, the State commissioned a report on Idaho's public defender services, and in 2010, the National Legal Aid and Defender Association ("NLADA") issued a report after studying trial level indigent services offered in seven Idaho counties. The report found there were no constitutionally adequate public defender systems in the sample counties and identified common areas of concern, including:

> the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; lack of consistent, effective, and confidential communication with indigent clients; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State.[5]

In 2014, the legislature created the Idaho Public Defense Commission ("PDC"). The PDC is a self-governing agency comprised of seven members, which includes two representatives from the state legislature, one representative appointed by the chief justice of the Idaho Supreme Court, and four representatives appointed by the governor. I.C. § 19-849. The PDC members' powers and duties have been expanded since the inception of this lawsuit, and they are tasked with overseeing the delivery of public defender services in all of Idaho. The PDC is responsible for promulgating statewide rules regarding: training and continuing education requirements for public defenders; data reporting, including caseloads and workloads; core contract requirements; indigent defense grants; and indigent defense workload and performance standards, plus the

[5] Compl. ¶ 2.

oversight, implementation, enforcement, and modification of those standards.[6] The PDC also has the authority to adopt and enforce performance standards,[7] provide counties with supplemental resources for the delivery of indigent defense services,[8] and it is responsible for ensuring that the statutory standards are met.[9]

Plaintiffs contend the progress made has been inadequate:

> Each county, however, is still currently responsible for providing indigent-defense services to all criminal defendants within the county who are charged with misdemeanor or felony offenses and who are unable to afford an attorney. The funding, oversight, and training that the State has provided since this lawsuit was filed has been inadequate to remedy the systemic actual and constructive denial of counsel that has continued at least since the 2010 NLADA report and the filing of this lawsuit in 2015. The additional funding, oversight, and training has similarly failed to prevent the systemic, actual conflict of interest that public defenders labor under, because their efforts to represent one indigent client are necessarily carried out at the expense of others. Even with the additional funding, oversight, and training, the State's public defense system continues to pose a significant risk that indigent defendants will be prejudiced, that their appointed attorneys will be unable to meet their professional responsibilities, and that their attorneys' representation of them will be materially limited by those attorneys' responsibilities to other clients.
>
> The PDC has not fulfilled its rulemaking duties. It has not promulgated rules establishing core contract requirements or uniform data reporting requirements. Although it has promulgated rules establishing some standards for defending attorneys, the standards are incomplete and many of them are permissive, rather than mandatory, leaving them with little or no effect on the reality of public defense across Idaho. Even with State funding through the PDC's Indigent Defense Grant program, Idaho counties are unable to meet even those standards that the PDC has so far established.[10]

Plaintiffs assert that the State has failed to sufficiently address the state and federal constitutional violations identified in the NLADA report. The deficiencies include (among others): public

[6] I.C. § 19-850(1)(a).
[7] I.C. § 19-850(1)(a).
[8] I.C. § 19-862A.
[9] *Id.*
[10] Compl. ¶¶ 47—48.

defenders being absent at initial appearances, inadequate funding for public defender services, excessive caseloads, and inadequate investigation into cases.[11]

(2) Named Plaintiffs

The four individually-named Plaintiffs allege experiences that are typical of the constitutional deficiencies throughout the State of Idaho.

Plaintiff Tracy Tucker was prosecuted in Bonner County in 2015 for attempted strangulation and domestic battery in the presence of a child. Tucker was assigned a public defender, but was not represented by counsel at his initial appearance, at which time his bail was set at $40,000. Tucker could not afford to post bail and remained in jail for the next three months. During those months in jail, Tucker's attorney had infrequent contact with him, and he met with his attorney only three short times prior to pleading guilty. Tucker attempted to reach his attorney by phone over 50 times, and had two short phone calls with him. Tucker contends that 10 days before his trial date, his attorney's demanding schedule had prevented him from conducting any meaningful investigation into Tucker's case. His attorney failed to review and explain relevant discovery materials or discuss trial strategy with him. Tucker ultimately pleaded guilty and was sentenced to probation. Tucker was also prosecuted in other cases in Bonner, Boundary, and Kootenai Counties. Tucker was not represented by counsel at initial appearances and contends that his other public defenders were also unable to maintain consistent contact with him.

[11] *Id.* at ¶¶ 49—57.

Plaintiff Jason Sharp was prosecuted in Shoshone County in 2014 for burglary and grand theft. Sharp was appointed a public defender, but was not represented by counsel at his initial appearance when bail was set at $50,000. During the course of proceedings, Sharp was unable to communicate effectively with his attorney regarding the status of his case. Despite Sharp's requests, his attorney failed to provide him with a copy of the discovery materials in his case for months after his arrest. Sharp was eventually granted probation; however, he was subsequently charged with other felonies in Shoshone County. His public defenders again were not present at his initial appearances. Sharp is currently incarcerated.

Plaintiff Naomi Morley was prosecuted in 2014 in Ada County for driving under the influence and possession of a controlled substance. Morley was represented by a public defender at her initial appearance, however, that attorney subsequently withdrew due to a conflict of interest and she was appointed conflict counsel. Throughout the course of proceedings, Morley insisted on her innocence. Morley undertook significant efforts on her case while it was shuffled between several different attorneys. Morley alleges the appointed lawyers' caseloads were so large, and their resources so few, they were unable to review her extensive comments on the police reports or undertake any meaningful investigation. Morley was unable to communicate effectively or consistently with her attorneys, and she felt pressured by them to plead guilty. Morley turned down numerous plea offers, and eventually, the State dismissed all but one charge, and she pleaded guilty to misdemeanor possession of drug paraphernalia.

Plaintiff Jeremy Payne was prosecuted in Gem County on an alleged probation violation and was unrepresented by an attorney at his initial appearance. Payne contends his public defender was

so busy with his other cases that he was almost never available to take his phone calls and was seldom able to return those calls. His public defender met with him only briefly before his court appearances. Payne has also been represented by public defenders in Payette and Canyon Counties. His experiences with public defense in those counties are similar: public defenders are so overloaded with work that they are not present at first appearances, hard to reach, and only able to meet with their clients briefly before court dates.

(3) Procedural History

On June 17, 2015, Plaintiffs filed the instant putative class action against the State of Idaho, Governor C.L. "Butch" Otter, and seven members of the PDC seeking declaratory and injunctive relief to remedy the Defendants' failure "to provide effective legal representation to indigent criminal defendants across the State of Idaho, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, of Article 1, Section 13, of the Idaho Constitution, and Idaho statutes and regulations."[12]

Thereafter, this Court held that the claims were not justiciable and dismissed the Complaint based on standing, ripeness, and separation of powers.[13] On appeal, the Idaho Supreme Court held that the dismissal as to the Governor was proper, but that the suit could continue against the State and the individual members of the PDC.[14] The Supreme Court specifically held that this suit does not implicate *Strickland v. Washington*, 466 U.S. 668 (1984) or necessitate "case-by-case inquiries." *Tucker v. State*, 162 Idaho 11, 394 P.3d 54, 62–63 (2017). The Supreme Court

[12] Complaint ¶¶ 170-183 (filed June 17, 2015).
[13] *See Mem. Decision and Order Granting Mot. to Dismiss* (filed Jan. 20, 2016).
[14] *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017).

also noted that the violations alleged by Plaintiffs are not unique to the individually-named Plaintiffs in this suit. *Id.* at __, 394 P.3d at 69–70.

After the case was remanded back to this Court, on August 15, 2017, the Plaintiffs filed a First Amended Class Action Complaint for Injunctive and Declaratory Relief and Supplemental Pleading against the State of Idaho and the current seven members of the PDC in their official capacities. On October 16, 2017, Defendants' the State of Idaho, the Honorable Linda Copple Trout, Darrel G. Bolz, Shellee Daniels, Senator Chuck Winder, and Representative Christy Perry filed an Answer. Defendants' Eric Fredericksen and Paige Nolta are represented by separate counsel and have not filed a separate Answer.

The parties subsequently submitted extensive briefing and evidence on the issue regarding class certification. On December 15, 2017, a hearing was held on the Motion for Class Certification, the parties presented oral argument, and the matter was taken under advisement.

LEGAL STANDARD[15]

A trial court's decision on a motion for class certification is reviewed under an abuse of discretion standard. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 171, 108 P.3d 315, 318 (2004); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 237, 646 P.2d 988, 1008 (1982) ("Generally, the scope of review of an order denying or granting a motion to maintain a class

[15] Preliminarily, the Court notes that Idaho case law is sparse regarding class certifications. Accordingly, this Court has found federal cases interpreting Rule 77 to be persuasive as IRCP 77 is substantially similar to FRCP 23. *Terra-W., Inc. v. Idaho Mut. Tr., LLC*, 150 Idaho 393, 398, 247 P.3d 620, 625 (2010) ("This Court has previously recognized that federal case law provides persuasive authority when interpreting rules under the I.R.C.P. that are substantially similar to rules under the F.R.C.P.").

action is narrow. If the district court properly applies the relevant criteria, its order should be reversed only for an abuse of discretion.")[16]

CONCLUSIONS OF LAW

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). "In order to justify a departure from that rule, 'a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Id.* at 348-49.

In order to certify a lawsuit as a class action, the Court must find that all four factors in Idaho Rule of Civil Procedure 77(a) exist and at least one factor in Rule 77(b) exists.[17] *Id.*; *Camp Easton Forever, Inc. v. Inland Nw. Council Boy Scouts of Am.*, 156 Idaho 893, 898, 332 P.3d 805, 810 (2014).

Rule 77(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

[16] The Ninth Circuit Court of Appeals has stated that on appeal, "When reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014) (citations omitted).

[17] The Rule regarding class certifications was recently changed from 23 to 77; however, they do not appear to be materially different with respect to subsections (a) and (b).

> (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 77(b)(2) provides:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.][18]

The Idaho Supreme Court has found that the Rules "command broad use of class actions whenever the interests of absentees can be adequately represented." *Bush v. Upper Valley Telecable Co.*, 96 Idaho 83, 89, 524 P.2d 1055, 1061 (1973). "An intelligent decision on class certification requires 'at least a preliminary exploration of the merits' of the plaintiff's claim. Based on that exploration, the court must make specific findings establishing that the case satisfies the several requirements for certification." *Pope*, 103 Idaho at 237, 646 P.2d at 1008 (citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312-13 (4th Cir. 1978)).

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). "Although we have cautioned that a court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits

[18] Although class certification may be proper upon various other grounds enumerated in Rule 77(b), Plaintiffs have only asserted that certification is proper under Rule 77(b)(2).

inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013) (citations omitted).

Plaintiffs seek class certification in order to effect system-wide changes to the manner in which indigent defense services are provided throughout the State of Idaho. Plaintiffs contend they meet all four requirements of Idaho Rule of Civil Procedure 77(a) and 77(b)(2).

Defendants contend that class certification is improper, because there is no way to establish that the Plaintiffs' experiences are representative of every indigent defendant across the State of Idaho. Defendants collectively[19] argued that Plaintiffs have failed to show commonality, typicality, adequacy, and the requirements set forth in Rule 77(b)(2).

(1) Numerosity

A class action may be certified only if the Court finds that "the class is so numerous that joinder of all members is impracticable." I.R.C.P. 77(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw. v. EEOC,* 446 U.S. 318, 330 (1980). The Court should consider the individual circumstances of the case to determine whether there are particular reasons why joinder would be impracticable. *BHA Investments, Inc.*, 141 Idaho at 172, 108 P.3d at 319 (finding that "seventeen

[19] Defendants' Eric Frederickson and Paige Nolta are represented by separate counsel from the rest of the Defendants. However, Frederickson and Nolta's incorporated the other Defendants' arguments into their own brief and arguments.

known entities located within the City did not constitute a class that was so numerous that joinder of all members is impracticable").

Here, there is no dispute that Plaintiffs meet the numerosity requirement. Plaintiffs seek to certify a class of plaintiffs comprised of every single indigent criminal defendant who has received or who will receive services provided by a public defender in the State of Idaho. Plaintiffs provided evidence showing that public defenders handled over 55,000 felony and misdemeanor cases between October 1, 2015 and September 30, 2016.[20] Accordingly, the Court finds that joinder of all the proposed class members would be impracticable and that Plaintiffs have met the requirements of Rule 77(a)(1).

(2) Commonality

Rule 77(a)(2) requires the Plaintiffs to show "there are questions of law or fact common to the class." Commonality requires that the Plaintiffs demonstrate that the class members "have suffered the same injury" not merely violations of "the same provision of law." *Falcon*, 457 U.S. at 157. Accordingly, Plaintiffs' claims "must depend upon a common contention" such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citation omitted). "[F]or purposes of Rule 23(a)(2) even a single

[20] 3d Aff. Eppink Ex. 13 (filed Sept. 15, 2017).

common question will do." *Id.* at 359 (citations and internal quotation marks omitted). Thus, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (citing *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012).

Here, Plaintiffs argue they meet the commonality requirement, because the central question in this case is "whether Defendants, in foisting trial-level public-defense obligations onto counties unable to meet them, have violated their constitutional obligations" to provide counsel for indigent defendants.[21] Plaintiffs also set forth in their Complaint the following questions of law and fact that they contend are common to the class:

a. Whether the State is required under the United States and Idaho Constitutions, and under Idaho law, to provide indigent defendants with effective legal representation, including at the time of initial appearance;
b. Whether the State is currently providing constitutionally sufficient representation for indigent defendants in their respective jurisdictions;
c. Whether the State has violated the United States and Idaho Constitutions by failing to implement, administer, and oversee adequate public defense systems;
d. Whether, by abdicating its responsibility to adequately fund, supervise, and administer indigent defense services to the counties, the State has failed to ensure that indigent defendants are provided with effective legal representation, all in violation of the United States and Idaho Constitutions;
e. Whether the State's failure to adequately fund and supervise the delivery of indigent defense services interferes with or impedes the provision of effective legal representation to indigent defendants;
f. Whether the State has adequately funded public defense in Idaho, considering the funding limitations of its counties;
g. Whether the State has established statewide standards adequate to meet constitutional minimums;
h. Whether the State's system of supervising public defense in Idaho through elected county commissioners and a commission including elected officials and political appointees allows public defenders adequate independence from undue political and judicial pressures;

[21] Pls.' Brief in Supp. of Mot. for Class Cert. p. 13 (filed June 17, 2015).

i. Whether the State's system, including its funding and standards, sufficiently ensure that public defenders are assigned as soon as feasible after clients' arrest, detention, or request for counsel and are present and able to provide meaningful assistance and representation at clients' initial appearances;
j. Whether the State's system, including its funding and standards, adequately ensure that public defenders have sufficient time and space to have confidential meetings with their clients;
k. Whether any statewide workload and caseload standards are valid and reasonable;
l. Whether any statewide workload and caseload standards are attainable given available county and state funding;
m. Whether existing resources for investigation, testing, and experts are adequate to ensure public defenders are able to promptly, routinely, and thoroughly investigate their clients' cases and challenge the prosecution's evidence;
n. Whether the State's ban on fixed-fee contracts has actually prevented the use of fixed-fee contracts for public defense in Idaho;
o. Whether the State's public defense system poses a significant risk that indigent defendants will be prejudiced, that their appointed attorneys will be unable to meet their professional responsibilities, or that their attorneys' representation of them will be materially limited by those attorneys' responsibilities to other clients.[22]

Plaintiffs rely on other cases that similarly alleged inadequate public defender services where class certification was granted. *See Hurrell-Harring v. State*, 81 A.D.3d 69 (N.Y.S.2d 2011) (in action against New York state and counties, court granted class certification to class of plaintiffs defined as indigent criminal defendants with charges pending in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties); *Wilbur v. City of Mount Vernon*, 298 F.R.D. 665 (W.D. Wash. 2012) (granting class certification to indigent criminal defendants in action alleging that the public defender system adopted by municipalities made it impossible for appointed counsel to engage in confidential attorney-client communications or to fill role of advocate); *Rivera v. Rowland*, 1996 WL 677452 (Conn. Super. Ct. Nov. 8, 1996) (unreported) (granting class certification to plaintiffs in action seeking injunctive relief in connection with claimed deficiencies in the legal representation being provided to various

[22] Compl. ¶ 103.

categories of indigent criminal defendants by the state's public defender system); *Flournoy v. State*, 2010 WL 9037133 (Ga. Super. 2010).

Defendants argue that Plaintiffs have failed to show a common question of law or fact. They contend that under *Dukes*, the dissimilarities of experiences with public defenders among the class are too great to warrant certification. Defendants contend that there is no "monolithic public defense system in Idaho," and as a consequence, the manner in which indigent defense services are provided varies greatly throughout the State. Defendants assert that the other public defender lawsuits that granted class certification are distinguishable, because they were either limited to indigent persons within the counties from which the named plaintiffs were prosecuted or they involved a state-run public defender system, unlike Idaho's county-run system. Defendants also contend that *CREEC v. Hospitality Property Trust* supports their conclusion that commonality is not met in this case.

In 2011, the United States Supreme Court extensively addressed the commonality requirement in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In that case, the plaintiffs filed a putative class action, comprised of about 1.5 million female employees, against Walmart for alleged gender discrimination. The plaintiffs argued that the question of whether Wal-Mart's pay and promotion policies gave rise to unlawful discrimination was a common question. However, the Court rejected that argument, holding that the plaintiffs failed to offer "significant proof" that Wal-Mart in fact had a companywide discriminatory pay and promotion policy.[23]

[23] The Court found that the evidence established that Wal-Mart had a "policy" of giving local supervisors discretion over employment matters, and while such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a "claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common." *Id.* at 355.

In *CREEC*, three physically disabled hotel patrons filed a lawsuit against HPT, a real estate investment trust that owns hotels across the country, alleging that those hotels violated various requirements of the Americans with Disabilities Act. The Ninth Circuit Court of Appeals found that the plaintiffs could not meet the commonality requirement required for class certification:

> CREEC cannot establish a pattern of discrimination orchestrated by HPT, as it must in order to establish a question of fact common to its claims against HPT.
>
> CREEC tried to avoid this conclusion at oral argument by insisting that HPT has a "nondelegable duty" to comply with the ADA specifically. Nondelegable duty is a tort concept associated with vicarious liability theories. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 57 cmt. b (Am. Law Inst. 2012). Contrary to CREEC's contention, however, the concept "does not mean that an actor is not permitted to delegate [an] activity to an independent contractor." *Id.* Rather, it means that an actor "will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity." *Id.* Even if HPT would be vicariously liable for ADA violations by its hired contractors, we fail to see how this fact bears on commonality. It would only create a common issue as to where the financial burden of liability would fall, not one regarding the question of that liability. While the latter issue is "central to the validity" of CREEC's claims, *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541, the former is not.

Civil Rights Educ. & Enf't Ctr. v. Hosp. Properties Tr., 867 F.3d 1093, 1105 (9th Cir. 2017).

The facts in *Dukes* and *CREEC* are distinguishable from the facts in this case. Neither case alleged constitutional violations on a state-wide basis as this case does. *Dukes* involved a grant of discretion among thousands of managers, whereas this case concerns the State and the PDC's responsibility to provide effective assistance of counsel to indigent criminal defendants in Idaho. This case involves about 50,000 indigent criminal defendants, whereas, the *Dukes* case involved millions of employees all over the country. This case will examine the State and the PDC's policies and practices concerning public defender services in the State of Idaho, which is dissimilar from the multitudinous decisions and answers concerning why an employee might have been disfavored in seeking a promotion in *Dukes*. Here, there are single answers to

questions such as whether the State has violated the United States and Idaho Constitutions by failing to implement, administer, and oversee adequate public defense in Idaho.

Instead, *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) is more akin to this case. In *Parsons*, 13 Arizona state inmates and Arizona's authorized protection and advocacy agency, filed a putative class action for declaratory and injunctive relief against senior officials from the Arizona Department of Corrections, asserting Eighth Amendment claims, based on alleged systemic deficiencies in the conditions of confinement in isolation cells, and in the provision of privatized medical, dental, and mental health care services in Arizona. The district court granted class certification. On an interlocutory appeal, the defendants advanced a similar argument to the Defendants' contention in this case that the commonality requirement is not met:

> "Eighth Amendment healthcare and conditions-of-confinement claims are inherently case specific and turn on many individual inquiries. That fact is an insurmountable hurdle for a commonality finding because *Wal–Mart* instructs that dissimilarities between class members 'impede the generation of common answers.' " In other words—also from the defendants—the plaintiffs fail Rule 23(a)(2)'s commonality test because "a systemic constitutional violation [of the sort alleged here] is a collection of individual constitutional violations," each of which hinges on "the particular facts and circumstances of each case."

Id. at 675 (citations omitted). The Ninth Circuit Court of Appeals noted that the defendants mischaracterized the plaintiffs' claims as the case sought systemic reform:

> Here, the defendants describe the plaintiffs' claims as little more than an aggregation of many claims of individual mistreatment. That description, however, rests upon a misunderstanding of the plaintiffs' allegations. The Complaint does not allege that the care provided on any particular occasion to any particular inmate (or group of inmates) was insufficient, *see, e.g., Estelle v. Gamble*, 429 U.S. 97, 104–05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), but rather that ADC policies and practices of statewide and systemic application expose all inmates in ADC custody to a substantial risk of serious harm.
>
> . . .

> Here, a proper understanding of the nature of the plaintiffs' claims clarifies the issue of commonality. What all members of the putative class and subclass have in common is their alleged exposure, as a result of specified statewide ADC policies and practices that govern the overall conditions of health care services and confinement, to a substantial risk of serious future harm to which the defendants are allegedly deliberately indifferent. As the district court recognized, although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide ADC policy or practice that creates a substantial risk of serious harm. *See, e.g., Farmer*, 511 U.S. at 834, 114 S.Ct. 1970; *Helling*, 509 U.S. at 33, 113 S.Ct. 2475; *cf. Plata*, 131 S.Ct. at 1923 ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result.").
>
> The putative class and subclass members thus all set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the specified statewide policies and practices to which they are all subjected by ADC expose them to a substantial risk of harm. *See Dukes*, 131 S.Ct. at 2551. The district court identified 10 statewide ADC policies and practices to which all members of the class are subjected, and seven statewide ADC policies and practices which affect all members of the subclass. These policies and practices are the "glue" that holds together the putative class and the putative subclass; either each of the policies and practices is unlawful as to every inmate or it is not. That inquiry does not require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination.

Id. at 676—78 (9th Cir. 2014) (citation omitted).

Similar to *Parsons*, the law of this case is well established that this case does not necessitate "case-by-case inquiries"[24]:

> The issues raised in this case do not implicate *Strickland.* Appellants alleged systemic, statewide deficiencies plaguing Idaho's public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State's expense, as required under the Sixth Amendment to the U.S. Constitution, and Article I, Section 13 of the Idaho Constitution. They have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform. Their allegations find support in both *Gideon v.*

[24] "[T]he district court erred by attempting to undertake case-by-case inquiries into Appellants' individual criminal cases." *Tucker*, 162 Idaho 11, 394 P.3d at 62 .

> *Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799, 803–04 (1963), and *State v. Montroy*, 37 Idaho 684, 690, 217 P. 611, 614 (1923), which make clear that it is the State's obligation to provide constitutionally adequate public defense at critical stages of the prosecution. Alleging systemic inadequacies in a public defense system results in actual or constructive denials of counsel at critical stages of the prosecution suffices to show an injury in fact to establish standing in a suit for deprivation of constitutional rights. *Cf. Luckey v. Harris*, 860 F.2d 1012, 1016–17 (11th Cir. 1988), cert. denied, 495 U.S. 957, 110 S.Ct. 2562, 109 L.Ed.2d 744 (1990).

Tucker v. State, 162 Idaho 11, 394 P.3d 54, 62–63 (2017).

As set forth in the Supreme Court's decision in *Tucker v. State*, the Plaintiffs have adequately pled "actual and constructive denials of counsel at critical stages of the prosecution." *Id.* at __, 394 P.3d at 63. The Court also found that the injuries alleged were fairly traceable to the State:

> Concerning the State, Appellants satisfy the causation standard. The right to counsel is "made obligatory upon the States by the Fourteenth Amendment." *Gideon*, 372 U.S. at 342, 83 S.Ct. at 795, 9 L.Ed.2d at 803–04 (emphasis added); *see also Montroy*, 37 Idaho at 690, 217 P. at 614. The State, therefore, has ultimate responsibility to ensure that the public defense system passes constitutional muster. While the provision of public defense has been delegated to Idaho's forty-four counties under Idaho Code section 19-859, "the ultimate responsibility for fulfilling the . . . constitutional duty cannot be delegated." *See Osmunson v. State*, 135 Idaho 292, 296, 17 P.3d 236, 240 (2000) (explaining that the Legislature could delegate provision of public education to school districts, although it could not delegate the ultimate responsibility of fulfilling constitutional duties). Moreover, it cannot be said that the counties are third parties acting independently of the State with respect to public defense. Instead, the counties are political subdivisions of the State. *See, e.g.*, Idaho Const. art. XVIII, § 1; State v. Peterson, 61 Idaho 50, 54, 97 P.2d 603, 605 (1939). Because Appellants' alleged injuries are fairly traceable to the State, we hold that causation as to the State is met.

Id. at __, 394 P.3d at 64. Moreover, the Supreme Court has already found that both the State and the PDC can redress the harms alleged by the Plaintiffs in the Complaint:

> Were the requested relief ordered, the State would be obligated to create a plan to ensure public defense is constitutionally adequate. That plan would cover training standards and workload limits, which, as discussed, stand at the root of many of the injuries alleged. Entities tasked with providing and overseeing public defense

> would be bound by the State's plan. Because Appellants' requested relief, if ordered against the State, would create a substantial likelihood of redressing Appellants' injuries, redressability as to the State is satisfied.
>
> . . .
>
> Ordering Appellants' requested relief against the PDC would create a substantial likelihood of remedying the injuries alleged. That is especially true in light of the 2016 amendments, as the PDC can promulgate rules to ensure public defense is constitutionally adequate and, moreover, can intervene at the county level. Yet, even analyzing redressability under the PDC's former powers shows that redressability is established. The 2016 amendments do not alter the PDC's duty to promulgate rules governing (1) training requirements for public defenders; and (2) caseload and workload reporting requirements. I.C. § 19-850(1)(a)(i)-(ii). Appellants allege their injuries are caused, in part, by the PDC's failure to promulgate these rules. Were the PDC to exercise these powers, it would create a substantial likelihood of remedying the injuries alleged. As such, redressability is satisfied as to the PDC.

Id. at __, 394 P.3d at 68–69.

Here, the putative class of plaintiffs set forth numerous contentions whose truth or falsity can be determined in one stroke, including (among others), whether the State is currently providing constitutionally sufficient representation for indigent defendants in their respective jurisdictions; whether the State has violated the United States and Idaho Constitutions by failing to implement, administer, and oversee adequate public defense systems; whether, by abdicating its responsibility to adequately fund, supervise, and administer indigent defense services to the counties, the State has failed to ensure that indigent defendants are provided with effective legal representation, all in violation of the United States and Idaho Constitutions. Accordingly, the Court finds that the Plaintiffs have established commonality.

(3) Typicality

Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852–53 (6th Cir. 2013) (citation omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons* at 685 (citation omitted). The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. Thus, typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Id.*

Commonality and typicality "tend to merge" in practice because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n. 5. In addition, commonality and typicality "also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Id.*

Here, the named Plaintiffs were all indigent criminal defendants who were prosecuted in different counties within the State of Idaho. As the Supreme Court already stated in this case:

> Appellants are not the only ones who could bring this lawsuit. In fact, the complaint alleges "the circumstances surrounding the named Plaintiffs'

> representations are not unique to them. Rather, they exemplify the experiences of thousands of indigent defendants across the State...." Because any one of those "thousands of indigent defendants" could bring this lawsuit, Appellants do not satisfy the relaxed standing analysis.

Tucker at __, 394 P.3d at 69–70. In *Parsons*, the Ninth Circuit Court of Appeals found that the inmates met the typicality requirement:

> The named plaintiffs thus allege "the same or [a] similar injury" as the rest of the putative class; they allege that this injury is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims. *See id.* Further, given that every inmate in ADC custody is highly likely to require medical, mental health, and dental care, each of the named plaintiffs is similarly positioned to all other ADC inmates with respect to a substantial risk of serious harm resulting from exposure to the defendants' policies and practices governing health care. *Cf. Hanlon*, 150 F.3d at 1020 (holding that "the broad composition of the representative parties" can "vitiate[ ] any challenge founded on atypicality"). It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only that their claims be "typical" of the class, not that they be identically positioned to each other or to every class member. *See Ellis*, 657 F.3d at 985 n. 9 ("Differing factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality."). Accordingly, we conclude that the district court did not abuse its discretion in determining that the plaintiffs have satisfied the typicality requirement of Rule 23(a).

Parsons at 685–86. Similar to this case, Plaintiffs alleged:

> Sadly, the circumstances surrounding the named Plaintiffs' representations are not unique to them. Rather, they exemplify the experiences of thousands of indigent defendants across the State, who have been denied their right to effective counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law.
>
> . . .
>
> The NLADA found that, for thousands of defendants across Idaho, the constitutional requirements of Gideon and its progeny have been left unfulfilled, and the standards set forth in the ABA's Ten Principles have gone largely unmet.[25]

[25] Compl. ¶¶ 10, 36.

Plaintiffs have made a sufficient showing that their individual experiences with their public defenders are typical of experiences faced by other indigent criminal defendants across the State of Idaho, including lack of representation at initial appearances, lack of time or space for meaningful communications with their public defender(s), and having public defenders with overwhelming caseloads. After review of the substantial evidence before the Court, the Court finds that Plaintiffs claims are typical of other class members, and thus, they meet the typicality requirement.

(4) Adequacy

Rule 77(a)(4) requires Plaintiffs show that the representative parties will fairly and adequately protect the interests of the class. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998).

Plaintiffs provided Affidavits from class counsel certifying that they do not have conflicts of interest with other class members and also certifying their experience in litigating class action lawsuits. Defendants do not contest Plaintiffs' counsels' adequacy, but rather the adequacy of the individually-named Plaintiffs, specifically with respect to their credibility. They contend the Plaintiffs are dishonest in that they all made misrepresentations to the Court that they were satisfied with their public defender and they were all convicted of crimes involving dishonesty.

Defendants' arguments do not address the two questions set forth above, i.e. whether the named Plaintiffs and their attorneys have any conflict of interest with other class members and whether they will vigorously prosecute the action on behalf of the class. The Court does not find Defendants' arguments regarding the individually-named Plaintiffs' credibility to be persuasive. As set forth previously, this case does not concern case-by-case inquiries. The main inquiry of this case is regarding state-wide policies (or lack thereof) in providing public defender services. Defendants' arguments do not indicate that the named Plaintiffs have any conflict of interest with class members, nor do they indicate that the named Plaintiffs will not vigorously litigate the case. Accordingly, the Court finds that Plaintiffs have sufficiently met the adequacy requirement.

(5) Rule 77(b)(2)

Rule 77(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

> The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Dukes, 564 U.S. at 360–62.

As the Supreme Court summarized, the Complaint's prayer for relief in this case "can be simplified into a request for two main remedies: (1) a declaratory judgment that Idaho's public defense system is unconstitutional; and (2) an injunction requiring [Defendants] to fix it." *Tucker* at __, 394 P.3d at 71. The Supreme Court has already recognized that injunctive and declaratory relief would be appropriate with respect to the Plaintiffs' allegations: "Were the requested relief ordered, the State would be obligated to create a plan to ensure public defense is constitutionally adequate. . . . Ordering Appellants' requested relief against the PDC would create a substantial likelihood of remedying the injuries alleged." *Id.* at __, 394 P.3d at 68–69.

Defendants assert that a "one size fits all" remedy will not work, because there are over 40 different public defender systems throughout the State of Idaho. This argument has already been addressed by the Supreme Court and has been rejected, at least at the initial pleading stage.

Although the Court is directed to make a "rigorous" analysis on a class certification motion, the Court does not have "license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013) (citations omitted). After conducting a rigorous analysis of the claims, evidence, and argument, the Court finds that Plaintiffs have met their burden for class certification under Rule 77(b)(2).

CONCLUSION

For the reasons contained herein, Plaintiffs' Motion for Class Certification is GRANTED. The Court HEREBY ORDERS and CERTIFIES a class of Plaintiffs defined as follows:

> all indigent persons who are now or who will be under formal charge before a state court in Idaho of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correction facility (regardless of whether actually imposed) and who are unable to provide for the full payment of an attorney and all other necessary expenses of representation in defending against the charge.

IT IS SO ORDERED dated Signed: 1/17/2018 03:34 PM.

SAMUEL A. HOAGLAND
District Judge

CERTIFICATE OF MAILING

I hereby certify that on Signed: 1/17/2018 04:19 PM, I served a true and correct copy of the within instrument to:

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