(Emailed to Mr. Billings Thursday 7/11)

Good morning, Executive Director Billings,

The Committee Chairs have asked me to share with you some questions they would like you to have the benefit of, in preparing for the Committee's discussion with you on July 17. I may also be sending along perhaps just a few in brief follow up to the prior OPEGA report and concerning financial stewardship, but that remains pending at this moment. I do not want to delay any longer in getting you the first set:

1. What does your most current data indicate about how many parties eligible for public defense services lack an attorney appointed to represent them?

a. In criminal cases?
b. In child protective custody cases?
c. In juvenile cases?
d. In any other eligible case types?
e. For the criminal cases, what is your most current data on how many eligible parties are in jail pending trial and lack access to an attorney?
f. What are the trends? Are the deficits growing and at what pace[s]?
g. Are you tracking the incidence of Maine judges finding Constitutional violations, and if not why not?

2. What steps have you taken to inquire of attorneys in Maine why they may no longer wish to accept public defense services appointments from the Commission?

3. What if anything, have these attorneys told you (as to their reasons)?

4. What steps have you taken to ask such attorneys, in essence, “what would it take for [them] to resume taking such appointments”?

5. What changes, if any, have you made in response to any such feedback?

6. What is your current estimate of the percentages of cases that will be addressed by the public defender offices currently authorized, and what is the timeline for that?

7. Do you agree or disagree that even if fully staffed, the currently authorized public defender offices will not be able to address the full requirements any time soon, and that the state still needs to entice more private practitioners back onto the Commission’s rosters? At least in the short and perhaps medium term?

8. You are no doubt familiar with the recent decision of the U.S. Court of Appeals for the Ninth Circuit concerning public defense services in Oregon. What steps are you taking to avoid or mitigate similar consequences in Maine (either the compromise of Constitutional rights, or public safety, or both). In the Oregon case, the appellate court opinion described the crisis as entirely of the state’s own making.

9. If press reports are accurate, the Chief Executive was recently quoted in the press as indicating her apparent belief that Maine judges have inherent authority to appoint attorneys seemingly outside the confines of the Commission. Do you agree, and can you describe the legal basis for that?

10. To the extent you believe that factors beyond the control of the Commission are impairing your ability to meet the Commission's mission concerning available representation, what if any additional steps can the Legislature take?

11. The same question as in 10, but as to what the Judicial Branch might do differently or additionally?

12. Same as 10 and 11, but as to the Chief Executive?

Thank you, kindly, for the opportunity to be of assistance.

Peter Schleck | Director
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From: Schleck, Peter
Sent: Thursday, July 11, 2024 2:03 PM
To: Billings, Jim
Subject: Additional Questions for MCPDS Regarding Financial Stewardship and Prior OPEGA Findings - For Consideration in Preparation for July 17, 2024 GOC Meeting

Executive Director Billings,

Here are some additional questions I am sharing on behalf of the Committee Chairs to "check in" on ongoing progress and any challenges with financial stewardship, and are keyed to selected issues in the prior OPEGA report. For ease of reference, the prior OPEGA report may be found here: 2020 OPEGA Report on MCILS.

[This is all I have for you, and we look forward to seeing you next week.]

In its review of the Commission in 2020, OPEGA identified five issues related to the Commission's processes for payments and expenditures and four issues related to the Commission's structure and oversight. Through the Commission's subsequent quarterly reports to the GOC and a series of legislative actions, the GOC reached a point in 2022 in which the committee concluded that the identified issues were either addressed or being addressed and those quarterly updates to the GOC were no longer necessary.

In the meantime, there has been the deepening crisis concerning available representation for eligible indigent parties.

The following questions relating to financial stewardship are for your consideration in preparing for the meeting with the Committee on July 17 in this current context:

Issue 1 in the OPEGA report was related to a lack of established policies governing expenditures and payments. Former Director Justin Andrus subsequently provided the GOC with the Commission's new policies as they were established.

Do the current challenges with finding legal representation for all eligible indigent parties impact the Commission's ability to implement and follow these policies?
Are established policies currently being followed?
Is further clarification needed on any allowable reimbursements and how if at all is this being addressed?
Are there any other challenges related to adhering to the established policies?

Issue 2 was related to the quality of expenditure data available to Commission staff.

Does the data in the Defender Data system now accurately reflect the time attorneys are spending on specific cases?
Are other attorney costs captured as discrete figures in Defender Data?
Is expenditure data coded and entered into the State's accounting system in such a way that would allow for analysis by expenditure type?

Issues 6 through 9 dealt with the Commission's staffing, resourcing, and oversight structure as it related to the Commission's ability to meet its statutory purpose – providing "efficient, high-quality representation" for indigent defendants.

What are the primary factors contributing to the lack of available legal representation?
Have the Commission's staffing, resourcing or oversight structure contributed to this?
What are the continuing implications of being unable to provide eligible indigent parties with legal representation?

Thank you, kindly.

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Lewiston Sun Journal, June 21, 2024, A3

“Mills wrote that although Maine law states the Maine Commission on Public Defense Services is responsible for providing lawyers for indigent defendants, ‘there is nothing to prohibit the (judge) from appointing counsel for defendants themselves when the commission appears unable to provide a lawyer. I strongly believe that the courts have the inherent right, and, in fact, the responsibility — backed by decades of precedent — to appoint counsel in such circumstances. I am interested in considering how we can make this right more well-understood, including potentially clarifying state law to make it more explicit.’”

[Please see accompanying two pages for reproduction of print edition.]

GIRLS BASKETBALL: NEW EL COACH MEETS TEAM Page C1

Since 1847
Sun Journal

FRIDAY, JUNE 21, 2024
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‘It’s like sitting in an oven’

Russ Dillingham/Sun Journal photos

Mark Cyr, left, of CPM Constructors works with his crew to “button up” the entrance to their workspace Thursday afternoon under the Longley Memorial Bridge just above the Riverwalk on the Auburn side of the Androscoggin River. “We are lucky as a lot of our coworkers are working on highways in this heat and we are mostly under cover,” Cyr said.

Lewiston, Auburn labors on despite heat wave

By LENA LAPIERRE
Sun Journal

As the Lewiston-Auburn area entered its third consecutive day under an excessive heat warning, some residents stayed indoors, close to their newly installed air conditioning units and safe from the sun’s scorching heat.

For the Twin Cities’ blue-collar labor force, however, “the work’s got to get done” regardless of the sweltering temperatures outside, explained Dakota Tuttle, a construction worker at Lucas Tree Experts.

Tuttle’s crew was trimming back trees on Lewiston’s Central Avenue.

“It’s like sitting in an oven,” explained Ryan Fitzpatrick, who was replacing pedestrian crossing signals.

Others described their experience toiling under the sun in more vulgar terms.

“It’s a pain in the ass,” Tuttle complained.

Extreme heat is more than simply an annoyance, it can also be risky.

Ryan Fitzpatrick looks at his co-worker Tim O’Gara on a ladder Thursday afternoon as they work on replacing crossing signals at Lisbon Street and East Avenue in Lewiston.

Mark Cyr of CPM Constructors said he and his crew have suffered from lethargy, headaches and heat exhaustion throughout the heat wave.

To guard against such threats, construction crews across the state have taken measures to keep their workers safe in extreme weather.

“The biggest thing is don’t overwork the crew. Take it nice and easy,” Cyr said. “If the job doesn’t get done today, it’ll get done tomorrow.”

Another important step in preventing heat-related illnesses among construction workers is maintaining adequate hydration. “They cannot drink enough water,” Joe Dumais, a supervisor at Lucas Tree Experts, said.

“We make sure everyone has plenty of water,” Dumais said. “As a supervisor, I keep an eye on them and I’ve always got a lot of ice water on the truck … they keep an eye on each other (as well).”

Some workers have gotten used to the extreme seasonal heat that comes with the job.

Please see **HEAT,** Page A3

Mills faults judge in Auburn rampage

Governor says the judge had authority to appoint an attorney to represent an indigent defendant

By CHRISTOPHER WILLIAMS
Sun Journal

AUBURN — Gov. Janet Mills criticized Thursday the actions of a Lewiston judge who reduced the bail of a defendant who later attacked a woman and her boyfriend and set a fire that destroyed two homes.

Mills said she reviewed the facts of the case of Leein Amos Hinkley, 43, who had been awaiting a court-appointed attorney to represent him on domestic violence assault charges and a probation violation.

When, after several court appearances, there was no attorney available to take Hinkley’s case, Judge Sarah Churchill lowered his bail from $5,000 to $1,500 cash and ordered him on house arrest.

“Based on the facts of the case and my experience as a former defense attorney, district attorney, and attorney general, I strongly disagree with the Judge’s decision,” Mills said in a written statement released Thursday to the Sun Journal.

“I recognize and appreciate that judges make difficult decisions every day, balancing constitutional rights, including the right to counsel, with many other considerations — chief among them being the safety of the public.

“In my view, given the severity of the charges, the defendant’s criminal history and the serious danger he posed, these important, competing interests were not properly balanced in this case,” Mills wrote.

Mills nominated Churchill to serve as a judge on Maine District Court in 2021.

Please see **JUDGE,** Page A3

L-A BALLOON FESTIVAL

Organizers ‘confident’ about goals after securing top sponsor

By ANDREW RICE
Sun Journal

LEWISTON — Officials in the Twin Cities announced they have secured a top sponsor for this year’s Lewiston-Auburn Balloon Festival and are making progress toward raising $180,000 in private donations.

Nina Mahaleris/Sun Journal file

Balloons float off into the distance during a launch from Simard-Payne Memorial Park in Lewiston during the 2023 Great Falls Balloon Festival.

A news release Thursday announced Emerson Toyota, the Auburn car dealership, as the “front fate top sponsor,” which provides a $20,000 donation to the festival. Officials are also optimistic they will meet their $180,000 goal, having raised $49,000 so far.

Last week, the cities announced former Lewiston Mayor Mark Cayer and former Auburn Mayor Jason Levesque as co-chairs of the festival’s sponsorship committee, and have now quickly announced its major sponsor.

In the news release, Nick Elwell, general manager of Emerson Toyota, said when they heard the festival was at risk of being cancelled, “we knew we had to step in.”

“Supporting this event means more than keeping balloons in the air; it’s about lifting the spirits of our community and creating lasting memories for everyone,” he said. “We’re proud to help ensure this cherished festival will continue for its 30th year.”

Please see **FESTIVAL,** Page A3

Hundreds turn out at cemetery on sweltering-hot day for funeral of ‘unclaimed’ Augusta veteran

No one came forward to claim Gerry R. Brooks after he died last month, and a funeral home director said it’s becoming a more common situation

By EMILY DUGGAN
Kennebec Journal

AUGUSTA — Hundreds of people gathered Thursday afternoon at the Maine Veterans’ Memorial Cemetery to send off Gerry R. Brooks one last time.

Brooks, 86, of Augusta, was a veteran of the U.S. Marine Corps, according to his obituary. He died on May 18, 2024, about three weeks after he was diagnosed with brain and several other types of cancer.

No one in his family stepped forward to claim his body. But after a Facebook post circulated with news of the funeral and the situation, hundreds of people showed up Thursday on a sweltering hot afternoon with temperatures in the 90s for Brooks’ funeral, including one person who fainted because of the heat.

Katie Riposta, director of Riposta Funeral Home where Brooks’ body was kept, said she received inquires from 100 or so people who called to say they would assist with the funeral for the “unclaimed” veteran.

“There has been an outpouring of support from veterans,” Riposta said.

Thursday’s funeral was Riposta Funeral Home’s second this year for an unclaimed veteran.

The funeral home assisted with another funeral in February and said that over the past five years, it’s becoming a more common situation.

Joe Phelan/Kennebec Journal

Two United States Marines salute before removing and folding the U.S. flag draping Gerry R. Brooks’ casket Thursday at Maine Veterans Memorial Cemetery in Augusta.

Please see **VETERAN,** Page A3

ACCUSATIONS AGAINST EX-PRINCIPAL DROPPED

A former school principal, accused of stalking and sexually assaulting a woman in December, has been cleared of the accusations, and the woman who made the claims has been charged in two counties with making false statements. **PAGE B1**

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LOTTERY NUMBERS
THURSDAY, JUNE 20, 2024

Maine, N.H. Daily

DAY DRAWING
PICK 3: 4-5-6
PICK 4: 6-6-6-5

EVENING DRAWING
PICK 3: 1-9-6
PICK 4: 8-9-3-6

POWERBALL
(Wednesday drawing)
4-27-44-50-64
Powerball 7
Power Play x 3

MEGABUCKS PLUS
(Wednesday drawing)
2-4-9-10-12
Megaball 4

MEGA MILLIONS
(Tuesday drawing)
21-22-50-55-67
Mega Ball 20
Megaplier x 2

LOTTO AMERICA
(Wednesday drawing)
19-21-24-44-51
Star Ball 8
All Star Bonus x 2

LUCKY FOR LIFE
(Wednesday drawing)
10-16-18-19-31
Lucky Ball 10

GIMME 5
(Thursday drawing)
18-20-24-31-38

Numbers drawn after press deadline are not included.

Russ Dillingham/Sun Journal

Dakota Tuttle looks at trees Thursday afternoon that he and his crew from Lucas Tree Experts cut along Central Avenue in Lewiston.

HEAT

Continued from **Page A1**

"I'm out here all the time … I've gotten used to it slowly, but surely," Tuttle said.

For others, the heat is a shock.

"I'm from Presque Isle, so working in southern Maine is a change for me," Cyr explained. "We don't get a lot of heat like this up there."

According to Sarah Jamison, senior service hydrologist at the National Weather Service's Gray/Portland office, this week's heat wave was exceptional.

"Mild heat waves typically occur every summer or every other summer in Maine. What sets this one apart is the extreme nature of the heat index. We're looking at heat indexes over 100 degrees … We also didn't really have any nighttime relief with this heat wave," she said.

Fortunately for Lewiston-Auburn's blue-collar workers, the heat wave will come to an end Friday.

"We have a cold front that will be coming through later Thursday afternoon," Jamison said. "We're going to have some strong to severe thunderstorms with it. Behind that front, we're looking at some cooler conditions moving in.

"So for Friday, we're looking at a high in the mid- to upper-70s. In fact, we're looking at scattered showers and thunderstorms going into the weekend and probably next week with temperatures generally mild and in the 70s for the next five days," she predicted.

Throughout the Twin Cities, construction workers expressed relief at the news.

According to Cyr, however, they're ready to face the next round of extreme weather that comes their way.

"You deal with it," he said. "You go on. You go home early and you live to fight another day."

JUDGE

Continued from **Page A1**

"My heart breaks for the victims of this heinous crime, including the woman, the family and friends of the individual whose body was recovered in the house, the neighbors who lost their home, and the community members who were scared for their safety and wellbeing," Mills wrote.

The woman, who was Hinkley's ex-girlfriend, had escaped to safety early Saturday morning after Hinkley had gone to her Russell Street home.

But, in the aftermath of the events that of morning, human remains were recovered in the rubble of her home.

Her boyfriend's whereabouts had been unknown since he had apparently struggled that morning with Hinkley, who had encountered the woman's boyfriend at her home.

Hinkley was later involved in a shootout with police, during which he either was fatally shot by Maine State Police tactical unit or took his own life, according to conflicting reports.

The Office of the Chief Medical Examiner has been working to identify the remains found at the home and determine a cause of death.

Mills wrote Thursday that she had also reviewed a case from last week in which Churchill had dismissed two domestic violence charges against a different defendant who had spent more than 100 days in jail without a court-appointed attorney.

Mills wrote that Churchill had concluded she lacked the authority to appoint an attorney for that defendant, "an assertion that I also disagree with."

Mills wrote that although Maine law states the Maine Commission on Public Defense Services is responsible for providing lawyers for indigent defendants, "there is nothing to prohibit the (judge) from appointing counsel for defendants themselves when the commission appears unable to provide a lawyer. I strongly believe that the courts have the inherent right, and, in fact, the responsibility — backed by decades of precedent — to appoint counsel in such circumstances. I am interested in considering how we can make this right more well-understood, including potentially clarifying state law to make it more explicit."

Hinkley had been represented during his several court appearances by temporary legal counsel.

Mills wrote that Churchill could have appointed one of those attorneys to represent Hinkley as his permanent lawyer for the case.

Mills also wrote that she understood "there are simply not enough rostered attorneys with the Maine Commission on Public Defense Services — a larger systemic issue that also contributed to this tragic situation."

She wrote that she is planning, in the coming weeks, to speak with the chairman of that commission, in addition to other stakeholders, "to consider what more can be done to improve the delivery of legal services and to ensure that such a terrible and avoidable incident does not happen again."

Mills wrote: "The right to counsel is one that I deeply value and have personally delivered, having represented indigent defendants hundreds of times during my own legal career. All of us — the Governor, the Legislature, the Judiciary, the Maine Commission on Public Defense Services, and — let us not forget — private law firms with attorneys who can take on public defense work — must work together to address this issue."

Earlier this week, Maine's judiciary defended Churchill's decision to lower Hinkley's bail, pointing blame at the commission, which is tasked supplying indigent defendants with qualified attorneys.

The lack of attorneys available for appointment amounts to a constitutional crisis, Maine Supreme Judicial Court Chief Justice Valerie Stanfill said this week.

"While prosecutors argue for defendants to continue to be incarcerated before trial and defense attorneys argue for charges to be dismissed, the burden falls on our dedicated judges to make the hard decisions in each case," Stanfill said. "Our system of justice depends on all the parts of the system being adequately resourced so that the parts can work together toward a just end for everyone. If one or more of the parts is inadequately funded, or missing altogether, the system will break down," she said.

Maine has been the only state in the country with no formal public defender office. Instead, the state has relied on private criminal defense lawyers who signed up with the courts to be appointed to represent indigent clients.

But, that's changing.

First, Mills boosted hourly reimbursement rates twice, eventually more than doubling the initial rate.

In recent years, Mills has worked with the Legislature to create and fund Maine's first public defender positions, which have expanded each year in northern Maine.

At the same time, she has beefed up funding for judicial positions, including trial judges and clerks, in an effort to address criminal case backlogs in the courts, according to Mills' office.

FESTIVAL

Continued from **Page A1**

Levesque said Emerson Toyota's sponsorship "displays their significant contribution to our region's economic and cultural future."

The cities have teamed up to organize what has been dubbed the Lewiston-Auburn Balloon Festival after the Great Falls Balloon Festival board initially canceled this year's event due to a lack of sponsorships, vendors and volunteers.

City officials on both sides of the Androscoggin River have pushed for a 2024 edition due to the significant tourism and economic impact. The three-day event is estimated to draw over 100,000 attendees annually with an estimated $2 million economic impact. The festival will take place Aug. 16-18 at Simard-Payne Memorial Park on Beech Street in Lewiston.

Organizers updated the City Council earlier this week, reiterating the excitement they've seen so far.

Nate Libby, assistant director of economic and community development, told the council the total budget for the festival is $225,000, which, if the fundraising goal is met, would allow the cities to "turn a very modest profit" to be put back into future festivals.

Libby said securing the major sponsor "gave us confidence to keep pushing."

The cities have also submitted a grant application to the Maine Office of Tourism that could provide between $30,000 and $60,000 for marketing costs.

Some councilors questioned where funding would come from if the cities aren't able to meet the fundraising goal.

"There's some wiggle room in some items based on what we raise," Libby said regarding the budget. "Our approach is to over-fundraise for this event — turn over every stone."

Libby said since it's the 30th year, organizers want it to feel familiar but also incorporate new activities and attractions.

Cathy McDonald, who organizes the annual Liberty Festival and has previously worked on the balloon fest, said they have secured all previous nonprofit organizations to return for the 2024 event.

She said she's seen "new energy and excitement" heading into this year.

Asked about next year's festival and whether there may be conflict between the cities and the Great Falls Balloon Festival, Libby said, "Having many people looking to run the event is a great problem to have."

He also said the cities would be "happy to hand the reigns over."

Following the Emerson Toyota announcement, Mayor Carl Sheline said Lewiston-Auburn "has always enjoyed a business community that focuses on our community and this situation is no different."

"I'm proud that local businesses have stepped up to support the balloon festival and all of the smiles and goodwill generated by this signature event," he said.

Andrew Rice — 207-689-2890
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VETERAN

Continued from **Page A1**

"No one claimed him or wanted to and where it's been over a month, it's not respectful to him to keep him here and it's why we decided to move forward with it," Riposta said.

In Maine, as of the 2020 census, there were more than 109,567 veterans from ages 18 to over 85 and 51% of the veterans were over 65. In Brooks' age category of over 85, there were 10,162 veterans in Maine, with the largest age category in the state being in the 70-75 range, with 17,000 veterans.

The VA estimated in 2023 that nationally there were around 20,298 unclaimed veterans waiting to be buried.

According to the U.S. Department of Veteran's Affairs, a veteran is entitled to a proper burial defined by federal law and the VA in some cases will pay for a portion of fees associated with the burial.

Ryan Lorrain, the director of communications for the Maine Bureau of Veteran Services, said his staff has not seen an increase in the number of abandoned veterans, but said it does happen.

"In these instances, our cemetery superintendent and other staff attend the service and accept the veteran's burial flag from the honor guard," said Lorrain.

Little is known about Brooks, but several people who knew him from the Bread of Life soup kitchen in Augusta showed up to honor his memory.

Neil Buck volunteered at the soup kitchen and would sit down with Brooks during his meals to chat, when Brooks would share stories about his life.

Buck said from what he remembers, Brooks grew up locally in central Maine, on a farm, and was widowed.

Photo courtesy of Neil Buck

Gerry R. Brooks

"I would just sit down and listen to his stories," he said.

Victoria Abbott, the executive director of the Bread of Life soup kitchen, knew Brooks well through the soup kitchen and helped call the ambulance for him three weeks before he died.

"He was walking toward the soup kitchen and he didn't look well, and he hadn't looked well," she said at the funeral. "We called the ambulance and found out he had brain cancer and other cancers through his body. Everyone from the soup kitchen signed a card for him."

Abbott visited him at the Glenridge rehabilitation center in Augusta, where Brooks spent his final few weeks, but did not know much about him as a person other than his sense of humor. She knew him for about three years, the same length of time she has worked at Bread of Life, but did not know anything about his family.

"We were happy to have him be a part of the community and he was a treat to see every day," she said. "He had a fun sense of humor."

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Joe Phelan/Kennebec Journal

After the service for Gerry R. Brooks, veterans lined and paid their respects Thursday at Maine Veterans Memorial Cemetery in Augusta.

FOR PUBLICATION

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FOR THE NINTH CIRCUIT

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DAVIS; RICHARD AARON CARROLL Sr.; JENNIFER LYN BRUNETTE; NICHOLAS WALDBILLIG; DEREK PIMENO ZAVALA; CURTIS RAY ANTHONY REMINGTON; CRISTA JEAN DAVIS; NICHOLE LYNN WHALEN; JACOB ISSAC NATHANIEL COLE,

Petitioners - Appellees,

v.

STATE OF OREGON,

Respondent - Appellant,

WASHINGTON COUNTY CIRCUIT COURT JUDGES, in their official capacities; PATRICK GARRETT, Sheriff, Washington County Sheriff, in his official capacity,

Respondents.

WALTER BETSCHART; JOSHUA SHANE BARTLETT; CALEB AIONA; TYRIK DAWKINS; JOSHUA JAMES-RICHARDS; TANIELA KINI KIN LATU; RICHARD OWENS; LEON

No. 23-3560

D.C. No. 3:23-cv-01097-CL

MICHAEL POLASKI; ALEX SARAT XOTOY; TIMOTHY WILSON,

Petitioners - Appellants,

v.

STATE OF OREGON; WASHINGTON COUNTY CIRCUIT COURT JUDGES,

Respondents - Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Argued and Submitted February 6, 2024
Pasadena, California

Filed May 31, 2024

Before: John B. Owens, Patrick J. Bumatay, and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Owens;
Dissent by Judge Bumatay

SUMMARY*

Habeas Corpus

In a case in which a class of incarcerated indigent criminal defendants awaiting trial in Oregon (Petitioners) filed a federal habeas corpus petition under 28 U.S.C. § 2241, the panel affirmed the district court's preliminary injunction requiring that counsel be provided within seven days of the initial appearance, and failing this, Petitioners must be released from custody subject to reasonable conditions imposed by Oregon Circuit Court judges.

Addressing whether a federal court should wade into these state court criminal proceedings, the panel wrote that it could not abstain, even assuming all four factors set forth in *Younger v. Harris*, 401 U.S. 37 (1971), are met, because the unthinkable situation for Oregon's defendants—those who are incarcerated, awaiting trial, and without counsel in direct violation of the watershed command of *Gideon v. Wainwright*, 372 U.S. 335 (1963)—is an extraordinary circumstance that requires federal action.

The panel held that the district court did not abuse its discretion in concluding that Petitioners were likely to succeed on the merits of their Sixth Amendment claim because, without counsel, Petitioners could not understand, prepare for, or progress to critical stages. Although it did not need to definitively resolve the question, the panel wrote that it was not an abuse of the discretion for the district court to conclude, alternatively, that bail hearings are critical stages

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that trigger the Sixth Amendment's counsel requirement. The panel held that the district court did not abuse its discretion in concluding that Petitioners are suffering and will continue to suffer irreparable harm, and that the district court was within its discretion to find that the public has an interest in a functioning criminal justice system and the protection of fundamental rights.

In a concurrently filed memorandum disposition in No. 23-3560, the panel rejected Petitioners' cross-appeal from the denial of a preliminary injunction as to a proposed class encompassing indigent criminal defendants not incarcerated but subject to liberty constraints as a condition of their supervised release. In a concurrently filed order in No. 23-3573, the panel denied permission to appeal the denial of class certification of that class.

Dissenting, Judge Bumatay wrote that the jailbreaking solution crafted by the district court and endorsed by the majority is not a legally permissible response. He focused on five errors: (1) this court lacks subject-matter jurisdiction; (2) the district court order violates the *Younger* abstention doctrine; (3) on the merits, the district court and majority's Sixth Amendment analysis is disconnected from precedent; (4) the Fourteenth Amendment's Due Process Clause doesn't justify the injunction; and (5) the district court failed to properly balance the interests of the public and the parties in crafting the injunction.

COUNSEL

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OPINION

OWENS, Circuit Judge:

The state arrests a citizen and incarcerates him pending trial. Days, weeks, and months pass without any legal representation. He seeks relief from the authorities—surely a lawyer should help him? In response, he gets a shoulder shrug, a promise that they are "working on it," and nothing more. He remains in jail, without legal counsel or any relief in sight.

You might think this passage comes from a 1970s State Department Report on some autocratic regime in the Soviet Bloc. Unfortunately, we do not need to go back in time or across an ocean to witness this Kafkaesque scene.

This is the State of Oregon in 2024.

The Supreme Court outlawed this practice more than sixty years ago, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Sixth and Fourteenth Amendments guaranteed trial counsel for indigent criminal defendants. The Court explained: "lawyers in criminal courts are necessities, not luxuries. The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* at 344. The Sixth Amendment right to counsel, as outlined in *Gideon*, is the only "watershed" right that the Supreme Court has recognized in the habeas context. *See, e.g.*, *Edwards v. Vannoy*, 593 U.S. 255, 267 (2021).

Yet, due to an "ongoing public defense crisis" of its own creation, Oregon does not provide indigent criminal defendants their fundamental right to counsel despite *Gideon*'s clear command. For several reasons, there are not

enough qualified attorneys in Oregon to represent criminal defendants, some of whom remain detained without counsel. Even worse, Oregon cannot proceed in prosecuting these defendants "unless and until an attorney is appointed to represent" them. Accordingly, an innocent person may languish in jail for months awaiting trial, simply because no lawyer has been provided to review or investigate his case.

Those that manage to appear before a judge can count on little help and scant information. When one Petitioner asked the judge at a pretrial hearing when he would be appointed counsel, the judge simply responded, "I don't know." When the Petitioner said that continuing without a lawyer was unconstitutional, the judge responded that the Petitioner "won't get a disagreement from me or from the prosecutor that you should have a lawyer. It is an unfortunate circumstance that we are in with the state." The hearing then proceeded, with the Petitioner left without counsel. This is no anomaly—the record contains many similar stories, including a Petitioner who remained in jail without counsel for nearly a year.

A class of incarcerated indigent criminal defendants awaiting trial in Oregon challenged this untenable situation via habeas corpus in federal court. Rather than avoid a "judicial jailbreak" by making counsel available to defendants as the Constitution requires, Oregon insisted on fighting the solution. After extensive litigation, the district court issued a preliminary injunction requiring, among other things, that "counsel . . . be provided within seven days of the initial appearance," and "[f]ailing this, defendants must be released from custody, subject to reasonable conditions imposed by [Oregon] Circuit Court judges." Considering the extraordinary (and extremely prejudicial) circumstances facing criminal defendants in Oregon in direct violation of

Gideon, we cannot say that the district court abused its discretion in issuing this preliminary injunction, and so we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Oregon's Public Defense Crisis

To understand how this Sixth Amendment nightmare became a reality, we review how Oregon provides counsel to indigent defendants awaiting trial. Rather than employ state or county public defenders, Oregon contracts with individual private attorneys for these services. Until January 2024, the Public Defense Services Commission ("PDSC") oversaw Oregon's public defense system. The PDSC made a bad situation worse when, in 2021 and 2022, it altered the rules governing compensation and caseloads for these private attorneys. These changes rendered public defense work financially untenable, and many private attorneys stopped taking criminal defense cases. While individuals continued to be arrested and charged with crimes, there were no longer enough lawyers to represent them.[1] Between March and June 2023 alone, the number of unrepresented criminal defendants increased by 198 percent. By September 2023, that number had grown another 48 percent, with almost 3,000 people awaiting their *Gideon*-guaranteed

[1] This explanation reflects Oregon's public defense system at the outset of this case. Oregon is reforming this system through state legislation. For example, effective January 2024, the PDSC was abolished and replaced with a new agency in the state government. Despite these early reforms, the crisis persists. Many of Oregon's planned reforms will not become effective until the late 2020s and into the 2030s.

counsel. More than 100 of these defendants remain incarcerated pretrial.[2]

B. The Litigation

In July 2023, ten indigent defendants in custody awaiting trial without representation in Washington County filed a joint habeas corpus petition in federal district court, seeking class status and alleging violations under the Sixth, Eighth, and Fourteenth Amendments. They moved for a Temporary Restraining Order ("TRO") requiring release if they were not appointed counsel within seven days. The district court provisionally certified "individuals in physical custody in Washington County Detention Center" as the "Custody Class" and entered a TRO. Under the TRO, if class members were not provided representation within ten days of their initial appearance, or within ten days of their previous counsel's withdrawal, Oregon would have to release them.

The State of Oregon subsequently intervened as Respondent. Petitioners filed their Second Amended Petition for habeas corpus, adding unrepresented defendants across the state, both in jail and out of jail on restrictive

[2] The State of Washington is facing similar problems and consequences. *See* Daniel Beekman, *WA's public defender system is breaking down, communities reeling*, Seattle Times (Feb. 25, 2024, 7:00 AM), https://www.seattletimes.com/seattle-news/politics/was-public-defender-system-is-breaking-down-communities-reeling/ ("Staffing shortages and burnout-inducing caseloads are squeezing urban . . . [and] rural areas . . . . In some instances, people presumed innocent are languishing in jail without counsel."); *see also* Colin Rigley, *Confronting a Crisis*, Washington State Bar News (Feb. 8, 2024), https://wabarnews.org/2024/02/08/confronting-a-crisis/.

conditions.[3] Petitioners requested that the district court convert the TRO into a preliminary injunction for the Custody Class and reduce the time in which counsel must be appointed from ten days to forty-eight hours.

C. The Injunction

After briefing and extensive argument, the district court granted the motion for a preliminary injunction. It declined to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), holding that "this remains a case of 'extraordinary circumstances' that demands federal intervention." The court rejected Oregon's argument that "Petitioners can challenge their right to counsel after trial without risk[ing] irreparable harm," reasoning that "the Sixth Amendment entitles the accused to adequate representation at all critical stages of trial." The court also applied the logic of *Page v. King*, 932 F.3d 898 (9th Cir. 2019), which held that a "complete loss of liberty for the time of pretrial detention is 'irretrievable' regardless of the outcome at trial." *Id.* at 904. The court reaffirmed its provisional class certification of the Custody Class and expanded it statewide. The court then found that Petitioners were likely to succeed on the merits of

[3] Petitioners then motioned for certification of and a preliminary injunction for a "Restrictive Conditions Class," a second proposed class encompassing indigent criminal defendants not incarcerated but subject to liberty constraints as a condition of their release. The district court denied certification and a preliminary injunction as to this proposed Restrictive Conditions Class, abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), and rejecting Petitioners' claims on the merits. Petitioners cross-appealed the denial of the preliminary injunction and, in the related case *Betschart v. Garrett*, No. 23-3573, appealed the denial of class certification. A concurrently filed memorandum disposition rejects the cross-appeal in this case, in which we abstain under *Younger*. A concurrently filed order in No. 23-3573 denies permission to appeal the denial of class certification of the Restrictive Conditions Class.

their Sixth Amendment and due process claims and subsequently "order[ed] that counsel must be provided within seven days of the initial appearance, or within seven days of the withdrawal [of] previously appointed counsel," and "[f]ailing this, defendants must be released from custody, subject to reasonable conditions imposed by [Oregon] Circuit Court judges."[4]

Oregon timely appealed from the preliminary injunction. A motions panel stayed the preliminary injunction pending appeal and expedited the appeal and cross-appeal.

II. JURISDICTION

We have jurisdiction under 28 U.S.C. § 1292(a)(1). The district court had jurisdiction under 28 U.S.C. § 2241. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (recognizing that class actions may be brought "pursuant to habeas corpus"), *abrogated on other grounds by Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1199-1201 (9th Cir. 2022); *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987) ("[A] class action may lie in habeas corpus."); *Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972) (same).

With great bluster but without any legal citations, the dissent contends that we lack jurisdiction because Sixth Amendment violations supposedly do not merit release from custody. Not even the State of Oregon made this argument at the district court or on appeal. And that is because that argument ignores the basic history of *Gideon* (and many

[4] Relying in part on Article I, Section 43 of the Oregon Constitution, the district court later amended the preliminary injunction to exclude "class members who fire their attorneys," those charged with "murder and aggravated murder," and those who are released under the order but have their release revoked.

other cases), where Sixth Amendment violations have led directly to defendants being released from prison. For example, the State of Florida released, or released and retried, over 4,000 prisoners after the Supreme Court issued its decision in *Gideon*.[5]

The dissent concedes that the public defense crisis in Oregon has resulted in "a delay, and sometimes a lengthy delay," in proceedings after a defendant is detained. This delay is enough to bring Petitioners' suits within the "core of habeas corpus" as required by *Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973)). *See Preiser*, 411 U.S. at 487-88 (holding that even if the state prisoners' requested relief had "merely shortened the length of their confinement . . . their suits would still have been within the core of habeas corpus in attacking the very duration of their physical confinement itself").

The dissent next claims that the district court's jurisdiction is "irregular[]" because it did not order release from custody for Petitioners charged with murder and aggravated murder. That the district court would have habeas jurisdiction to *hear* a case only if it ultimately ordered release from custody is an odd argument. District courts routinely deny release from custody under habeas jurisdiction. The district court's decision, which was consistent with state law as to those Petitioners and mitigates

[5] *See* Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright*, 33 Stetson L. Rev. 181, 222 (2003); M. Alex Johnson and Vidya Rao, *A 'nobody's' legacy: How a semi-literate ex-con changed the legal system*, NBC News (Mar. 18, 2013, 2:40 AM), https://www.nbcnews.com/news/us-news/nobodys-legacy-how-semi-literate-ex-con-changed-legal-system-flna1C8914521.

the "jailbreak" the dissent so ardently fears, was within its discretion.

The dissent also challenges class certification and whether class actions can lie in habeas, citing dicta from a footnote in a concurrence to a case on a completely different question. *See Jennings v. Rodriguez*, 583 U.S. 281, 324 n.7 (2018) (Thomas, J., concurring). Oregon does not challenge class certification on appeal, and we decline to do so for them. *See United States v. Sineneng-Smith*, 490 U.S. 371, 375-76 (2020) ("[A]s a general rule, our system 'is designed around the premise that . . . [the parties] are responsible for advancing the facts and argument entitling them to relief.'" (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment))).

And in any case, the dissent acknowledges but completely disregards our binding precedent, which establishes that a class action can lie in habeas. *See Hayes*, 591 F.3d at 1117 ("[C]lass actions may be brought pursuant to habeas corpus."). It instead suggests that because the Supreme Court has reversed our immigration-detention class-action cases on different grounds, our precedent "may be an outlier." This assertion does not reflect an understanding of precedent. The Supreme Court overturned our immigration-detention class-action cases because of the special discretion the Immigration and Nationality Act gives the government, *see Jennings*, 583 U.S. at 303, which is irrelevant in this context, *see Marin*, 90 F.4th at 1240.[6]

[6] The dissent, relying on *Jennings*, also says that "the Supreme Court has instructed our court to 'consider' whether a Rule 23 class action is an

Thus, we are satisfied that our long-standing law remains valid, and that we have jurisdiction. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) ("[A] three-judge panel may not overrule a prior decision of the court.").[7]

III. DISCUSSION

A. Standards of Review

We review de novo the district court's application of the *Younger* abstention doctrine and must "conduct the *Younger*

"appropriate vehicle" for providing habeas relief in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)." That is simply not accurate. The Court in *Jennings* said that this court should consider on remand whether a Rule 23(b)(3) class action, specifically, "continues to be the appropriate vehicle for respondents' claims" after *Dukes*, because there, the Court held "that 'Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class'" and "[t]hat holding may be relevant on remand because the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter." *Jennings*, 583 U.S. at 313 (quoting *Dukes*, 564 U.S. at 360). The *Dukes* holding is not relevant here, and we fail to see how that quote from *Jennings* could logically be construed as an instruction to this court to consider our precedent on an entirely different question.

Additionally, the dissent brings up the Solicitor General's recent comments before the Supreme Court on class actions in the Eighth Amendment context. As with the dissent's cite to a footnote in a concurrence in an unrelated case, we strain to see how this is relevant.

[7] The dissent also calls into question whether "habeas relief can be granted *prospectively* to individuals who are not yet even in custody." But "[t]he inclusion of future class members in a class is not itself unusual or objectionable," because "[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe." *A.B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022) (quoting *Hayes*, 591 F.3d at 1118).

analysis 'in light of the facts and circumstances existing at the time the federal action was filed.'" *Duke v. Gastelo*, 64 F.4th 1088, 1093 (9th Cir. 2023) (citation omitted).

We "review the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (citation omitted). "The district court abuses its discretion when it makes an error of law." *Id.* The district court's legal conclusions are reviewed de novo, and its factual findings for clear error. *Id.* The abuse of discretion standard is "highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012).

B. *Younger* Abstention

We first address whether a federal court should wade into these state court criminal proceedings. "[A] federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). However, federal courts must exercise caution when the relief sought impacts state court criminal proceedings. *Younger* abstention, "an extraordinary and narrow exception to [this] general rule" of hearing cases, reflects this concern. *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (citation omitted).

Under *Younger*, federal abstention is warranted when "(1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding." *Page*, 932 F.3d at 901-02 (quoting *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir.

2018)). Even when all four *Younger* factors are met, abstention is nevertheless inappropriate "where there exist other 'extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.'" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (quoting *Younger*, 401 U.S. at 53). "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Arevalo*, 882 F.3d at 766 (quoting *Hernandez*, 872 F.3d at 994).

Even assuming all four *Younger* factors are met here, we cannot abstain. As the district court explained, the unthinkable situation for Oregon's defendants—those who are incarcerated, awaiting trial, and without counsel in direct violation of *Gideon*'s watershed command—is an extraordinary circumstance that requires federal action. The situation here mirrors that in *Page*, in which we ruled that Page, who had been wrongfully civilly committed, had suffered a "complete loss of liberty" during his pretrial detention that was "'irretrievable' regardless of the outcome at trial." 932 F.3d at 904. We reasoned that "a post-trial adjudication of his claim [would] not fully vindicate his right to a current and proper pretrial probable cause determination." *Id.* As a result, we concluded that Page's claim "fit[] squarely within the irreparable harm exception." *Id.* (quoting *Arevalo*, 882 F.3d at 766).

This case is also like *Arevalo*, in which the defendant was arrested following a domestic dispute. 882 F.3d at 764. A few days after his arrest, the state trial court set his bail at $1.5 million. *Id.* He filed a motion for a bail hearing, contending that the bail amount was excessive. *Id.* The trial court, without discussing Arevalo's "ability to pay or what government interests the bail amount would serve," lowered

bail to $1 million, an amount Arevalo still could not afford. *Id.* at 764-65. Arevalo filed a habeas petition, and the district court abstained under *Younger*. *Id.* at 765. We reversed, holding that *Younger* abstention was not appropriate in part because Arevalo was irreparably harmed when he was incarcerated "without a constitutionally adequate bail hearing." *Id.* at 767.

Here, Petitioners suffer irreparable injury for the duration of their unlawful pretrial detention. *See id.* ("Deprivation of physical liberty by detention constitutes irreparable harm."). Oregon does not dispute that its failure to provide counsel lengthens Petitioners' pretrial detention. Its violation of Petitioners' core Sixth Amendment rights undoubtedly impacts their ability to mount a vigorous defense. *See Gideon*, 372 U.S. at 343 ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" (citation omitted)).

Oregon contends that the district court's reliance on *Page* is misplaced, because in *Page* "the challenged procedure . . . was 'distinct from the underlying criminal prosecution,' and because the relief . . . could be granted without an ongoing intrusion into the state court proceedings." Oregon conflates the fourth *Younger* factor and the extraordinary circumstances exception. *See Bean v. Matteucci*, 986 F.3d 1128, 1133 (9th Cir. 2021) ("[E]ven where the *Younger* factors are satisfied, 'federal courts do not invoke it if there is . . . "some [] extraordinary circumstance that would make abstention inappropriate."'" (quoting *Arevalo*, 882 F.3d at 765-66)). In both *Page* and *Arevalo*, the extraordinary circumstances exception constituted an independent basis for federal intervention, regardless of whether the *Younger* factors were met. *See*

Page, 932 F.3d at 904 (citing *Arevalo*, 882 F.3d at 767 n.3) (rejecting the state's argument that Page's failure to meet the third *Younger* factor categorically barred the irreparable harm exception and required abstention); *Arevalo*, 882 F.3d at 766 ("*Younger* abstention doctrine *also* does not apply because this case fits squarely within the irreparable harm exception." (emphasis added)). Indeed, if meeting the preliminary four-factor test precluded application of the exception, there would be no exception at all.

Citing no authority, the dissent contends that the extraordinary circumstances exception does not apply here because "the right's vindication can come after trial through vacatur of the conviction." The dissent does not explain how indefinite pretrial detention while a defendant waits for counsel can be repaired after trial. *See Bean*, 986 F.3d at 1134 ("[P]retrial rights, like those protecting unlawful pretrial detention, 'cannot be vindicated post-trial.'" (quoting *Page*, 932 F.3d at 905)); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) ("[T]he costs to the arrestee of pretrial detention are profound. 'Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.'" (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975))).

Again citing no authority, the dissent claims that "the harm the Sixth Amendment protects against is a conviction obtained through uncounseled critical stages" and that "[t]here's no *independent* Sixth Amendment protection against being held in pretrial custody without counsel." In other words, the dissent apparently believes there is *no* Sixth Amendment protection for those jailed by the state before conviction, when they are presumed innocent, and that Sixth Amendment protection only kicks in *after* they have been proven guilty beyond a reasonable doubt. This cannot be

correct. The Sixth Amendment's protection applies to "all criminal prosecutions." U.S. Const. Amend. VI. The dissent would edit the Sixth Amendment from "prosecutions" to "prosecutions *that result in convictions*." This view also ignores all of the caselaw, discussed *infra* pp. 23-27, holding that the Sixth Amendment provides essential protection for defendants awaiting trial.

Because we conclude that Petitioners suffer irreparable injury and thus extraordinary circumstances exist here, we do not abstain under *Younger*.

C. Preliminary Injunction

"[T]o obtain a preliminary injunction a plaintiff must establish (1) 'that he is likely to succeed on the merits,' (2) 'that he is likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'that the balance of equities tips in his favor,' and (4) 'that an injunction is in the public interest.'" *Hernandez*, 872 F.3d at 989-90 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "Under our 'sliding scale' approach, 'the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.'" *Id.* at 990 (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam)).

The district court determined that the relief Petitioners sought was a mandatory injunction, because it "order[ed] a responsible party to take action" going "well beyond simply maintaining the status quo." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). To obtain a mandatory injunction, a plaintiff must "establish that the law and facts clearly favor [their] position, not simply that [they are] likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

But see Hernandez, 872 F.3d at 998 (questioning whether the distinction between mandatory and prohibitory injunctions is meaningful). "Mandatory injunctions are most likely to be appropriate when 'the status quo . . . is exactly what will inflict the irreparable injury upon [the] complainant.'" *Hernandez*, 872 F.3d at 999. "Because our review is deferential, '[w]e will not reverse the district court where it "got the law right," even if we "would have arrived at a different result," so long as the district court did not clearly err in its factual determinations.'" *Garcia*, 786 F.3d at 739 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)) (alteration in original).

1. Likelihood of Success on the Merits

The district court concluded that Petitioners were likely to succeed on the merits of their Sixth Amendment claim, and that the law and facts clearly favored their position, because (a) the lack of counsel prevented them from preparing for or progressing to critical stages and (b) bail hearings, to which Oregon custodial defendants are entitled within a certain time frame, are critical stages. We hold that the district court did not abuse its discretion in reaching either conclusion.[8] We address each in turn.

a) Preparation for and Progression to Critical Stages

The district court concluded that Petitioners were likely to succeed on the merits of their Sixth Amendment claim

[8] The district court also concluded that Petitioners were likely to succeed on the merits of their Fourteenth Amendment due process claim. Because we decide that Petitioners are likely to succeed on the merits of their Sixth Amendment claim, we do not reach their Fourteenth Amendment claim.

because, without counsel, Petitioners could not understand, prepare for, or progress to critical stages.

Indigent defendants have a fundamental right, guaranteed by the Sixth and Fourteenth Amendments, to "the aid of counsel in a criminal prosecution." *Gideon*, 372 U.S. at 343 (citation omitted). The right attaches "at or after the time that judicial proceedings have been initiated against [the defendant] 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Once the right attaches, the defendant is guaranteed counsel "during any 'critical stage' of the postattachment proceedings." *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *United States v. Cronic*, 466 U.S. 648, 654-55 (1984) (citation omitted). "[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212.

The district court's conclusion that Petitioners were likely to succeed on the merits was not an abuse of discretion. There is a high likelihood that the failure to appoint counsel in Petitioners' cases impairs their Sixth Amendment right to counsel. Lack of counsel not only interferes with indigent criminal defendants' progression to critical stages by delaying those stages but also prevents any meaningful advocacy. The Sixth Amendment requires not just that counsel show up on the day of a critical stage but prepare for it too. *See id.*; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the

right to counsel is the right to the effective assistance of counsel.").

The right to counsel encompasses myriad attorney duties beyond mere presence at certain pretrial hearings. It is a continuous right to competent and zealous advocacy outside of the courtroom. It includes:

- counsel's investigation of lines of defense;[9]
- counsel's "available advice about an issue like deportation;"[10]
- counsel's ensuring that the defendant is competent to stand trial;[11]

[9] *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (defining counsel's general duty to investigate lines of defense); *see also Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999) ("Hart's counsel 'failed to fulfill his duty to investigate [Hart's] most important defense.'" (alteration in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994))); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984) (determining counsel had a duty to interview key witnesses and investigate defendant's mental problems).

[10] *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" (quoting *Hill v. Lockhart*, 474 U.S. 52, 62 (1985))).

[11] *See Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003) ("[C]ounsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired.").

- confidentiality in communication with counsel;[12]
- counsel's communication of formal plea offers;[13]
- counsel's warning of possible risks in sentencing;[14]
- counsel's assistance with a defendant's attempt to cooperate;[15]
- guidance through the plea-bargaining process, including counsel's competent

[12] *See Nordstrom v. Ryan*, 762 F.3d 903, 906 (9th Cir. 2014) (holding that a prison guard reading a prisoner's letter to his lawyer violates the prisoner's Sixth Amendment right to confide in his lawyer); *Mangiaracina v. Penzone*, 849 F.3d 1191, 1198 (9th Cir. 2017) (holding that a prison guard opening a prisoner's letter from his lawyer outside the prisoner's presence is "sufficient to state a claim for violation of [the prisoner's] Sixth Amendment right to counsel").

[13] *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

[14] *Risher v. United States*, 992 F.2d 982, 984 (9th Cir. 1993) (holding that counsel "cannot be said to have been functioning as counsel within the meaning of the Sixth Amendment" when they did not warn defendant of "significant risk" he would be sentenced as a career offender).

[15] *United States v. Leonti*, 326 F.3d 1111, 1122 (9th Cir. 2003) ("The Sixth Amendment guarantee of competent counsel applies to the process of cooperation with the government . . . .").

advice on how to plead[16] and the right to appeal;[17]

- other rights, including counsel "keep[ing] abreast of Supreme Court decisions affecting their clients' interests."[18]

The dissent ignores these bedrock Sixth Amendment cases and dismisses every Sixth Amendment violation that occurs prior to a jury verdict as "collateral." That is incorrect. The Sixth Amendment is not a haphazard jack-in-the-box that occasionally appears when cranked. As the Supreme Court made clear when rejecting a similar argument, it is an ongoing right that persists throughout trial court proceedings. *See Lafler*, 566 U.S. at 164-65 ("[T]he Solicitor General claim[s] that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. The Sixth Amendment . . . is not so narrow in its reach." (citations omitted)); *see also Padilla*, 559 U.S. at 373 (detailing counsel's duty to provide competent immigration advice to defendants during plea bargaining). *Leonti*, a case the dissent itself cites, also undercuts its argument. *Leonti* held that the right to counsel extended to the entire period of time in which a defendant could "attempt[] to render substantial assistance to the government" to lower his

[16] *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012).

[17] *See Marrow v. United States*, 772 F.2d 525, 529 (9th Cir. 1985) ("[C]ounsel has a duty to advise his client of the right to appeal the conviction.").

[18] *See United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990).

sentence—*after* pleading guilty and thus, *after* the merits of his case were already decided. 326 F.3d at 1122.[19]

Oregon and the dissent suggest that counsel's pretrial duty to appear at critical stages encompasses only presence and not preparation. This view is fundamentally incompatible with the decades of precedent defining what counsel must do to provide criminal defendants their Sixth Amendment right to counsel. *See, e.g.*, *De Roche v. United States*, 337 F.2d 606, 607 (9th Cir. 1964) ("It is of course true that the right conferred by the Sixth Amendment to effective assistance of counsel implicitly embraces adequate opportunity for the accused and his counsel to consult, advise and make such preparation for arraignment and trial as the facts of the case fairly demand.").

Even assuming that a bail hearing is not a critical stage, Oregon and the dissent fail to explain how an indigent criminal defendant could progress to critical stages without counsel or without being pressured into giving up their rights altogether. How, for example, would an indigent criminal defendant investigate their case from a prison cell?[20] Or

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[19] In any event, confinement pretrial does affect trial outcomes. *See, e.g.*, *Lopez-Valenzuela*, 770 F.3d at 781 ("Pretrial confinement . . . may affect the defendant's ability to assist in preparation of his defense" and "considerable evidence [shows] that pretrial custody status is associated with the ultimate outcomes of cases, with released defendants consistently faring better than defendants in detention." (citations omitted)); *Faheem-El v. Kilncar*, 841 F.2d 712, 719 (7th Cir. 1988) ("[P]retrial detention lessens the defendant's ability to assist in preparing his or her defense for trial.").

[20] *See, e.g.*, *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017) (holding that counsel's failure to conduct psychological evaluation constituted ineffective assistance because counsel had a duty to investigate).

establish alibis?[21] Or interview witnesses?[22] Or review electronic discovery? How, without a formal legal education, would they know what rights they possess? Oregon and the dissent provide no answers because there are none. Lawyers are uniquely situated to carry out these tasks. *See Gideon*, 372 U.S. at 345 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him."). The bottom line is that the dissent would allow indefinite detention without counsel, as long as the accused has not yet been tried. Not even Oregon goes that far.

The Sixth Amendment imposes responsibilities on counsel to ensure that indigent criminal defendants' cases are not neglected, and defense strategy is formulated before counsel shows up in court, before making tactical decisions that could make all the difference. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) ("[C]ounsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision."). The discussions and interactions between a defendant and his attorney are integral to his defense. The "necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust" are all unfulfilled when a defendant has no lawyer at all. *Luis v. United States*, 578 U.S. 5, 11 (2016) (describing the

[21] *See, e.g.*, *Bemore v. Chappell*, 788 F.3d 1151, 1164 (9th Cir. 2015) ("[C]ounsel cannot neglect to investigate both the possible alibi and alternative defenses.").

[22] *See, e.g.*, *Baumann v. United States*, 692 F.2d 565, 580 (9th Cir. 1982) ("We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel.").

attorney-client relationship in the context of the Sixth Amendment right to counsel of choice).

The dissent contends that we are in "uncharted constitutional territory." It is true that there is not a case that says, "an indefinite delay in counsel probably does not stand under the Sixth Amendment." There is good reason for that: Our law assumes that the system is working the way that it should. Our law assumes that our state governments would pay to provide counsel to indigent defendants. Our law assumes that state governments would want to swiftly bring those proven guilty to justice, and to promptly release those who do not merit prosecution. It is Oregon's uncharted refusal to adequately pay lawyers, not some new-fangled right, that forced the district court to make a tough call.

Oregon and the dissent's myopic view that the Sixth Amendment is a scattershot right—and not a consistent and ongoing one—ignores decades of controlling precedent and effectively erases the Sixth Amendment from the Constitution. The district court did not abuse its discretion in rejecting this radical take.[23]

b) Bail Hearings

The district court alternatively held that bail hearings are critical stages that also trigger the Sixth Amendment's counsel requirement. The court reasoned that because Oregon law required bail hearings for all criminal defendants

[23] The dissent tries to dismiss generational precedent by labeling it "New Deal." There are at least two problems with this argument. First, the Court decided the landmark *Powell v. Alabama*, 287 U.S. 45 (1932), on President Herbert Hoover's watch. President Franklin Delano Roosevelt took office in 1933. Second, and more importantly, Supreme Court precedent is precedent, even if it dates back to the 1930s and remains unpopular in certain quarters.

within a certain period, Petitioners were likely without counsel for such critical stages. While we need not definitively resolve this question here, it was not an abuse of discretion for the district court to have reached this conclusion.

In determining what constitutes a critical stage, we consider three factors, any one of which "may be sufficient to render a stage of the proceedings 'critical'": whether "(1) 'failure to pursue strategies or remedies results in a loss of significant rights,' (2) 'skilled counsel would be useful in helping the accused understand the legal confrontation,' and (3) 'the proceeding tests the merits of the accused's case.'" *Hovey v. Ayers*, 458 F.3d 892, 901 (9th Cir. 2006) (citations omitted).

The district court, quoting *Coleman v. Alabama*, 399 U.S. 1, 9 (1970), reasoned that the Supreme Court has specifically stated bail is one matter where "counsel can . . . be influential . . . in making effective arguments for the accused." The district court also noted that the Second Circuit has drawn on that language from *Coleman* to hold that "[t]here is no question" that a bail hearing is a critical stage. *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007). The dissent attempts to distinguish *Higazy* (ignoring the resulting circuit split) by arguing that the hearing there was an adversarial preliminary hearing, not just a hearing to set bail.[24] But Oregon bail hearings are also adversarial. The district court applied the Ninth Circuit test, quoted *supra* p. 29, and concluded that all three criteria were met, because in a bail hearing, "witnesses are called, evidence is

[24] The dissent also discounts *Higazy* as "out-of-circuit," while citing state court cases from Maryland and Alaska to cobble together its argument.

presented, facts are mitigated, alternatives to incarceration are proposed, and the defendant can address the court."

The dissent, quoting *United States v. Ash*, 413 U.S. 300, 310 (1973), contends that "[b]ail hearings are not a critical stage because they are not 'pretrial events that might appropriately be considered to be parts of the trial itself.'" The dissent's reliance on *Ash* is misplaced. *Ash* did not stand for the proposition that there needs to be a merits determination at a pretrial proceeding to make it a critical stage; rather, the Supreme Court in that case was concerned with "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313.

As to the first critical stage factor, the dissent, relying on *Hovey*, contends that the Ninth Circuit has "said that a proceeding is not a critical stage if there's no 'risk of permanent deprivation of any significant rights during the hearing.'" But we have said no such thing. *See Hovey*, 458 F.3d at 901-02 (holding that, because the defendant had not met any of the other factors—any one of which would have been sufficient—*and* did not meet the first factor because the defendant could raise questions of his attorney's competency in the future, an attorney competency hearing was not a critical stage). The dissent next claims that Oregon law "doesn't forbid a new bail determination once counsel is appointed." This claim highlights the circularity of the dissent's logic: Petitioners do not have counsel, they are bringing this suit because Oregon refuses to provide them counsel, yet the dissent crows that if they had counsel, there would not be a problem. Additionally, the statute the dissent is referencing—Or. Rev. Stat. § 123.245—only provides for *modification* of release agreements "[i]f circumstances concerning the defendant's release change." There is no indication that modification requires a hearing at all. So,

even if a defendant were to convince the court to consider a modification request, the defendant would not have the same opportunity to argue his case.

As to the second factor, the dissent relies on *Gerstein* to argue that bail hearings do not "present . . . complex legal issues." But *Gerstein* concerned a "nonadversar[ial] proceeding" of "limited function" to determine probable cause that could be decided "on hearsay and written testimony." 420 U.S. at 120, 122. The dissent's contention that Oregon bail hearings are only probable cause hearings is simply wrong. Under Oregon law, the magistrate considers all of the "primary release criteria," which includes evidence of a defendant's propensity for law-breaking and flight. Or. Rev. Stat. § 135.230(7). The defendant has the right to appear and present evidence, as do the district attorney and the victim. *Id.* § 135.245(5). These competing presentations of evidence make up the very "critical confrontation" to a defendant's interests that *Hovey* requires to satisfy the second factor. 458 F.3d at 902.

As to the third factor, the dissent quotes *McNeal v. Adams*, 623 F.3d 1283, 1288 (9th Cir. 2010), for the proposition that "[c]ritical stages [must] involve 'significant consequences' to the defendant's case." We note that the dissent misquotes *McNeal* by injecting "must" to artificially prop up its point. The actual quote is: "Critical stages involve 'significant consequences to the defendant's case.'" 623 F.3d at 1288. In any case, *McNeal* held that a motion to compel a defendant's DNA did not have significant consequences for the defendant because his counsel had time to object, and the taking of physical evidence is otherwise "subject to meaningful challenge through the adversar[ial] process." *Id*. In contrast here, the bail hearing *is* the

adversarial process through which a defendant may meaningfully challenge his pretrial detention.

Our standard of review—which the dissent appears continually to forget—is clear: "A [district] court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Briseño v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) (alteration in original) (citation omitted). The district court appropriately applied the Ninth Circuit test for critical stages, and it does not appear, nor is it argued, that the district court's factual findings regarding bail hearings were clearly erroneous. *Id.*

* * *

The dissent's insistence that today we establish a "brightline rule that the Sixth Amendment right to counsel is violated by a seven-day gap" is a gross mischaracterization that demonstrates the dissent's confusion over our standard of review. We merely hold that it was not an abuse of discretion for the district court to conclude, when faced with a complete collapse of Oregon's indigent defense attorney network, that *Gideon* guarantees pretrial counsel to those incarcerated and awaiting trial.[25]

[25] While we agree that "[c]riminal prosecutions do not proceed in a one-size-fits-all fashion," the district court is best positioned to make fact-specific judgments. For instance, the dissent takes issue with a part of the amended injunction concerning attorney withdrawal. That amendment was made to accommodate concerns that the parties had raised. Allowing the district court to fashion an equitable remedy based on the facts it is uniquely situated to address is the very purpose of abuse of discretion review.

2. Irreparable Harm, Balance of Equities, and the Public Interest

The district court's conclusion that Petitioners are suffering and will continue to suffer irreparable harm was not an abuse of discretion. *See Hernandez*, 872 F.3d at 994 ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012))).

"When the government is a party, [the third and fourth preliminary injunction factors] merge." *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 975 (9th Cir. 2020) (citation omitted). The district court concluded that the balance of equities tips in Petitioners' favor because providing counsel "will guarantee efficiency, make criminal proceedings less burdensome on all involved, and will prevent cases from being needlessly delayed," without raising administrative costs. The court also concluded that the preliminary injunction is in the public interest because "all citizens have a stake in upholding the Constitution." *Hernandez*, 872 F.3d at 996 (citation omitted).

The district court was within its discretion to find that the public has an interest in a functioning criminal justice system and the protection of fundamental rights. *See Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023) ("A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor. Because 'public interest concerns are implicated when a constitutional right has been violated, . . . all citizens have a stake in upholding the Constitution.'" (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005))).

Oregon contends that the preliminary injunction "will impair the State's ability to protect victims, witnesses, and the public because it requires the State to release defendants, including potentially dangerous defendants, who are lawfully detained." But the preliminary injunction does not unconditionally release defendants; it recognizes "the [Oregon] Circuit Court's independent authority to set reasonable pre-trial conditions for release." *See Roman v. Wolf*, 977 F.3d 935, 944 (9th Cir. 2020) (per curiam) (upholding issuance of a preliminary injunction requiring population reduction in immigration detention facilities "particularly in light of . . . the alternative means available to prevent [detainees] from absconding if they were released, such as electronic monitoring").

In *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court affirmed a remedial order that effectively did the same, but with convicted prisoners. *Id.* at 500-01 ("[A]bsent compliance through . . . other means[,] . . . the State will be required to release some number of prisoners before their full sentences have been served."). In *Plata*, the Court considered overcrowding in California prisons. After extensive litigation, a three-judge district court panel had ordered the state to "reduce its prison population to 137.5% of design capacity." *Id.* The population reduction, by the panel's estimate, "could [have been] as high as 46,000 persons." *Id.*

In upholding the order, the Supreme Court considered its impact on public safety. It reasoned that considering the public interest "necessarily involves difficult predictive judgments regarding the likely effects of court orders" and that "[t]hese questions are difficult and sensitive, but they are factual questions and should be treated as such." *Id.* at 535. The Court then held that the district court had properly

"credited substantial evidence that prison populations can be reduced in a manner that does not increase crime to a significant degree," *id.*, and that "any negative impact on public safety would be 'substantially offset, and perhaps entirely eliminated, by the public safety benefits' of a reduction in overcrowding," *id.* at 536-37 (citation omitted).

In this case, the district court found that Petitioners' requested relief did not pose a "fiscal or administrative burden on the government" and that Oregon's fear of the threat to community safety was "theoretical." Indeed, Oregon neither disputes that the relief imposes little or no fiscal or administrative burden nor provides any evidence that releasing non-convicted defendants, whom Oregon could monitor by any other appropriate means, would threaten community safety so drastically as to justify continuing to deny Petitioners their constitutional rights.

Here, as in *Plata*, the relief could be characterized as "of unprecedented sweep and extent." *Id.* at 501. But "so too is the continuing injury and harm resulting from these serious constitutional violations." *Id.* And here, as in *Plata*, "[t]he State's desire to avoid [Petitioners' requested relief] . . . creates a certain and unacceptable risk of continuing violations of the rights of [Petitioners], with the result that many more will . . . needlessly suffer." *Id.* at 533-34. "Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety . . . ." *Id.* at 534.

The dissent, without any elaboration, cites the dissent in *Plata* to argue that the risks to the public outweigh the Petitioners' constitutional rights. Relying on a dissent is not the best argument. A better one is that "'[e]ven in times of

crisis,' judges must 'not shrink from our duty to safeguard th[e] rights' guaranteed by the Constitution." *United States v. Olsen*, 21 F.4th 1036, 1057 (9th Cir. 2022) (Bumatay, J., concurring in the denial of rehearing en banc) (alterations in original) (quoting *Tandon v. Newsom*, 992 F.3d 916, 939 (9th Cir. 2021) (Bumatay, J., dissenting in part and concurring in part)). Denying a watershed right to criminal defendants, presumed to be innocent, is a textbook example of shrinking from this duty.

The dissent cites nothing in the record to support the fear-mongering parade of horribles it claims will result if Petitioners are released. Instead, it details the crimes that Petitioners are accused of. First, we remind the dissent that criminal law features people accused of horrible things—it is *criminal* law after all. If the dissent were to go into the record of all the convicted prisoners in *Plata*, it would undoubtedly find conduct similar to, or even much worse than, what Petitioners are accused of here. The simple reality is that our Constitution protects people regardless of the accusations against them. Second, the dissent ignores a crucial part of the preliminary injunction—Petitioners are not going to be given free rein in the community. Instead, they "are subject to the conditions of release set forth in [Or. Rev. Stat.] § 135.250 and any other conditions that the Circuit Court may impose that are related to assuring the appearance of the class member and the safety of the community." No-contact orders, GPS monitoring, and check-ins with Probation are available. The dissent does not explain why any of these standard measures would fail. The injunction further provides that if a Petitioner violates these conditions, their release can be revoked, and they are not entitled to a new seven-day period.

The dissent also asserts that the district court "failed to consider alternatives" and suggests that the court could have compelled members of the bar to represent indigent criminal defendants. But first, Oregon, despite multiple hearings and hundreds of pages of briefing, has *never* proposed a single alternative remedy to the district court (or our court); making up such alternatives on the fly would hardly have been an appropriate exercise of discretion. Second, the district court did, in fact, consider compelling members of the bar to represent indigent criminal defendants, and concluded that doing so in the past had not worked and repeating that mistake would be ill-advised:

> THE COURT: . . . The idea that judges can just grab somebody out of the hallway or grab – I mean, there was a great idea. Let's take associate attorneys from law firms who never spent a day in a courtroom, and we'll have them represent people. It's kind of insulting to people who practice criminal law, first of all, and second, I – it just seems like we're setting things up for malpractice.

Indeed, the record supports this concern. One named Petitioner, who was not sure whether she had been arraigned, was appointed an attorney that had been forced out of retirement, refused to look at her case, and promptly withdrew. The dissent says that this "anecdote" does not justify the injunction. Meanwhile, the dissent—again—points to nothing in the record that supports its contrary

position.[26] In any event, this practice likely also would violate the Sixth Amendment. *See Barber v. Nelson*, 451 F.2d 1017, 1019 (9th Cir. 1971) ("[I]f no time to prepare is available to counsel, his assistance is ineffective as a matter of law."). The dissent even suggests that this court could order Oregon to pay their defense bar more money, but cites no authority for the extraordinary idea that we could set state wage rates under habeas. Oregon has that power yet has chosen not to wield it.

The preliminary injunction respects the Oregon Constitution and state law by excepting from release those charged with murder and aggravated murder. *See E. Bay Sanctuary Covenant*, 994 F.3d at 985 (noting public interest in "ensuring that 'statutes enacted by [their] representatives' are not imperiled" (alteration in original) (citation omitted)). The district court was well within its discretion to follow Oregon law with respect to these defendants. *See Melendres*, 695 F.3d at 1002 (holding there was "no abuse of discretion in the district court's determination that the equities favor issuance of a narrow, limited preliminary injunction" that does not enjoin the enforcement of valid state laws).

IV. CONCLUSION

Despite nearly fifty pages, the dissent never focuses on the standard of review or the *Winter* factors. It repeatedly disregards controlling precedent, raises new issues and

[26] The dissent also states that the district court "rejected this option because it feared that some lawyers might find it 'kind of insulting.'" That misreads the transcript. The district court was commenting that it was insulting to the criminal defense bar to suggest that their essential work could be replicated by lawyers who lack criminal defense and/or trial experience.

arguments, and either ignores authority or misreads it to prop up its personal opinions of our jurisdiction and the limits of the Constitution. The dissent's unbounded approach is an ode to classic judicial overreach.

It remains unclear why the dissent blames the district court for a "judicial jailbreak." Consistent with the Sixth Amendment, Oregon could solve this problem overnight simply by paying appointed counsel a better wage. It is Oregon, and not the district court, that created this crisis. At the end of the day, our question is a narrow one: did the district court abuse its considerable discretion in issuing a preliminary injunction to address an unprecedented situation where, in direct violation of *Gideon*, unrepresented and indigent defendants wait in cells for months, helpless and powerless, while favorable evidence goes cold or disappears altogether?

With that question in mind, we cannot say the district court abused its discretion.

AFFIRMED.

BUMATAY, Circuit Judge, dissenting:

I do not say this lightly—the injunction the majority affirms here is both reckless and extreme. It orders the State of Oregon to release from jail all criminal defendants not appointed state-funded counsel within seven days of their initial appearance. Given the complexities of the situation and the shortage of public defense counsel, the result of this order is that more than a hundred criminal defendants will be *immediately* released from jail. And those being released are not sitting there for some petty offense. Just look at the charges of the named Petitioners here—they are accused of rape, kidnapping, strangulation, assaulting a police officer, public indecency, and burglary. All will now be released into Oregon's communities. But this is not the end of it. Countless others will be released on an *ongoing basis* because the injunction applies prospectively. To avoid the inevitable chaos, our court wisely paused the district court's extraordinary order pending appeal. But that wisdom has run out. The majority now endorses the release scheme, lifts the stay of the injunction, and lets it take immediate effect. By doing so, the Ninth Circuit is now complicit in a judicial jailbreak. I fear the coming disorder.

* * *

For the first time in our Nation's history, we order the release of pretrial criminal defendants from jail based solely on a *delay* in appointing state-funded counsel. While the Sixth Amendment grants indigent defendants the right to government-funded counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), this right applies only at "critical stages" of the criminal process, *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004). But the district court and the majority make up a new rule: defendants must receive appointed counsel *within*

seven days or be released from jail. That's an incredibly short deadline cut from whole cloth. Rather than analyzing the nuances of each defendant's case, the district court and majority establish a categorical, one-size-fits-all rule mandating appointed counsel within a brief period. And it does so not by applying the traditional remedies of suppression or vacatur of conviction, but with blanket release from detention.

If that relief were not extraordinary enough, the district court's injunction applies on a class-wide basis, meaning that this order will lead to the immediate release of more than a hundred defendants from jail. So defendants who were denied bail—those considered too dangerous to release—will immediately be let loose into the community. *See* Or. Rev. Stat. § 135.240. This jailbreak applies regardless of the posture of a particular case or the individualized assessment of the defendant's dangerousness.

And if all this were not damaging enough, the district court extended this remedy to all *future* criminal defendants in the State. So it will lead to the ongoing release of an unknown number of defendants from Oregon jails—even those not even arrested yet. In approving this order, we have effectively commandeered the state courts and indefinitely dictate to Oregon judges when a defendant must be released from a state jail. Never mind that habeas corpus is a remedy that may be invoked only by those currently in "custody" based on the illegality of that custody.

Even on its own terms, the injunction here makes little sense. It is purportedly based on the Sixth Amendment's fundamental right to counsel—a right which attaches to *all* criminal defendants charged with felonies. Yet the order picks and chooses which defendants are entitled to

immediate release. While freeing dozens of defendants, the injunction decrees that *some* defendants must remain in jail without appointed counsel—defendants accused of murder and aggravated murder. While keeping those defendants in jail makes practical sense, it doesn't make constitutional sense. Those defendants possess the same constitutional right to counsel as everyone else. So it is baffling that the district court and now the majority somehow conclude that the Sixth Amendment doesn't apply equally to those charged with murder. This sort of interest-balancing reeks of policymaking, not dispassionate application of the rule of law. Tellingly, the majority doesn't even try to defend this.

And most ironically of all, the order doesn't even cure the alleged Sixth Amendment violation. Petitioners complain that Oregon has failed to appoint them their state-funded counsel. But under the order, not one defendant will receive appointed counsel. Whether in jail or on bond, Petitioners will still be left unrepresented. Sure, the injunction may inflict so much harm on Oregon that it may push the State to work harder to fix the problem, but it doesn't directly remedy the supposed Sixth Amendment injury for any defendant.

In fairness, the district court faced challenging circumstances. Oregon suffers from a critical shortage of public defense attorneys. In 2021, state officials exacerbated the problem by limiting the number of cases public defense attorneys may take. Following this rule change, the number of indigent defendants without state-funded counsel skyrocketed. The State responded by seeking to overhaul the public-defense system and by allocating $100 million in new funds to it. Still, as of the district court's hearing on the matter, roughly 106 criminal defendants remained in jail without state-appointed counsel.

While I share the concerns for the challenges facing Oregon, this injunction is not the solution. The delay in the appointment of counsel is troubling. The Sixth Amendment is a fundamental right and must be adhered to in all applicable criminal proceedings. And the State must fix this problem. But the jailbreaking solution crafted by the district court and now endorsed by the majority is not a legally permissible response.

* * *

Several reasons show that the majority was wrong to affirm the district court injunction here. This dissent focuses on five errors:

First, we simply lack subject-matter jurisdiction. Petitioners seek habeas corpus relief under 28 U.S.C. § 2241. But by its plain language, habeas relief requires a person "in custody in violation of the Constitution." 28 U.S.C. § 2241(c)(3). Neither the district court nor the majority explains why failing to appoint state-funded counsel makes pretrial *custody* unconstitutional. Often, the remedy for a Sixth Amendment violation is suppression of evidence or vacatur of the defendant's conviction. The right to counsel is, after all, about defending against the merits of a prosecution—protecting against "results [that] might well settle the accused's fate and reduce the trial itself to a mere formality." *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (simplified). But no court has ever ruled that a failure to appoint state-funded counsel makes pretrial custody by itself unconstitutional. The majority ignores these limits on our authority by bounding over this important issue. And even putting aside the fundamental incompatibility between the right, the remedy, and habeas corpus, the application of class-wide relief using this writ is itself dubious. *See*

Jennings v. Rodriguez, 583 U.S. 281, 324 n.7 (2018) (Thomas, J., concurring) (questioning whether habeas relief may be granted on a class-wide basis). To top it all off, it is impossible to see how the district court had authority to issue prospective relief for those who have yet to be accused of a crime and have yet to be placed in "custody"—the core requirement for habeas relief. *See* 28 U.S.C. § 2241(c)(3).

Second, the district court order violates the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). It is not seriously contested that this case meets the four *Younger* factors demanding abstention. That alone should have ended the matter. But we contort the doctrine by expanding the extraordinary-circumstances exception. That exception is a limited one; it does not swallow the rule and anoint federal judges as superintendents of a state's criminal-justice system.

Third, turning to the merits, the district court and majority's Sixth Amendment analysis is disconnected from precedent. Under the Supreme Court's longstanding framework, the right to counsel is violated only when the defendant lacks an adequately prepared attorney at a "critical stage" of the criminal process—one that determines the prosecution's merits. To justify the blanket release, we disregard a half-century of caselaw and hold that a seven-day stretch without appointed counsel violates the Sixth Amendment. So we no longer need to analyze the posture of the criminal case to determine whether a critical stage has occurred; we just need to count the days from initial appearance. That conclusion transforms the well-developed right-to-counsel doctrine into a novel one—one unsupported by text, history, or precedent.

Fourth, the Fourteenth Amendment's Due Process Clause doesn't justify the injunction either. While the district court viewed the delays in the appointment of state-funded counsel as a substantive due process violation, no court has extended substantive due process as far as this. Due process provides certain procedural protections and ensures access to courts, but it has little to say about the timing of the appointment of state-funded counsel.

Fifth, even while recognizing its discretion in the matter, the district court failed to properly balance the interests of the public and the parties in crafting the injunction. No one can seriously question the obvious risks to the public by the immediate release of dozens of prisoners. Yet the district court didn't even seriously consider more narrowly tailored alternatives before choosing its jailbreak solution. But Petitioners concede that other remedies are available, like ordering new bail hearings with counsel or directing the State to revisit its public-defender policies. Given that this order will not even remedy the lack of appointed counsel, the balance of interests cannot favor this injunction.

Despite all these issues, the majority rushes to lift the stay of the injunction and endorses the prisoner-release scheme. Even worse, the majority suggests expanding this jailbreak solution to other states in the circuit. Thus, the majority's endorsement of a seven-day rule now becomes the law in every State and federal district in the Ninth Circuit. We are now embarking into uncharted constitutional territory. This case is not only a radical reinterpretation of the Sixth Amendment and due process, but a radical reinterpretation of federalism and the separation of powers, a radical reinterpretation of the scope of habeas corpus, and a radical reinterpretation of class actions. It doesn't push our precedent—it sets it ablaze.

* * *

Because our court has ill-considered this radical decision, I respectfully dissent.

I.

Background

Oregon suffers from a significant shortage of public defense attorneys. Several factors contribute to this problem, such as the backlog of cases from the COVID-19 pandemic and increased remands for new trials following the end of nonunanimous jury verdicts in Oregon, *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1407–08 (2020). But the most acute cause is the State's attempt to improve the quality of representation by limiting the number of cases public defenders can take. After that policy was enacted, the gap between the number of indigent defendants who require counsel and the number of defenders available to represent them increased exponentially. The result is a delay, and sometimes a lengthy delay, in the State providing government-funded counsel to criminal defendants.

Under Oregon law, the initial release decision must be made at arraignment unless "good cause" is shown, in which case the hearing can be delayed up to five days. Or. Rev. Stat. § 135.245(2)(a), (7)(a). A defense attorney generally is present and available at arraignment. *See id*. § 135.040. A judge shall deny release if (1) the defendant is charged with murder, aggravated murder, or treason, and the proof is evident or the presumption is strong that the defendant is guilty; or (2) the defendant is charged with a violent felony and there is probable cause to believe that the defendant committed the crime and clear and convincing evidence of a danger of physical injury or sexual victimization to the

victim or public by the defendant while on release. *Id*. § 135.240(2), (4). Otherwise, a judge may grant release subject to conditions and bail. *Id*. § 135.245.

Petitioners filed a joint petition for the writ of habeas corpus in the District of Oregon under 28 U.S.C. § 2241, alleging violation of their right to state-funded counsel. Petitioners sought to certify a class to include all indigent criminal defendants held in jail without counsel, as well as another class to include all indigent criminal defendants placed under restrictive release conditions without counsel. The district court provisionally certified the class of jailed defendants and entered a temporary restraining order freeing any indigent defendants in the Washington County jail who had not been appointed counsel within ten days of either their arraignment or the withdrawal of their previously appointed counsel.

The State of Oregon intervened and Petitioners subsequently moved for a preliminary injunction. The district court granted a preliminary injunction and sua sponte applied it statewide. The preliminary injunction said the following:

> - If counsel is not secured within seven days of initial appearance for any class member currently in physical custody, or if counsel is not appointed within seven days of the withdrawal of previously appointed counsel, the sheriff of that county is ordered to release the class member.
> - Any future class member who has not secured counsel within seven days of

> their initial appearance must be released from physical custody.

Less than two weeks later, the district court amended its order, materially changing the injunction's terms without any accompanying explanation.

First, the amended order redefines the scope of the class to "individuals who are or will be" physically housed in a jail in Oregon. The district court no longer uses the "future class member" language. It is unclear if there is any substantive difference between the terms.

Second, the district court also clarifies that the preliminary injunction "does not apply to crimes of murder and aggravated murder." It notes that the injunction "does not impact the provisions of Article I, Section 43 of the Oregon Constitution." That section, like Oregon Revised Statute § 135.240(2) and (4), sets forth that defendants charged with murder, aggravated murder, treason, or a violent felony are not bailable if the court makes certain findings. Or. Const., Art. I, § 43(1)(b).

Third, the amended order says that the injunction does not apply to "class members who fire their attorney."

Fourth, the amended order limits the class members eligible for release after the withdrawal of a prior counsel. Reappointment within seven days must only occur "[i]f counsel is secured within the seven-day period but subsequently withdraws due to a conflict within that period." Thus, a class member is only entitled to reappointment within seven days of the withdrawal of a previously appointed attorney if the withdrawal was due to a conflict and was within seven days of the initial appearance.

Fifth, under the amended order, Oregon courts may set conditions of release to ensure the appearance of class members and the safety of the community. Oregon courts may also require class members to execute a "release agreement" before release. The failure to execute such an agreement "will result in the continued detention of the class member."

The State of Oregon sought an emergency stay of the district court order, which we granted. We then expedited this appeal. The majority votes to lift the stay and affirm the district court's order. So the district court's preliminary injunction now goes into effect.

II.

Lack of Jurisdiction

To begin, the district court simply lacked authority to issue this injunction. Under 28 U.S.C. § 2241, federal courts have no jurisdiction over state defendants unless the defendant's *custody* itself is illegal. Here, neither the district court nor the majority demonstrate how the alleged violation of the right to state-funded counsel *alone* renders pretrial custody unconstitutional. The district court also didn't examine whether we have authority to grant a class-wide remedy under habeas. And there's reason to question whether we do. Finally, the district court didn't consider whether habeas—which requires "custody"—can be prescribed prospectively to "future class members" who may one day be detained without appointed counsel. Such relief seems at odds with the plain text of § 2241.

All these reasons counsel against permitting the injunction to take effect.

A.

Federal habeas statutes are recognized as a grant of "jurisdiction" for courts "to inquire into violations of the United States Constitution." *See Carafas v. LaVallee*, 391 U.S. 234, 238 n.11 (1968); *see also Maleng v. Cook*, 490 U.S. 488, 494 (1989) (per curiam) (explaining that the issue of custody goes to the "subject-matter jurisdiction of the habeas court"); *Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist.*, 411 U.S. 345, 352 n.10 (1973) (determining that habeas jurisdiction "would not merely have [been] postponed . . . but would have [been] barred . . . altogether" without a finding of custody). Because § 2241 is a jurisdictional statute, this threshold question cannot be waived. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (noting that "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived" (simplified)). To that end, it is our duty to ensure that we possess the authority to render a judgment under § 2241. We lack that authority here.

Section 2241 commands that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Put simply, § 2241(c)(3) provides a mechanism to challenge the unlawfulness of one's "custody." Naturally, then, "an action sounds in habeas [under § 2241(c)(3)] . . . *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Pinson v. Carvajal*, 69 F.4th 1059, 1071 (9th Cir. 2023) (dismissing a habeas petition under § 2241 for lack of subject-matter jurisdiction) (simplified). Claims that, if successful, don't demand "the invalidity of the confinement" fall outside "the core of habeas corpus." *Id*. In other words, "the relevant question is whether, based on the allegations in

the petition, release is *legally required*." *Id.* at 1072. It is one's *custody* that must be unlawful—not any other violation.

Whether we possess habeas jurisdiction here boils down to a simple question—if Petitioners' claims succeed, does it make their custody illegal so that their release is mandatory? If custody itself is not unconstitutional, the claim cannot be vindicated under § 2241 and we lack jurisdiction. *See id.* ("[T]he proper analytical tack when determining whether actions . . . are at the core of habeas is to consider *why* release from confinement is necessary to remedy the underlying alleged violation.").

A bit of background on the Sixth Amendment illustrates how release from jail isn't a proper remedy here. As a general principle, "remedies should be tailored to the injury suffered from the constitutional violation" but "should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Practically, that approach "tailor[s] relief . . . to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365; *see also Rushen v. Spain*, 464 U.S. 114, 119–20 (1983) ("The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred"). In plain terms, the general rule is—cure the constitutional defect and inflict no further harm.

Before today, our practice generally followed that guidance from the Supreme Court. We constructed remedies for a violation of the right to counsel to include either suppressing evidence obtained from the violation or, in extreme cases, vacating one's conviction. *See, e.g.*, *Cahill v. Rushen*, 678 F.2d 791, 795–96 (9th Cir. 1982) (suppressing evidence obtained in violation of the right to counsel);

United States v. Kimball, 884 F.2d 1274, 1280 (9th Cir. 1989) (same); *United States v. Forrester*, 512 F.3d 500, 509 (9th Cir. 2008) (vacating a conviction following a violation of the right to counsel).

Immediate release from jail, to my knowledge, has *never* been a remedy for a violation of the right to appointed counsel. And there's good reason for that. According to the Supreme Court, the right of state-funded counsel is to ensure that "the accused . . . need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967). So the right's purpose is to guarantee a meaningful defense to prosecution—not merely to assist with any independent interest of the defendant's, such as avoiding pretrial detention. *See Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 216 (2008) (Alito, J., concurring) ("[D]efense at trial, not defense in relation to other objectives" is protected by the right.). That's why the Court has limited the right to "critical" pretrial stages that "preserve the defendant's basic right to a fair trial." *Wade*, 388 U.S. at 227. Without more, a violation of the right to appointed counsel does not render pretrial detention illegal. In other words, the right is concerned with the ultimate merits of the criminal prosecution—not securing every possible advantage for a defendant.

In attempting to refute this point, the majority unwittingly proves it. The majority cites articles discussing the release of prisoners from the State of Florida post-*Gideon*. But the majority misses the most basic fact of those articles—each of those prisoners had already been *convicted*. *See, e.g.*, Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright*, 33 Stetson L. Rev. 181, 222 (2003)

("[M]ore than 4,500 of the 8,000 inmates in Florida could be released and retried, or released without retrial. Of these, 4,065 had been *convicted* after pleading guilty while 477 had been *convicted* after going to trial.") (emphases added).

In this case, habeas is even more inapplicable because the alleged Sixth Amendment violation didn't cause Petitioners' detention. The pretrial detention determination is generally made at arraignment while Petitioners were represented by counsel. *See* Or. Rev. Stat. § 135.245. So nothing about delaying the appointment of state-funded counsel made the pretrial detention unconstitutional. Given that the purported constitutional violation didn't lead to pretrial detention, the remedy is not release from "custody"—taking this case out of the scope of § 2241. Indeed, releasing a defendant from custody here would have no effect at all on the lack of appointed counsel.

Complicating things even more, the district court didn't order release from *custody*, in the habeas sense, it only ordered release from *jail*. The district court still orders that Petitioners must submit to conditions of release that ensure their appearance in court and the safety of the community. And the district court directed that the "[f]ailure of the class member to execute [a] release agreement will result in the continued detention of the class member." But these conditions often amount to "custody" for purposes of habeas. *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (explaining that a prisoner's conditions of release were "enough to keep him in the 'custody'" of a parole board for habeas purposes because they "significantly restrain [his] liberty to do those things which in this country free men are entitled to do"); *Hensley*, 411 U.S. at 349 ("[A] substantial number of courts, perhaps a majority, have concluded that a person released on bail or on his own recognizance may be

'in custody' within the meaning of the statute. . . . [W]e conclude that this . . . reflects the sounder view."). Thus, even the district court seemingly did not think that the Sixth Amendment violation here results in "custody in violation of the Constitution"—the requirement for habeas relief under § 2241. If it did, it should have ordered release from *all* custody, not just release from jail.

The confusion over habeas's requirement of illegal custody is also apparent from the district court's refusal to order *any* relief for Petitioners charged with murder or aggravated murder, even though they suffer the same alleged violation of the right to counsel. The Sixth Amendment right to counsel does not depend on the type of felony charged. But the district court and the majority mysteriously exempt those charged with murder and aggravated murder from the district court's seven-day rule. This is not how the Sixth Amendment works. True, Oregon may law forbid their pretrial release under some conditions, *see* Or. Const., Art. I, § 43(1)(b); Or. Rev. Stat. § 135.240(2), (4), but that feature has nothing to do with the Sixth Amendment analysis. Indeed, the same Oregon law provides that those charged with violent felonies are not bailable under certain conditions. *See* Or. Const., Art. I, § 43(1)(b); Or. Rev. Stat. § 135.240(2), (4). So it makes no sense to rely on state law here. Either the Sixth Amendment violation doesn't render custody illegal, meaning that *no* defendants should be released. Or it does, meaning that *all* defendants should be released. There's no room for picking and choosing who deserves a constitutional right.

The bottom line—if the district court and majority were correct that Petitioners' Sixth Amendment rights had been violated and that release from custody were the mandatory remedy, then there would be no valid basis to deprive *some*

defendants of their rights. The carve-out of one particularly eye-catching group of defendants only cements the irregularity of the injunction.

B.

We also should have questioned whether this habeas petition can be pursued in a class action. Whether habeas relief is available through class action remains an open question at the Supreme Court. *See Jennings*, 583 U.S. at 324 n.7 (Thomas, J., concurring) ("This Court has never addressed whether habeas relief can be pursued in a class action. I take no position on that issue here." (simplified)). At least in the immigration-detention context, the Supreme Court has instructed our court to "consider" whether a Rule 23 class action is an "appropriate vehicle" for providing habeas relief in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *See id.* at 313 (majority opinion). *Wal-Mart Stores* tells us that some class actions may only apply "when a single injunction or declaratory judgment would provide relief to each member of the class." 564 U.S. at 360.

True, some of our older decisions have suggested a habeas petition can be treated as a class action. *See Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir. 1972); *Cox v. McCarthy,* 829 F.2d 800, 804 (9th Cir.1987); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010), *abrogation recognized by Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1199–1201 (9th Cir. 2022). But given more recent changes in the legal landscape regarding class actions, I question whether these cases remain good law. Further, the Supreme Court's long history of reversing our immigration-detention class-action cases suggests that our prior views may be an outlier. *See, e.g.*, *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022) (reversing *Aleman Gonzalez v. Barr*, 955 F.3d 762

(9th Cir. 2020)); *Jennings*, 583 U.S. at 281 (reversing *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015)).

But even if a habeas petition could be grounded in a class action, other questions remain—like, what standards must we use? Whether the class-action standards of Rule 23 of the Federal Rules of Civil Procedure apply in habeas corpus proceedings "has engendered considerable debate." *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969) (simplified). Our own court has questioned whether "Rule 23 might be technically inapplicable to habeas corpus proceedings." *Ali v. Ashcroft*, 346 F.3d 873, 891 (9th Cir. 2003) (simplified), *opinion withdrawn on other grounds by Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). While non-precedential, *Ali* also explained that an "analogous procedure by reference to Rule 23" could be applied. *Id.* (simplified). Two circuits have adopted the view that federal courts must create new standards for class actions brought under habeas. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974); *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 220–21 (7th Cir. 1976).

Regardless of whether Rule 23 directly applies, any habeas class action will need to rely on similar considerations. And those factors are challenging when applied to habeas corpus proceedings. For example, Rule 23(a) delineates four prerequisites for class certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a). While numerosity might be easily met, commonality and typicality requirements are a significant wrinkle when applied to habeas proceedings.

Consider a due process challenge. "[D]ue process is flexible" and so a Due Process Clause claim "calls for such

procedural protections as the particular situation demands." *Jennings*, 583 U.S. at 314 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Because of this, a "class action litigated on common facts" might not be "an appropriate way to resolve . . . Due Process Clause claims." *Id.* After all, resolving Due Process claims for hundreds of individuals is unlikely to be resolved "in one stroke." *Wal-Mart Stores*, 564 U.S. at 351.

The Solicitor General recently raised related issues with class actions in the Eighth Amendment context. *See City of Grants Pass, Ore. v. Johnson*, No. 23-175, Brief for the United States as Amicus Curiae 31 (Mar. 4, 2024). The Solicitor General cited approvingly the concern that "the need for particularized inquiries should have precluded the certification of a class because respondents cannot satisfy Rule 23(a)'s commonality requirement or Rule 23(b)(2)'s requirement that the challenged conduct must be 'such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them[.]" *Id*. (quoting *Wal-Mart Stores*, 564 U.S. at 360). The Solicitor General then argued that the case should be vacated and remanded to "reconsider all the relevant issues in the case—including class certification." *Id*. at 32.

Similar concerns abound here. Criminal proceedings all have different moving pieces; they proceed at different paces for different reasons. For some defendants, delay may be the goal; for others, speed is a litigation advantage. Thus, to provide a one-size-fits-all remedy to a problem with individualized effects makes little sense. Neither the district court nor the majority grapple with these concerns. Ultimately, then, it is unclear whether and how a class action would even apply in a habeas corpus proceeding.

C.

There's an even bigger problem here—it's unlikely that habeas relief can be granted *prospectively* to individuals who are not yet even in custody. As stated earlier, the habeas provision invoked by Petitioners "shall not extend" except to "a prisoner" who "is in custody." 28 U.S.C. § 2241(c)(3). But the district court's injunction applies to "any future class member" or any individual who "will be . . . physically housed in a jail in Oregon." So it seems that the district court has afforded habeas relief to parties who are neither "prisoner[s]" nor "in custody" now, which conflicts with the plain language of § 2241.

While the Supreme Court has instructed that prisoners may apply for federal habeas relief for a sentence they have not yet served, *see Peyton v. Rowe*, 391 U.S. 54 (1968), or for a sentence they previously served if they are in custody for a consecutive sentence, *see Garlotte v. Fordice*, 515 U.S. 39 (1995), the key factor is that there must be some sort of current *custody* that the prisoner will experience. By opening the injunction to "any future class member," we expand habeas relief even to individuals who have yet to be arrested. Thus, if § 2241 applies, the district court's sweeping injunction may have exceeded its statutory scope. *See Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) ("Did the *Preap* court overstep this limit by granting injunctive relief for a class of aliens that includes some who have not yet faced—but merely 'will face'—mandatory detention? The District Court said no, but we need not decide.").

III.

Younger Abstention

That leads to *Younger* abstention. This petition shouldn't have progressed this far because we should have ordered abstention from the start.

The *Younger* doctrine is an exception to the general rule that federal courts have a duty to "hear and decide" cases falling within their jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). *Younger* reflects the importance of federalism in our constitutional system. It requires us to recognize "the fact that the entire country is made up of a Union of separate state governments" and to respect the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. In other words, *Younger* commands us to exercise some humility and acknowledge that, despite our jurisdiction, considerations more important than our desire to correct perceived wrongs require us to abstain and allow the state courts to manage their own proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (noting that *Younger* helps protect "the State's interests in the proceeding" and "avoid[s] unwarranted determination of federal constitutional questions" (simplified)).

Younger applies in various circumstances where there are pending state proceedings parallel to an action for federal equitable relief. *See Sprint* at 77–78 (collecting cases). The quintessential application of the doctrine, however, is to avoid intervening in pending state criminal proceedings. As *Younger* itself said, courts "should not act to restrain a criminal prosecution, when the moving party has an

adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43–44.

Unfortunately, we fail to follow *Younger* here.

A.

We apply a four-factor test to determine whether abstention under *Younger* is appropriate. *Younger* applies *"*when: (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding." *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018) (simplified).

This habeas petition meets each factor—

The first two factors are easily satisfied. Indeed, no one contests them. Petitioners here seek interference with dozens, if not hundreds, of ongoing criminal prosecutions. And the prosecution of criminal law is the quintessential state interest. *See Judice v. Vail*, 430 U.S. 327, 335 (1977) (recognizing the importance of "the State's interest in the enforcement of its criminal laws").

The third factor is also met. For this factor, we look to whether a procedural bar to the presentation of a federal constitutional claim exists. *Commc'ns Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1020 (9th Cir. 1999). We "assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co.*, 481 U.S. at 15. Here, nothing disturbs this presumption. No procedural bar prevents Petitioners from asserting their federal right-to-counsel claim in state court. Indeed, we have an example in

the record. Oregon asked us to take judicial notice of an order from the Circuit Court of Multnomah County granting relief for a Sixth Amendment violation nearly identical to the ones asserted in this petition. *See State v. Cutting*, No. 21CR06122, slip op. 1–3 (Or. Cir. Ct. Mar. 7, 2022). The state court concluded that the State had violated the defendant's Sixth Amendment rights by failing to provide counsel for any proceedings after his arraignment and gave the State 25 days to appoint counsel. *Id.* If the State failed to do so, the court made clear that it would dismiss the defendant's charges without prejudice. *Id.* So it's clear that Oregon courts not only take the constitutional rights of criminal defendants seriously, but are able and willing to grant appropriate relief.

The fourth factor also favors abstention. First, in their habeas petition, Petitioners expressly asked the district court to dismiss their charges. Such action would, of course, enjoin state proceedings. But even more, the district court's sweeping injunction constitutes a pervasive and continuous intrusion into ongoing state prosecutions. *See O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) (observing that an injunction which requires "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint" recognized by *Younger*).

In *O'Shea*, the Court said that *Younger* applies to "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials," even if it didn't enjoin any criminal prosecution. *Id*. at 500. The purpose of abstention, the Court said, is to avoid "interference in the state criminal process by means of continuous or piecemeal interruptions of the state

proceedings by litigation in the federal courts." *Id*. So the Court reversed an injunction on abstention grounds because it "would disrupt the normal course of proceedings in the state courts" and "it would require for its enforcement the continuous supervision by the federal court over the conduct of the [state courts] in the course of future criminal trial proceedings involving any of the members of the [defendants'] broadly defined class." *Id*. at 501. The Court also worried how an injunction, which "impose[s] continuing obligations of compliance," would be enforced against state courts and decried a regime of constant "monitoring of the operation of state court functions." *Id*. So abstention may be required even when a challenged injunction doesn't directly enjoin the ongoing prosecution of criminal defendants.

O'Shea should control here. While Petitioners' prosecutions may proceed in some form, the district court injunction represents a "continuous . . . interruption[]" of those proceedings in general and of state pretrial-detention decisions in particular. *Id*. at 500. First, it would require constant monitoring of Oregon courts for compliance. Second, it would need ongoing intrusion and refinement by the district court. For example, it doesn't apply when a defendant "fire[s]" his state-appointed counsel, but further proceedings would be necessary to determine when a "firing" has occurred. The simple reality is that the injunction calls for the ongoing federal management of state criminal prosecutions—the quintessential *Younger* problem.

Given the satisfaction of these four factors, there's no question that *Younger* abstention applies here.

B.

Despite this, the majority presses ahead with our interference with Oregon's courts based on a dubious expansion of the extraordinary-circumstances exception to *Younger*. The extraordinary-circumstances exception asks whether a case is so extreme as to justify displacement of our foundational principles of federalism. The Supreme Court has made clear that the exception requires "an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Kugler v. Helfant*, 421 U.S. 117, 125 (1975). Outside of cases of proven harassment or prosecutions undertaken in bad faith, the exception may only apply in "'extraordinary circumstances' that might constitute great, immediate, and irreparable harm." *Moore v. Sims*, 442 U.S. 415, 433 (1979).

With no allegation of bad faith or harassment, only "irreparable harm" comes into play here. But that doesn't fit either. The district court concluded that Petitioners have established an irreparable injury because they are "being held in custody without counsel" in violation of the Sixth and Fourteenth Amendments. But the existence of a constitutional violation isn't enough to override *Younger*. After all, constitutional violations are at issue in many abstention cases. "[W]ithout some claim that a prosecution affects federally protected rights, there would be no basis for federal jurisdiction in the first place, and thus nothing from which to abstain." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 738 (9th Cir. 2020).

Rather, the question is whether the constitutional injury could be remedied outside of this habeas proceeding. Here, the district court seemed to conflate the injury from the

alleged violation of the Sixth and Fourteenth Amendments with the injury of being detained pretrial. But that doesn't make sense because neither alleged constitutional deprivation *caused* the pretrial custody here. Recall that the initial detention decision is usually made at arraignment when Petitioners are represented by counsel. So the injury of pretrial detention doesn't invariably flow from the lack of appointed counsel. Even assuming a constitutional violation occurs later, it doesn't necessarily cause Petitioners' pretrial detention as a class. Thus, the injunction releasing defendants with a seven-day gap in court-appointed representation is a remedy unconnected from the claimed irreparable harm.

As discussed above, the Sixth Amendment isn't a protection against pretrial detention without counsel. Instead, the Amendment entitles a defendant to state-funded representation at critical stages of the trial—that is, stages that determine the merits of the criminal prosecution. So the harm the Sixth Amendment protects against is a conviction obtained through uncounseled critical stages. Pretrial custody is separate. There's no *independent* Sixth Amendment protection against being held in pretrial custody without counsel. Indeed, the Supreme Court has *never* required appointed counsel at a pretrial detention proceeding. *See Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) ("To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present [a] high probability of substantial harm[.]").

Thus, if Petitioners are left without appointed counsel at a critical stage, the right's vindication can come after trial through vacatur of the conviction because any violation "bears directly on the framework within which the trial

proceeds, . . .—or indeed on whether it proceeds at all." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (simplified). Think of it another way. If a defendant is made to go to trial in violation of the right to counsel, it is not the trial itself, but the lack of counsel during critical stages that constitutes the injury. So any alleged Sixth Amendment injury isn't irreparable because redoing the relevant stage (or perhaps the whole criminal proceeding) repairs the harm. *See, e.g.*, *Forrester*, 512 F.3d at 509 (reversing a conviction because of right-to-counsel violation). Thus, the claimed Sixth Amendment violation here can be remedied in later state proceedings or in a post-conviction federal habeas proceeding. The same goes for any claimed substantive due process violation.

And *Page v. King*, 932 F.3d 898 (9th Cir. 2019), which the district court relied on, shows why its *Younger* analysis was off. In *Page*, a defendant accused of rape alleged that his due process rights were violated because the State detained him based on a "stale and scientifically invalid probable cause determination." 932 F.3d at 904. We concluded that *Younger* abstention was inappropriate because the claimed due process violation directly led to his "complete loss of liberty" pretrial which is "irretrievable" regardless of the outcome of trial. *Id*. So, in that case, the defendant alleged that the constitutional violation *directly* caused the pretrial detention. Here, we have no such scenario. In fact, each Petitioner was represented at arraignment when the initial detention decision was made. No direct link can be drawn between the constitutional violation and the detention and so *Page* doesn't support the *Younger* exception here.

Likewise, *Arevalo*, which the majority focuses on, doesn't show "extraordinary circumstances" either. In that

case, the State conceded that Arevalo's federal constitutional rights to equal protection and due process were violated when the state court ordered him detained on $1 million bond without considering his ability to pay and nonmonetary alternatives to bail. *See Arevalo*, 882 F.3d at 764–65. Despite the concession, the district court sua sponte applied *Younger* abstention. *Id*. We reversed under the "irreparable harm exception." *Id.* at 766. We observed that "[d]eprivation of physical liberty by detention" could constitute an "irreparable harm." *Id*. at 767. But in that case, unlike this one, the constitutional violation directly caused the pretrial detention. We noted that "the petitioner has been incarcerated for over six months without a constitutionally adequate bail hearing." *Id*. But here, Petitioners—as a class—haven't shown that any Sixth Amendment or Fourteenth Amendment violation directly caused their pretrial detention. Nor have they shown—as a class—that those rights can't be vindicated in state proceedings or later federal proceedings.

In sum, the massive federal seizure of Oregon's criminal justice apparatus is precisely the kind of action barred by *Younger*. We make a mistake in shrugging off this significant federalism concern.

IV.

Likelihood of Success on the Merits

Even setting aside the myriad of procedural hurdles barring the district court's action here, no injunction was appropriate because Petitioners cannot show the requisite likelihood of success on the merits. In our circuit, this is not only the "most important" factor, but also a dispositive one. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("[W]hen a plaintiff has failed to show the

likelihood of success on the merits, we need not consider the remaining three [*Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, (2008) elements for a preliminary injunction]." (simplified)).

And Petitioners' burden was even higher here because the district court imposed a "mandatory injunction" requiring Oregon state courts to affirmatively release all criminal defendants meeting the court's seven-day test. *Id*. (defining a mandatory injunction as one that "orders a responsible party to take action"—not simply maintaining the status quo (simplified)). Thus, to justify this injunction, the "law and facts [must] *clearly favor* [Petitioners'] position"; it is "simply" not enough that they are "likely to succeed." *Id*. (simplified). And we never approve mandatory injunctions in "doubtful cases." *Id*. (simplified). Thus, the injunction here must meet a "doubly demanding" standard because the remedy imposed by the district court is "particularly disfavored." *See id.* (simplified). The majority fails to live up to this standard in uncritically deferring to the district court's chosen injunction.

So while we normally grant some deference in reviewing preliminary injunctions, we don't defer when the district court gets the law wrong—and we especially don't defer when the district court orders a mandatory injunction based on an erroneous view of the law. And here, neither the Sixth Amendment nor the Fourteenth Amendment *clearly* justifies the district court's sweeping, one-size-fits-all jailbreak order.

A.

Sixth Amendment Right to Counsel

Begin with the Sixth Amendment. To refresh, the district court injunction applies to any individual who is or will be jailed in the State of Oregon. The district court concluded that those individuals suffer or will suffer a violation of their Sixth Amendment right to counsel if not appointed government-funded counsel within seven days. It then formulated a rule—Oregon must provide state-funded counsel to every detained defendant within seven days of the initial appearance (or within seven days of the withdrawal of a previously appointed attorney if the withdrawal was due to a conflict and was within the first seven days), or else release the defendant from jail.

Nothing in the text nor history of the Sixth Amendment supports the seven-day rule. And the Supreme Court has been clear that the Sixth Amendment is violated only when a defendant fails to have been appointed counsel at a "critical stage" of the criminal proceedings. Thus, mandating appointment of state-funded counsel within seven days disregards the established framework for resolving Sixth Amendment questions.

i.

Let's start with the basics. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const., amend. VI. Thus, by its plain text, the Sixth Amendment is concerned with counsel's assistance for "defence" against "criminal prosecutions."

As an original matter, the Sixth Amendment right was largely understood to encompass a right to employ counsel,

not a guarantee of counsel at government expense. *See Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting); *see also Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting). Indeed, the text of the Amendment says nothing about government-funded counsel. Instead, there was a long history of defendant self-representation or, when necessary, ad hoc court appointment of counsel in difficult cases. W. Beaney, The Right to Counsel in American Courts 8–31, 226 (1955).

It wasn't until the 1930s that the Court suggested that a right to government-appointed counsel (rooted in the Fourteenth Amendment's Due Process Clause, not the Sixth Amendment) might apply in capital cases, and even then, only when the defendant was unable to "mak[e] his own defense because of ignorance, feeble-mindedness, illiteracy, or the like." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). The Court refurbished this into a Sixth Amendment right to government-appointed and government-funded counsel in all federal criminal cases during the New Deal. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938). In 1963, the Court then incorporated the right against the States via the Fourteenth Amendment in *Gideon*. There, the Court reasoned that the average individual "[l]eft without the aid of counsel . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Gideon*, 372 U.S. at 345 (simplified). Thus, the right to government-funded counsel, now re-anchored in the Sixth Amendment, is incorporated as a "fundamental right" in the Fourteenth Amendment—extending it to cover state criminal defendants as well. *Id.* at 343.

This judicial innovation ultimately required a framework for evaluating *when* state-funded counsel must be provided.

First, the Sixth Amendment right attaches with "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery*, 554 U.S. at 198 (simplified). Second, in any "postattachment proceedings" deemed a "critical stage," the defendant is guaranteed counsel. *Id.* at 212. Of course, "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* So the dispositive question under the Sixth Amendment is whether a defendant proceeds through a "critical stage" with effective counsel.

We must start then with what exactly constitutes a critical stage. They are proceedings where "the presence of [defense] counsel is necessary to preserve the defendant's basic right to a fair trial" such that the defendant is "as much entitled to such aid (of counsel) as at the trial itself." *Wade*, 388 U.S. at 227, 237 (simplified). In other words, they are "pretrial events that might appropriately be considered to be parts of the trial itself." *United States v. Ash*, 413 U.S. 300, 310 (1973). But just because a hearing is important in some larger sense does not render it a critical stage. Instead, "[t]he Court has identified as 'critical stages' those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Gerstein*, 420 U.S. at 122. What matters is "defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 554 U.S. at 216 (Alito, J., concurring); *see also id.* at 217 (explaining that critical stages consist of "certain pretrial events [that] may so prejudice the *outcome* of the defendant's prosecution that, as a practical matter, the defendant must be represented at those

events in order to enjoy genuinely effective assistance at trial" (emphasis added)).

Time and again, the Supreme Court's critical-stage analysis has centered on a proceeding's impact on the case's *resolution*—conviction and sentence—not on collateral issues unrelated to the defense against the merits of the prosecution. For example, four years after *Gideon*, the Court held that a pretrial lineup constitutes a critical stage because the "results might well settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 U.S. at 224. Then, a few years after that, the Court determined that a preliminary hearing was a critical stage because "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

More recently, when the Supreme Court has identified new critical stages, its focus remains on whether the stage affects the prosecution's merits. Take the ruling that a plea negotiation is a critical stage. *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). When the Court made that determination, it again focused on how the plea negotiation affects the outcome of a defendant's case. *Id*. The Court reasoned that nearly all federal and state convictions "are the result of guilty pleas," so "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* Because the plea bargain is "so central to the administration of the criminal justice system" and the ultimate result of the prosecution, the Court recognized it as a critical stage. *Id*. at 143. Even *Lafler v. Cooper,* which the majority cites extensively, was resolved based on the prejudice to the outcome of the defendant's prosecution. 566 U.S. 156, 165–66 (2012) (reasoning that

plea negotiations are a critical stage since "the trial [may not] cure[] the particular error at issue . . . the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence").

On the other hand, the Court has considered collateral considerations—of the kind not concerned with defense on the merits—insufficient to render an event a critical stage. Look at *Gerstein*. There, the Court explained that a pretrial hearing "addressed only to pretrial custody" did not constitute a critical stage. *Gerstein*, 420 U.S. at 123. While pretrial custody may impact the defendant, it is not considered "critical" because it doesn't "substantial[ly] harm" "the defendant's ability to assist in preparation of his defense." *Id.* at 122–23 (simplified). That an event will dramatically affect the defendant isn't enough to make the event a critical stage.

In evaluating these concerns, the Ninth Circuit considers three factors: whether "(1) failure to pursue strategies or remedies results in a loss of significant rights, (2) skilled counsel would be useful in helping the accused understand the legal confrontation, and (3) the proceeding tests the merits of the accused's case." *Hovey v. Ayers*, 458 F.3d 892, 901 (9th Cir. 2006) (simplified). In *Hovey*, we held that a proceeding didn't meet these critical-stage factors because there were (1) no "risk of permanent deprivation of any significant rights," (2) no "complex legal problems," and (3) no "test[ing] the merits of [the defendant's] case." *Id.* at 902. Like the Supreme Court, we've rejected many other pretrial hearings as "critical stages" over the years. *See, e.g.*, *United States v. Benford*, 574 F.3d 1228, 1232–33 (9th Cir. 2009) (pretrial status conference); *Hovey*, 458 F.3d at 901–02 (attorney competency hearing); *McNeal v. Adams*, 623

F.3d 1283, 1288–89 (9th Cir. 2010) (hearing on motion to compel DNA sample).

ii.

Under this framework, the Sixth Amendment right is concerned with adequate representation at critical stages. Whether a defendant is unrepresented during periods of the pretrial process, even prolonged periods, is not the dispositive question. Instead, the right is more nuanced, focusing on "*certain* steps before trial" that are seen as critical. *Frye*, 566 U.S. at 140 (emphasis added). Such an individualized assessment is not susceptible to blanket, brightline rules.

But here, the district court creates, and the majority endorses, a brightline rule that the Sixth Amendment right to counsel is violated by a seven-day gap without government-funded representation. The district court crafted this blanket rule based on the view that (1) bail hearings, which must be held within five days of the initial appearance, are a critical stage, and (2) counsel must have time to prepare for trial within 60 days. Neither ground justifies the injunction here.

Bail Hearings

Bail hearings are not a critical stage because they are not "pretrial events that might appropriately be considered to be parts of the trial itself." *Ash*, 413 U.S. at 310. To start, the Supreme Court has never said that bail hearings are critical stages. In fact, it has suggested the opposite in *Gerstein*. Because there wasn't a high probability that pretrial detention would impair a defendant's ability to prepare his defense, the Court said a hearing "addressed only to pretrial custody" was not a critical stage. *Gerstein*, 420 U.S. at 122–23.

And the district court was wrong to focus on a passing line from *Coleman* to suggest that the Court treats bail hearings as a critical stage. In that case, the Court said that a counsel could be useful at a "preliminary hearing" to "mak[e] effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Coleman*, 399 U.S. at 9. But the preliminary hearing involved multiple merits-based considerations, including "whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and, if so, to fix bail if the offense is bailable." *Id*. at 8. Indeed, the Court focused on how lawyers may assist on merits issues at a preliminary hearing, like (1) "expos[ing] fatal weaknesses in the State's case," (2) "fashion[ing] a vital impeachment tool for use in cross-examination of the State's witnesses at the trial," (3) "preserv[ing] testimony favorable to the accused," and (4) "prepar[ing] a proper defense to meet that case at the trial." *Id*. at 9. It was in this context that the Court mentioned psychiatric examinations and bail—almost as an afterthought. But the Court has said that a proceeding "addressed *only* to pretrial custody," *Gerstein*, 420 U.S. at 123 (emphasis added)—like bail hearings—is *not* a critical stage.

The Ninth Circuit's three-factor test confirms this conclusion. For the first factor, we've said that a proceeding is not a critical stage if there's no "risk of permanent deprivation of any significant rights during the hearing." *Hovey*, 458 F.3d at 902. Here, "[n]othing prevents" Petitioners from revisiting their pretrial detention status "at any point after the" bail hearing. *See id.* Oregon law doesn't forbid a new bail determination once counsel is appointed. Indeed, Oregon courts appear to regularly entertain renewed motions of release. *See, e.g.*, *State v. McDowell*, 279 P.3d

198, 200 (Or. 2012) (ordering trial court to grant defendant's motion for release); *In re Application of Haynes*, 619 P.2d 632, 635 (Or. 1980) (reviewing trial court's multiple denials of motions of release decided on the merits). So, the first factor does not support treating the hearing as a critical stage.

So too for the skilled-counsel factor. This factor fails to establish a critical stage when the "hearing d[oes] not involve a confrontation at which an attorney would be needed to help [the defendant] cope with complex legal problems," when a defendant's "interests [are not] subjected to a 'critical confrontation,'" or when there's no "power 'imbalance' in the face of the state's prosecuting authority." *Hovey*, 458 F.3d at 902 (simplified). Under Oregon law, the initial release decision is usually made at the initial appearance when defendants are represented by counsel—not at bail hearings. *See* Or. Rev. Stat. § 135.245(2)(a). Bail hearings only come into play after a magistrate first determines that "good cause" supports postponing the detention decision. *Id*. And then, the bail hearing must be held within five days. *Id*. § 135.245(7)(a). State law provides that defendants charged with only a few offenses—murder, aggravated murder, treason, or a violent felony—are allowed to be detained. *Id*. § 135.240. While a defendant may present evidence, the bail hearing "may not be used for purposes of discovery." *Id*. § 135.240(4)(d). At the bail hearing, the magistrate considers only limited information to determine whether release is appropriate. *See id.* § 135.230(7). While there may be good reason to have government-funded counsel at bail hearings, they do not present the kind of complex legal issues that would implicate this factor. *Cf. Gerstein*, 420 U.S. at 121 (reasoning that probable-cause bail hearings "do[] not require the fine resolution of conflicting evidence that a reasonable-doubt or

even a preponderance standard demands, and credibility determinations are seldom crucial").

Finally, bail hearings do not test the merits of the Petitioners' case. To test the merits, "[c]ritical stages [must] involve 'significant consequences' to the defendant's case." *See McNeal*, 623 F.3d at 1288 (quoting *Bell v. Cone*, 535 U.S. 685, 695–96 (2002)). The events that qualify "will determine whether a criminal conviction is possible," *see United States v. Bohn*, 890 F.2d 1079, 1081 (9th Cir. 1989), or the terms of the eventual sentence, *see, e.g.*, *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (holding that the cooperation period for a plea bargain was a critical stage because of the "profound effect a substantial assistance motion can have on a defendant's sentence"). A bail hearing is far from this kind of merits inquiry, focusing instead on mere releasability. No motions for dismissal. No inquiry into a privilege. No suppression of evidence. No profound effect on one's trial or sentence.

All told, under our precedent, nothing supports viewing bail hearings as critical stages in this expedited litigation. Other precedent supports this view. *See Fenner v. State*, 381 Md. 1, 24 (2004) (bail review hearing is not a critical stage); *Padgett v. State*, 590 P.2d 432, 436 (Alaska 1979) ("The setting of bail is likewise not an adversary confrontation wherein potential substantial prejudice to the defendant's basic right to a fair trial inheres, but rather is limited to the issue of interim confinement." (simplified)). And nothing explains why the district court chose seven days from initial appearance as the trigger point when the bail hearing must be held within five days of that appearance.

The only contrary evidence the majority could muster is a single line of dicta from a single out-of-circuit opinion. *See*

Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007). In that case, the Second Circuit held that a bail hearing implicates a defendant's *Fifth Amendment* right against self-incrimination. *Id*. at 170. As additional "support[for] the conclusion," the Second Circuit observed in passing that the bail hearing is "part of a criminal case" and "the Supreme Court found that a bail hearing is a 'critical stage of the State's criminal process.'" *Id*. at 172 (quoting *Coleman*, 399 U.S. at 10). But, as explained above, *Coleman* was not about bail hearings. It was about a "preliminary hearing," which encompasses much more than determining bail. *See Coleman*, 399 U.S. at 8, 10 (holding that a "preliminary hearing is a 'critical stage' of the State's criminal process" which includes "whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and, if so, to fix bail if the offense is bailable"). So the Second Circuit's Fifth Amendment ruling offers little support for the majority's Sixth Amendment conclusion. And to my knowledge, no other circuit decision supports the majority's novel ruling that bail hearings are a critical stage under the right to counsel.

Preparation for Trial and the Progression Through Critical Stages

The district court also justified its rule by reasoning that state law provides an unqualified right to trial in 60 days for defendants in custody. *See* Or. Rev. Stat. § 136.290. Thus, the district court concluded that counsel must be immediately appointed to allow for adequate preparation before that date. The majority adopts a different theory—it states that the lack of state-appointed counsel within seven days would "interfere[]" with the "progression to critical stages by delaying those stages" and by "prevent[ing] any meaningful advocacy." Maj. Op. 22. While preparation for,

and progression through, critical stages is important, the Sixth Amendment doesn't support a blanket seven-day rule. These rationales are wrong for several reasons.

First, the district court's state-law analysis is inaccurate. As Oregon points out, the 60-day statutory scheme applies only to select defendants and is inapplicable to many crimes. Or. Rev. Stat. § 136.295(1) (requirement does not apply to many violent felony cases). Nor is it unqualified; it may be extended for good cause, *id.* § 136.295(4), including when defense counsel is recently appointed or would have trouble preparing for trial within the deadline, *id.* § 136.295(4)(b)(C), (D). Finally, if the deadline arrives, the remedy is statutorily provided for: release from pretrial detention. *Id.* § 136.290(2). So the district court's focus on 60 days to generate a seven-day deadline makes little sense.

Second, both the district court and majority wrongly establish a bright-line rule that critical stages must quickly follow the attachment of the Sixth Amendment right. The Supreme Court has explained it is an "analytical mistake [to] assum[e] that attachment necessarily requires the occurrence or imminence of a critical stage." *Rothgery*, 554 U.S. at 212. Instead, determining whether a critical stage is reached must be made case-by-case. *See, e.g.*, *Benford*, 574 F.3d at 1233 ("We limit our holding to what happened (and what did not happen) in this case."); *Hovey*, 458 F.3d at 901 ("Based on the specific facts of this case, we conclude that the [hearing was not a critical stage].").

Criminal prosecutions do not proceed in a one-size-fits-all fashion. While I agree with the majority that the Sixth Amendment is not "a haphazard jack-in-the-box," Maj. Op. 25, neither is it a rigid cookie cutter—invoked by a mechanical calculation of dates. Some cases may proceed

slowly. In those cases—where critical stages may not occur until later in the proceedings—the seven-day rule is disconnected from a Sixth Amendment violation. Other cases proceed quite quickly. In those cases, it's easy to see how a critical stage could occur shortly after attachment. But even in those cases, nothing in the record supports the requirement of appointed counsel within seven days. While attorney preparation for the critical stages is required, *see Rothgery*, 554 U.S. at 212, it's a mistake to assume that preparation *must* start within seven days *in every case*.

If a delay in appointment does result in a critical stage without effective counsel, the Sixth Amendment provides for the remedy—vacatur of the conviction, a redo of the critical stage, or suppression of any evidence obtained. For example, the majority correctly lists several important duties counsel must undertake before trial, like investigating defenses and ensuring the defendant is competent to stand trial. But if counsel does not have adequate time to complete those tasks, those interests may be vindicated either *before* trial, by redoing the critical stage, or *after* trial, through vacatur of any conviction.

Third, the majority's belief that *any delay* in the "progression to critical stages" violates the Sixth Amendment puts us into uncharted constitutional territory, as the majority acknowledges. The majority blames Oregon for this unprecedented situation. But while the widespread delay in appointing counsel is extremely troubling, the Sixth Amendment is an individual right. By altering the Sixth Amendment analysis because of the large number of Petitioners involved, the majority transforms the right into a collective one.

Fourth, other constitutional and statutory grounds are more focused on preventing delays in prosecutions, such as the speedy-trial right. *See Doggett v. United States*, 505 U.S. 647, 651 (1992) (explaining the multi-factor test for evaluating whether delay between accusation and case resolution is unconstitutional). It is that Speedy Trial Clause which "[r]eflect[s] the concern that a presumptively innocent person should not languish under an unresolved charge," *Betterman v. Montana*, 578 U.S. 437, 443 (2016), not the right to counsel. As I've said elsewhere, "the text and history of the Speedy Trial Clause establish an enduring principle": "[a]t its core," the right "ensures that defendants are not locked up in jail indefinitely pending trial." *United States v. Olsen*, 21 F.4th 1036, 1058 (9th Cir. 2022) (Bumatay, J., concurring in the denial of rehearing en banc). Plus, the majority forgets that Oregon law expressly accounts for this concern—ordering the release of any defendant from custody if trial does not commence within 60 days after the time of arrest. Or. Rev. St. § 136.290. And so the majority raising the specter of "indefinite detention without counsel" is textbook straw-man alarmism—a position argued by no one and detached from the realities of our criminal-justice system. See Maj. Op. 26–27.

Fifth, neither the Supreme Court nor the Ninth Circuit has tackled the difficult task of setting a brightline rule for when the Sixth Amendment's right to counsel is violated under a delay theory. *See Rothgery,* 554 U.S. at 213 ("We do not decide whether the 6–month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this."); *Farrow v. Lipetzky*, 637 F. App'x 986, 988 (9th Cir. 2016) (unpublished) (remanding to resolve "how soon after the

Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant?"). But in one fell swoop, the majority devises a seven-day rule—on the shakiest of foundations.

Without developing any constitutional standards, the majority determines—for every State and federal district in the Ninth Circuit—that seven days may be set as the outer bound for the appointment of counsel. What evidence does the majority rely on to make this determination? Not much. While seven days may have Biblical significance, it doesn't have obvious constitutional relevance. The majority doesn't justify its holding based on constitutional text or history. It doesn't support its holding based on any statistics or other objective measures of criminal proceedings. And the majority makes this blanket rule without considering the varied resources, caseloads, and practices of the jurisdictions within the Ninth Circuit. While the majority proclaims it is only deferring to the district court's seven-day rule and not adopting one itself, because the seven-day deadline is justified by both the thinnest record and the broadest Sixth Amendment principles, the majority's rationale will apply *in every case*. Thus, the majority can't ignore that its seven-day rule will effectively become the law of the land in the Ninth Circuit.

Sixth, the injunction is both overinclusive and underinclusive of its Sixth Amendment rationale. As stated above, the injunction inexplicably leaves out those charged with aggravated murder and murder. But that's not all. Notice that, in the district court's amended order, only a Petitioner whose prior counsel has withdrawn within seven days of the initial appearance is eligible for release from jail. Under those terms, if a Petitioner's prior appointed counsel withdraws on the eighth day, then the Petitioner may not be

released over the failure to re-appoint counsel. But if any delay in "progression to critical stages" is a violation of the Sixth Amendment, it makes little sense to deny relief to Petitioners whose counsel withdraws later in the criminal proceedings—when it is *more likely* that a critical stage occurs. Thus, the injunction draws arbitrary lines—the hallmark of an abuse of discretion.

* * *

No one questions how problematic the situation is in Oregon. The Sixth Amendment guarantees Oregon defendants a right to appointed counsel. And the delays in appointments raised by Petitioners may very well lead to violation of the Sixth Amendment at some point. But we are not empowered to jettison Sixth Amendment precedent, dispense with the critical-stage analysis, and fashion a blanket remedy out of thin air. And there's simply no constitutional basis for the arbitrary choice of seven days. Given the shifting rationales for the rule and its haphazard application, it's hard to avoid the conclusion that we are just making it up as we go along. In the normal course, we would carefully consider whether a critical stage has occurred in an individual case and, if so, whether effective counsel was available. Only then would we begin to think of appropriate remedies.

B.

Fourteenth Amendment Due Process

Nor does the Fourteenth Amendment's Due Process Clause justify the injunction's jailbreak solution.

According to the district court, Petitioners' substantive due process rights are violated because they are detained pretrial without the appointment of counsel. It ruled that

Oregon disregards the "reliable process" guaranteed by the Fourteenth Amendment by requiring indigent defendants to proceed "without counsel while incarcerated." It justified its ruling based on substantive due process cases in *United States v. Salerno*, 481 U.S. 739, 755 (1987), and *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014) (en banc).

No court has extended substantive due process to the reaches that the district court would. In *Salerno*, the Court rejected the view that a bail law "violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial." 481 U.S. at 746. Any due process concern related to pretrial detention in that case was alleviated by the arrestee's right to "a prompt detention hearing" and by "the maximum length of pretrial detention" under federal speedy-trial protections. *Id.* at 747. Here, given that Petitioners were represented by counsel at arraignment and are protected by state and constitutional speedy-trial rights, *Salerno* shows that substantive due process isn't implicated.

Lopez-Valenzuela is similarly divorced from this case. There, Arizona categorically banned pretrial release for undocumented immigrants arrested for a wide range of felony offenses. 770 F.3d at 775. We held that such a regime violated immigrants' substantive due process rights because the law was not limited to only "extremely serious offenses" and arrestees were not afforded "an individualized determination of flight risk or dangerousness." *Id*. at 788, 791 (simplified). Once again, a delay in the appointment of state-funded counsel is nothing like a categorical detention law. As mentioned, Petitioners each received an individualized assessment at arraignment when they were represented by counsel.

Contrary to the district court's ruling, the Supreme Court has said that due process affords *lesser* protections than our modern Sixth Amendment jurisprudence when it comes to the assistance of counsel. Due process only "prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right." *Betts v. Brady*, 316 U.S. 455, 473 (1942). Indeed, "while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the [Fourteenth A]mendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.* While a fundamentally unfair conviction or denial of access to court offends due process, the Fourteenth Amendment has little to say about a delay in the appointment of state-funded counsel. And nothing supports a blanket seven-day rule under the Due Process Clause.

So the Fourteenth Amendment does not save the injunction.

V.

Balance of Interests

Finally, no injunction should have been issued because the balance of interests doesn't support the immediate release of criminal defendants when other remedies are potentially available. *See Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) (when the government opposes a preliminary injunction, the courts must consider "balance of equities and public interest" together).

A.

As a general principle, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (simplified). Indeed, "[w]e will not grant a preliminary injunction . . . unless those public interests outweigh other public interests that cut in favor of *not* issuing the injunction." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). Critically, "[a]n injunction must be narrowly tailored to remedy the specific harm shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (simplified).

It is true that courts must "not shrink from [their] duty to safeguard th[e] rights" guaranteed by the Constitution, *Tandon v. Newsom*, 992 F.3d 916, 939 (9th Cir. 2021) (Bumatay, J., dissenting in part), and that "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (simplified). But assuming a constitutional violation, the district court's remedy doesn't even rectify the alleged injury. After being released into Oregon's communities, no formerly detained criminal defendant will have been appointed counsel. So the injunction fails to vindicate the harms to Petitioners while ignoring the risks to the public. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 577 (2011) (Alito, J., dissenting) (describing the rearrest of thousands of prisoners for committing new crimes after a court ordered a cap on the number of inmates in the Philadelphia prison system).

Rather than acknowledge the problems with the injunction here, the majority categorically dismisses any

safety concerns as an unsupported "fear-mongering parade of horribles." Maj. Op. 36. But it is the majority that ignores the record in this regard. First, recall that only Oregon defendants who present a "danger of physical injury or sexual victimization" by clear and convincing evidence may be detained in the first place. Or. Rev. St. § 135.240. Second, consider just the ten named Petitioners here that will be *immediately* released into Oregon communities:

First there is Petitioner Richard Owens, Jr., who has been convicted of two felonies—one for prior assault with a firearm. Mr. Owens's current detention stems from a June 2023 incident, when he allegedly sped his vehicle down the road and in front of an eight-year-old's birthday party. When victims yelled at him to slow down, he got out of his car, pulled out a gun, told the victims to "[f]uck around and find out," and fired the gun into the air after speeding off.

Next is Petitioner Tyrik Dawkins, who has two prior drug-trafficking felony convictions, a contempt-of-court conviction from Pennsylvania, a prior domestic-violence arrest from Washington, and at least three restraining orders filed since 2020 by women whom he allegedly physically abused, sexually assaulted, or threatened to murder. What brings Mr. Dawkins to the Washington County jail? Four counts of rape in the first degree, four counts of sexual abuse in the first degree, and two counts of kidnapping in the first degree. This is aside from Mr. Dawkins's open 2021 rape investigation in Multnomah County, Oregon, for allegedly locking a victim in his hotel room, anally and orally sodomizing her for several hours, and threatening her with a firearm.

We have also Petitioner Leon Polaski, who is accused of strangling his girlfriend during an argument and then fleeing

Oregon to avoid prosecution; Petitioner Joshua James-Richards, who allegedly assaulted a police officer and who had already missed mandatory check-ins with Oregon's pretrial-release services; and lead Petitioner Walter Betschart, who was arrested for violating the terms of his previous release agreement and for violating his stalking order against his neighbor. Next to these defendants, Petitioner Timothy Wilson's two counts of public indecency seem banal.

And these are just the ten Petitioners who originated this lawsuit; it says nothing of the other 100 defendants who will also be released with the majority's order or the countless others who will be released on an ongoing basis.

B.

Even more serious, the district court failed to consider alternatives that were less drastic than simply letting all criminal defendants out of jail. As the district court conceded, its fashioned injunction was a "blunt instrument" and "somewhat arbitrary." That alone is an abuse of discretion.

And less-restrictive alternatives appear readily available. Take one remedy discussed at oral argument—a court order requiring each criminal defendant to have a new, counseled bail hearing. Such a remedy would have addressed the district court's belief that the bail hearing was a critical stage requiring appointed counsel without going further than necessary to resolve the issue. When asked about the viability of this remedy, Petitioners' counsel agreed that it was "certainly one way that the district court could have structured its injunction."

Yet another alternative was discussed at oral argument—directing the State to reconsider the limit on the number of criminal cases a public defense attorney can handle. Again, Petitioners' counsel was admirably honest with this potential solution: "My understanding of the crisis is that it was kicked off . . . by a change in the contracting system, and so [ordering state public defenders to take more cases] may solve the problem."

According to the majority, the district court apparently considered compelling members of the bar to represent indigent criminal defendants. But the district court rejected this option, as the majority concedes, because it feared that some lawyers might find it "kind of insulting." *But see Supreme Court of N.H. v. Piper*, 470 U.S. 274, 287 (1985) (noting that members of the bar "could be required to represent indigents"); *Powell*, 287 U.S. at 73 ("Attorneys are officers of the court, and are bound to render service when required by such an appointment [by a trial court]."). Even so, the fear of insulting lawyers pales in comparison to the burdens on the people of Oregon imposed by the immediate release of dozens of criminal defendants. And the majority's anecdote of one bad experience with one attorney doesn't justify acceding to this far-reaching injunction.

And finally, there's the majority's own proposed remedy, which it claims would fix the problem "overnight." Maj. Op. 39. To the majority, the problem is "simply" a matter of Oregon "paying appointed counsel a better wage." *Id*. If so, this would actually solve the lack of counsel without resorting to a judicial jailbreak. Ironically, the majority finally understands that its own solution would be an "extraordinary idea," *id.* at 38, yet it continues to call for the jailbreak solution, which pushes the envelope even more.

Unlike the district court's chosen remedy, all these alternatives would have more effectively and less restrictively remedied the alleged right-to-appointed-counsel violation. I do not opine on whether these alternatives are properly within the district court's authority; I raise them only to show the how ill-considered it was to blindly defer to the injunction here.

* * *

Given these issues, the balance of interests strongly disfavors this injunction.

VI.

As is obvious, the problems with the preliminary injunction here are significant. The majority brushes away these concerns—not by refuting them, but by claiming that they are merely "an ode to classic judicial overreach." Maj. Op. 39. While this dissent may raise difficult questions and it may be easier to skirt them, it is our duty to confront them. After all, we always have a duty to ensure that a district court has authority to order an injunction. We always have a duty to respect federalism and not unduly interfere with state proceedings. And we always have a duty to follow Supreme Court precedent. The majority ignores these concerns even though the injunction here doesn't even remedy the alleged constitutional violation. Under a proper understanding of the judicial role, we should have paused and thought through these issues before unleashing a sweeping and dangerous order on the people of Oregon. The public and the rule of law deserve better.

FINAL

REPORT

Maine Commission on Indigent Legal Services (MCILS) – An evaluation of MCILS's structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

Report No. SR-MCILS-19

November

2020

a report to the
Government Oversight Committee
from the
Office of Program Evaluation & Government Accountability
of the Maine State Legislature

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DANIELLE D. FOX
DIRECTOR

MAINE STATE LEGISLATURE
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

November 9, 2020

Sen. Justin M. Chenette, Chair
Rep. Anne-Marie Mastraccio, Chair
Members Government Oversight Committee

As directed by the 129th Legislature's Government Oversight Committee (GOC), and in accordance with the scope approved by the Committee, OPEGA has completed the first phase of a review of the Maine Commission on Indigent Legal Services (MCILS). The GOC, on January 10, 2020 directed OPEGA to expedite a review of 2 of the 5 evaluation areas listed in the project direction statement which can be found in Appendix A. OPEGA anticipated presenting this expedited report in April, but this was delayed due to the adjournment of the Legislature because of COVID 19. The project direction statement was approved on December 10, 2019. The two evaluation areas addressed in this report are the:

1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent; and
2. adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA would like to thank the management and staff of MCILS for their cooperation throughout this review.

In accordance with Title 3 §997 sub-§1, OPEGA provided MCILS an opportunity to review the report draft for the purposes of providing a formal agency comment to be included with this report. Their response can be found at the end of this report.

Sincerely,

Danielle D. Fox
Director, OPEGA

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Maine Commission on Indigent Legal Services - An evaluation of MCILS's structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

Part I. Introduction and Background

About the Maine Commission on Indigent Legal Services and OPEGA's evaluation

As written in statute, the purpose of the Maine Commission on Indigent Legal Services (MCILS) is to provide efficient, high quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. MCILS is comprised of the Commission itself and what we will refer to in this report as the "agency." The agency refers to the office staff who administer the day-to-day functions of MCILS and supports the workings of the Commission.

The Government Oversight Committee (GOC) directed OPEGA to expedite two elements of a broader evaluation of MCILS on January 10, 2020[1].

- Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

This evaluation will speak to each of those areas and what OPEGA found. Our review of the financial functions includes an examination of the systems used by the agency to process invoices, vouchers and payments and the methods employed by the agency to detect potential overbilling. OPEGA accessed from the agency, or independently obtained, MCILS's financial data to evaluate both the adequacy of those systems, and the methods employed by the staff, in administering the financial responsibilities of the agency. In Part II of this report, OPEGA details our analysis of the financial data and identifies issues with the effectiveness and efficiency of those systems and methods. The data obtained by OPEGA covers financial information from FY09 through FY19. Unless otherwise indicated, our analysis of the data applies to that time period. With regard to MCILS's oversight structure, OPEGA applied a more qualitative approach to evaluate that structure and identify weaknesses. Part III of this report discusses the overall weakness of this structure, by describing inadequate staffing levels and inefficient use of staff resources within the agency, resulting in a lack of appropriate support to facilitate the Commission's responsibility to establish and

[1] See appendix A for Project Direction Statement

monitor a system intended to ensure that efficient, high quality legal representation is provided to criminal defendants in the state (and others) who are determined to be indigent or partially indigent.

Overview of MCILS

Establishment of MCILS and organizational structure

MCILS was established as an independent commission in 2009. Prior to its establishment, indigent legal services were administered by and funded through the Judicial Branch. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. The Commission is made up of nine members (currently one vacancy), and is supported by an office staff of four, who administer the day-to-day operations of the agency. As stated in 4 MRSA §1801, the purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. Indigent defendants are those without sufficient means to retain the services of competent counsel. This representation is provided in accordance with requirements established in statute and in both the Constitution of the United States and the Constitution of Maine. Statute requires that the Commission work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner.

The purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases - 4 MRSA §1801.

In 2018, a change to 4 MRSA §1803 increased the number of members appointed to serve on the Commission from five to nine. Statute provides for certain representation on the Commission, including; one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are practicing attorneys providing indigent legal services.

As currently structured, MCILS agency staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time and remotely. The Office Associate position was vacant for over two years due to a hiring freeze – it was filled in June 2019.

For fiscal year 2020, the Legislature appropriated approximately $17.7 million for MCILS and $17.6 million for fiscal year 2021.

Representation for indigent or partially indigent

In Maine, representation for those who have been determined indigent, or partially indigent, is provided by attorneys in private practice, rather than state-employed public defense attorneys. The

Court assigns representation to a person by selecting an attorney from rosters maintained by MCILS, which are separated by region. In order to be listed on a roster, attorneys must have met basic requirements, along with certain ongoing requirements, such as continuing education. There are separate rosters for attorneys who provide specific types of services, or have a defense specialty, including homicide, sexual offenses, operating under the influence, domestic violence, serious violent felonies, and juvenile felony cases.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring and seeking representation. At some court locations, a financial screener may be available to collect information to be considered as part of that judicial determination. The screener meets with the defendant, gathers financial information, including the defendant's assets, income, and expenses and uses this information to provide a recommendation to the judge. The judge may determine that the person is indigent or partially indigent, in which case a rostered attorney will be assigned. A person determined partially indigent will receive an order to make payments making up a portion of the assigned attorney's fees.

Attorney and non-counsel payments

A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent and partially indigent clients.

A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent or partially indigent clients. Attorneys submit a voucher for payment to the agency via the electronic case management program, Defender Data. The Executive Director and Deputy Executive Director review these vouchers and approve attorney payments. The hourly rate for attorneys is currently $60, with maximum fee caps per type of case. Any services provided by vendors hired by the attorney, such as investigators, interpreters, and medical and psychological experts, are to be pre-approved by either the Executive Director or Deputy Executive Director. The vendor sends an invoice to the attorney, who verifies satisfactory completion of that work and then the invoice is submitted to the agency for processing. MCILS staff makes payment directly to the vendor.

Until June 30, 2019, an alternate method to pay for legal services was facilitated by MCILS in the form of a single, fixed-fee contract in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. This contract was not renewed and currently MCILS is not using this alternate method to pay for legal services.

Part II. Systems and Procedures Used by MCILS Staff to Process Payments and Expenditures Associated with Providing Legal Representation

Are the systems and procedures used by MCILS to process payments and expenditures associated with providing legal representation adequate?

OPEGA was tasked with determining the adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent. In this section, we identify several issues with the systems and procedures used by the agency to process attorney and non-attorney payments.

- **There are no established policies and procedures governing expenditures and payments - and MCILS expectations for billing practices may not be effectively communicated to attorneys.**
- **Data available to MCILS staff via Defender Data is unreliable and potentially misleading.**
- **Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness.**
- **Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.**
- **Audit or review procedures have not been established and current audit efforts used by MCILS are limited, inconsistent, and of limited scope, depth and effectiveness.**

Some of these issues associated with the agency's financial procedures appear to be linked to our assessment of the MCILS oversight structure discussed in Part III, where we describe the interconnectedness of inadequate agency staffing and poor functioning of the Commission. Had the agency been appropriately staffed and the Commission been more functional, it is possible that some of these financial procedure issues may have been mitigated. OPEGA notes, however, that due to the prioritization of the two questions (financial procedures and oversight structure), we did not conduct a full review including all of the evaluation scope areas outlined in the GOC's original project direction statement. Thus, OPEGA did not fully establish the root cause for all identified issues. Nonetheless, there appears to be a link between the poorly functioning organizational oversight structure, inadequate staffing, and inadequate financial procedures.

One of the primary drivers for this review were the issues noted in a report issued by the Sixth Amendment Center (6AC) in April 2019. Of particular concern were the number of annual hours

billed by rostered attorneys and MCILS's ability to identify such occurrences—which were later reported by the media as potential examples of overbilling and/or fraud. Appendix C of this report includes a comparison of the previously reported attorney billing analysis conducted by the 6AC to an analysis conducted by OPEGA, using data we independently obtained directly from the billing service provider. As described in the Appendix, the magnitude of the 6AC's finding appears to be overstated. However, the underlying issues—attorneys billing for large amounts of hours annually and MCILS's ability to identify when that happens—remain valid. These issues are explored in this Part and are discussed in detail in Issue 3.

Issue 1. There are no established policies and procedures governing expenditures and payments and - MCILS's expectations for billing practices may not be effectively communicated to attorneys.

The system used by MCILS staff to govern billing practices by rostered attorneys, and to guide the agency's approval of payments, is limited. Necessary policies and procedures that would outline expectations for attorneys submitting vouchers are sparse and are not in written form or otherwise codified. Of greater concern, the few standards that do exist in writing -the (established) fee schedule in agency rules which outline allowable and covered expenses -may not be effectively communicated to attorneys. A process, or system, reliant upon unwritten standards which are not widely communicated to attorneys—when agency review of payment submissions is governed by those standards—is one of potentially limited effectiveness.

Among the sparse procedures, OPEGA did observe some standards developed by the Executive Director and Deputy Executive Director, for their use in approving certain work event entries on attorney vouchers—procedures which they describe as "informal." Specifically, these unwritten standards guide staff's treatment of attorney voucher entries billing for the attorney's time spent on common, or generic, work activities. These standards include maximums for events, like opening a file – which is subject to a limit of .5 of one hour (the system records time in tenths of an hour). If an attorney submits a voucher that includes an entry for opening a file exceeding that amount of time, and the attorney provided no note to explain the duration of time taken to complete that activity, MCILS staff would presumably reject, or question, that entry on the voucher. It is important to note again that these billing standards are not established as policies and are otherwise unwritten. Based on the frequency with which OPEGA noted nonconformity with these informal standards, it also appears that these standards may not be communicated effectively to rostered attorneys.

Voucher-level review conducted by MCILS staff relies on information entered into Defender Data by attorneys who are provided only sparse, informal guidance on billing standards.

A fee schedule, governing payments to assigned counsel, written and formally established in agency rules (94-649 Chapter 301), states the hourly rate paid to attorneys (currently $60) and outlines which services are to be billed under that rate. The rules state that "routine office expenses are considered to be included in the hourly rate." Among the routine office expenses defined in the fee

schedule are office overhead, utilities, and secretarial services. MCILS staff has interpreted secretarial services to include most paralegal services[2]. In other words, if an attorney worked for 10 hours on a particular case and a paralegal also provided 2 hours of work in support, the attorney is only authorized to be paid for 10 hours of work (not twelve) in accordance with MCILS's stated interpretation of the rule. However, we identified multiple instances indicating a voucher was submitted billing for hours which included paralegal (or other non-counsel) time. This is important because that time, if approved, is paid at the attorney's hourly rate. While we do not know the extent to which this occurs, one attorney's perspective[3] indicated that the practice was common:

> *In speaking with a myriad of other MCILS rostered attorneys who also employ paralegals, it is clear we track our paralegals' time in similar fashion as others doing this work do. The general consensus seems to be that paralegal time for tasks that attorneys normally do, but a paralegal actually does the work in their stead, is billed under the attorney working on the case. Without exception, the six attorneys I spoke with unequivocally stated the time is captured and submitted with MCILS vouchers.*

As a result of the agency's lack of policies and procedures and limited communication of (informal, unwritten) billing standards, MCILS-rostered attorneys may not have an awareness, or an understanding, of what is expected of them, or what expenses are covered and allowable. Thus, these attorneys may be billing MCILS incorrectly. Monitoring efforts to detect and correct instances of incorrect attorney billings fall on MCILS. However, as discussed on page 8/Issue 3, issues with existing monitoring efforts implemented by MCILS make detection difficult.

Additionally, OPEGA notes that the absence of policies and procedures to govern expenditures and payments may have the potential to financially impact those who have been deemed partially indigent. Because partially indigent clients are ordered to contribute to counsel costs (up to the voucher cap), incorrect billings may change the actual amount the client is obligated to pay. MCILS staff has agreed that this situation is possible, but noted that it was probably a rare occurrence. Further, MCILS staff told us that such a situation would be potentially difficult to reconcile, and that they have no mechanism in place to check and correct this, if it does occur.

- Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non-counsel service providers.

[2] MCILS does allow for some paralegal services to be reimbursed at their own, lower rate in murder cases, but this is subject to preapproval and is to be separately invoiced and not billed through Defender Data.
[3] Letter from rostered attorney to MCILS Executive Director.

Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading.

With the lack of established and available policies and procedures to educate and guide attorneys towards compliance with MCILS's desired timekeeping and attorney voucher submission practices, the responsibility for ensuring the accuracy of billing entries and identifying instances of noncompliance, rests almost entirely upon agency staff. MCILS's Executive Director and Deputy Executive Director attempt to fulfill this responsibility primarily through their review of work events listed on attorney vouchers. During this review by agency staff, particular attention is paid to the duration of each event (such as phone conferences with clients, reviewing files, composing correspondence, etc.) and any notes associated with an event, or attached to the voucher generally, to explain the billed entries. Using the attorney voucher data OPEGA obtained, we reviewed these notes, as well as attorney responses to MCILS staff notifications (communicated via Defender Data system) that the attorney may have exceeded some limit or billed incorrectly. In this review, OPEGA noted multiple scenarios when the effectiveness and efficiency of MCILS's current review system (which triggers the notifications to attorneys) is impeded because of the quality and accuracy of the data in the Defender Data system, which they rely upon. The quality and accuracy of the data are unreliable and potentially misleading. OPEGA found that entries made by attorneys into the Defender Data System:

The quality and accuracy of the data impedes the effectiveness and efficiency of the agency's current system of attorney voucher review.

- captured or entered the hours of multiple attorneys under one attorney;
- batched multiple small work events into one large single-event entry;
- captured and entered work hours on the wrong date; and
- captured and entered the work hours of staff—particularly paralegals—under an attorney.

These scenarios all increase the amount of time recorded for a single, discrete entry. With the exception of incorrectly capturing and entering the work hours of staff (i.e. paralegal hours entered as attorney hours), the entirety of the aggregated time in these scenarios may reflect time appropriately spent on a case which would be otherwise allowable and billable to MCILS. However, due to the lack of consistency in how attorneys record time events and the prevalence of data entry errors, these scenarios may generate false-alarms requiring follow-up action from both MCILS staff and response from the billing attorney.

Additionally, the quality and accuracy of the data limits the potential effectiveness of any future, high-level, data analysis to potentially identify and flag outlying values. Such analysis may identify lengthy durations for particular work events, or days, or billings from one attorney that are inconsistent with those of attorneys performing similar work.

OPEGA also observed that when MCILS does identify and correct an incorrect value, only the voucher total is changed, leaving the incorrect value for the work event entry to remain in the data set. These incorrect values hinder the establishment of any baseline metrics, or standards, that could

be used to identify questionable attorney billings and any subsequent, overarching data analysis. Further, the incorrect values could also potentially hinder the use of more efficient techniques for review and audit by MCILS and by the Defender Data system itself. (See Issue 5).

It is important to note that these issues with the quality and accuracy of the data had an impact on the data analysis OPEGA performed for this review, and will ultimately limit our ability to identify specific attorneys for further audit work. (See page 21).

➢ The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:

- Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;
- work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and
- correct data errors within Defender Data at the time they are identified to improve the reliability of the data when used for data analysis or risk-based auditing.

Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.

There are multiple elements comprising the attorney voucher review process currently used by MCILS staff. Below, OPEGA identifies issues within those elements of the voucher review process which have the effect of limiting its overall efficiency and effectiveness.

Event-Level Voucher Review, Generally

Event-level voucher entries are individual entries on a voucher reporting time spent by an attorney on a case-related activity (reviewing discovery, preparing email, phone conversation).

Event-level voucher review has been described as representing a significant portion of both the MCILS Executive Director and Deputy Executive Director's daily work hours. This time-consuming effort purportedly involves manual review of all event-level entries on each attorney voucher (typically one per case). Event-level entries, typically reported in tenths of an hour, include things like: reviewing discovery; preparing email; and phone correspondence. Even accounting for the number of relatively simple vouchers submitted by attorneys billing for serving as lawyer of the day, or resource counsel[4], (14.4% of total vouchers), event-level voucher review appears to be a significant amount of work. The average annual number of vouchers paid by the agency from FY10 through FY19 was just over 28,000, containing roughly 450,000 individual events to be reviewed.

[4] Mentoring, supervision and evaluation of private assigned counsel providing indigent legal services is described in further detail on page 28.

This large number of vouchers (and events) reviewed calls into question, both the amount of staff time available for this work and the thoroughness of the review conducted by staff. OPEGA analyzed the number of vouchers approved by a single staff member in a day over this period. We found that in 36.7% of the days in which a staff member was approving vouchers, over 100 vouchers were approved – allowing less than four minutes and forty-eight seconds to review each voucher[5]. Table 1 lists several ranges of approvals completed by a single approver in one day, from 100 or less to 601 or more, and indicates how many times (days) approvals within each range occurred. Table 2 provides time per voucher reference points to better illustrate the time potentially available in a day for a single reviewer to review and approve various numbers of vouchers. Of particular interest were the eleven days from FY10 through FY19 in which an approver approved more than 400 vouchers in a day. Those occasions, however, as explained by the agency and preliminarily confirmed by OPEGA, were largely due to the availability of funds and do not accurately reflect time spent reviewing and approving those vouchers. On these occasions, the vouchers were reviewed and would have otherwise been approved and paid if funding were available at the time. Instead, the approved vouchers accumulated pending an appropriation and then later were approved simultaneously when the funds became available.

On almost 37% of the days in which a staff person was approving vouchers, they reviewed more than 100 vouchers – allowing less than 5 minutes to review each voucher.

Table 1: Number of Vouchers Approved by Single Approver in a Day		
Number of Vouchers Approved	Number of Days	Percent of Total
601 or more	4	0.1%
501 to 600	5	0.2%
401 to 500	2	0.1%
301 to 400	15	0.5%
201 to 300	185	5.6%
101 to 200	1,010	30.4%
100 or less	2,103	63.3%
Total	3,324	100.0%
Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.		

Table 2: Single Approver Time Per Voucher Reference Points	
Number of Vouchers	Time Per Voucher*
600	48s
500	58s
400	1m 12s
300	1m 36s
200	2m 24s
100	4m 48s
*Assuming an entire, eight-hour, work day spent only reviewing and approving vouchers.	

[5] Based on a full, eight-hour, work day spent only reviewing and approving vouchers.

Defender Data Entries and Identifying Outlying Values

Despite the large number of vouchers and the significant staff burden associated with voucher review, neither the agency, nor the Defender Data system itself, appear to make effective use of technology for preventive controls against data entry errors. We noted that Defender Data will generate a flag alerting a billing attorney when an entry exceeds an established maximum voucher fee by case type (such as $3,000 for Class A crime) and then prompt a potential correction and/or addition of a note prior to final submission of the attorney voucher. However, we observed no other data entry controls preventing, or limiting, the input of values (particularly durations of events). Although the agency has some informal maximums (.5 of an hour for opening a file) and some values that, if included on a voucher would be considered questionable, the Defender Data system is not being utilized as a control by rejecting those entries or generating a flag prompting staff to follow up.

Our analysis of data from 2010 - 2019 found nearly 110,000 outlying values[6] across eight selected types of timekeeping events (such as opening or closing a file) with some appearing far beyond reason (such as 30 hours to prepare an email or a 20-hour phone call with a client). Most of the identified outlying values (81.4%) were either:

- flagged by MCILS and later corrected by the attorney;
- explained in the system by a note added to the timekeeping event entry;
- explained in the system by a note or by one attached to the voucher; or
- addressed using a voucher override by the Executive Director or Deputy Executive Director.

Although ultimately addressed, these outliers necessitated a member of MCILS staff to review and question the entry and, as needed, follow-up with the billing attorney. Data entry controls in the Defender Data system, such as preventing the attorney from entering a value that exceeds a maximum fee, or generating a flag when a reasonable value is exceeded, could reduce the amount of staff resources required to address such issues.

Monitoring High Annual and Daily Hours Worked

MCILS staff's system of voucher review does not monitor cumulative annual hours recorded as worked by an attorney.

In general, event-level review of each voucher does not provide MCILS with the information necessary to monitor cumulative annual hours worked by an attorney, and, until recently, did not allow for any monitoring of the daily hours worked by attorneys facilitating identification of rostered attorneys working potentially problematically high numbers of hours on a given day. Using the dataset OPEGA obtained directly from MCILS's billing service

[6] We defined outlying values as those that fell far from the median values for each type of event, and, more specifically, those exceeding boundaries calculated by finding the median, lower and upper quartile values, and interquartile range.

provider for our analysis in this review, we observed that instances of both high annual hours worked and high daily hours worked by attorneys occurred frequently in the time period reviewed, FY10 through FY19.

While 97.7% of attorney's annual fiscal year totals were below 2,080 work hours (40 hours a week for 52 weeks), there were 100 instances in which an attorney's annual total hours exceeded that threshold. Annual, fiscal year hours billed by attorney are stratified in Table 3. Table 4 provides average hours per week reference points to better illustrate the average time billed by attorneys.

Table 3: Annual Fiscal Year Hours Billed by Attorney (10 – year period)

Total Annual Hours	Average hours per week*	Number of Attorneys	Percent of Total
1,040 or less	20 or less	3,655	82.7%
1,041 to 2,080	20-40	663	15.0%
2,081 to 2,600	40-50	76	1.7%
2,601 to 3,120	50-60	16	0.4%
3,121 or more	More than 60	8	0.2%
Total		4,418	100.0%

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.
*Assuming 52 weeks worked per year.

Particularly noteworthy were eight instances in which an attorney billed over 3,120 hours in a fiscal year. The totals and average number of hours billed per week for these eight highest instances are presented in Table 4.

Table 4: Attorneys Exceeding 3,120 Hours in Any Fiscal Year

Fiscal Year	Work Attorney	Total Hours	Calculated Hours per Week
2018	Attorney A	4429.0	85.2
2014	Attorney B	3446.8	66.3
2019	Attorney C	3438.3	66.1
2015	Attorney D	3400.9	65.4
2014	Attorney D	3398.0	65.3
2013	Attorney B	3343.1	64.3
2017	Attorney E	3281.4	63.1
2013	Attorney F	3269.8	62.9

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

In terms of daily hours billed, we identified 2,993 instances in which an attorney billed 16 or more hours in a single day. Most concerning were the 224 attorney and date combinations in which more

than 24 hours were billed in one day; these 224 instances ranged from 24.1 to 84.2 hours. Roughly 70% of these instances were recorded by six attorneys, as shown in Table 5.

Table 5: Attorneys with highest counts of billing more than 24-hour days	
Work Attorney	Count of 24+ Hour Days
Attorney G	41
Attorney B	32
Attorney A	27
Attorney E	25
Attorney D	19
Attorney F	13
Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.	

12-Hour Alert Notification System

During the time period that the 6AC evaluated MCILS, the agency conducted its own internal investigations of high billing by attorneys. The Executive Director reviewed the billings by attorneys with over $150,000 in billings in any of the previous three fiscal years (FY16, FY17, FY18). [This investigation is described in detail on pages 18 through 20. Limitations with this investigation and other similar efforts are detailed in Issue 5.] Following this work, the Executive Director instituted a 12-hour alert notification system. Under this notification system, as attorneys submit vouchers for cases (generally upon conclusion of the case), Defender Data tracks the hours billed on a daily basis. When one or more submitted vouchers show an individual attorney billing more than 12 hours on a given day, the system generates an alert email that is sent to both the attorney and MCILS staff. These alerts are entered into and tracked using, what the agency refers to as its "High Daily Hours Tracking" spreadsheet.

The agency's 12-hour alert notification system is an ineffective control to address potential overbilling.

OPEGA reviewed this spreadsheet and found this monitoring tool to be an ineffective control, and the process used to track alerts, to be inefficient for a number of reasons.

- The alert is generated independently of voucher approvals within Defender Data, which means that attorneys are paid as usual before the attorney responds to the notification, or even if the attorney never responds.
- The alert system creates a flag for, but does not correct, potential issues. The alert may be generated **years** after the date on which the 12-hour threshold was reached, because attorney vouchers are primarily submitted when a case concludes which could be months, or years, after the start of the case. We observed some 12-hour alerts dating back to 12/4/2017, which could prove difficult for attorneys and/or MCILS to accurately reconcile.

- The responsiveness by attorneys to the alert notifications was poor. Of the 1,285 rows in the High Daily Hours Tracking spreadsheet containing at least one day with a 12-hour alert, 70.6% (907) showed no attorney response[7].
- The 12-hour threshold may be too low and not focused enough on true outliers or exceptions, as 12-hour days are not atypical for the profession. Of the 378 responses from attorneys in the spreadsheet, 131 (34.7%) indicated the hours were accurate - or the explanation provided by the attorney was accepted by the Executive Director. This process required follow-up and attention from both the attorney and MCILS. Common explanations offered by attorneys included the following:

    - The time was accurate, as attorneys either had lengthy days during the normal course of business or were trying to get caught up before, or after, a vacation or holiday.
    - The time was accurate, as the attorney was a rural practitioner which necessitates a lot of travel time.

  Other frequently noted explanations do not appear to be consistent with agency rules or desired billing practices:

    - More than one attorney's time was captured under one attorney's billing (the time worked was otherwise accurate).
    - Additional staff hours—such as a paralegal's time—were billed as the attorney's hours (even though this appears to be inconsistent with policy – see pages. 5-6).

  Another 70 (18.5%) of the 378 attorney responses indicated that the work was done, but entered on the wrong date.

- In terms of impact in dollars, the figure populating the "Amount Overbilled" column of the spreadsheet totals only about $6,400. However, in terms of the value, or effectiveness of the 12-hour flag as control, we note that this number ($6,400) is likely understated because in some cases attorneys can change the amount before the voucher is billed.

Identification of Double Billing

Despite the general lack of relevant responses to the Executive Director's investigation into high billing attorneys and the agency's general lack of follow-up (issues with audit and investigation processes are noted in Issue 5), one attorney's responses were useful in illustrating how double billing can occur. Double billing is unlikely to be identified through MCILS's current attorney voucher review process, and, in this attorney's case, was not.

[7] The Executive Director reported that while there are a large number of attorney non-responses, the number is lower than OPEGA's figure, as MCILS has not yet entered some attorney responses into the spreadsheet.

Double billing – more than one request by an attorney for payment for the same time – is unlikely to be identified through the current voucher-level review system.

As illustrated in the following bulleted examples, double billing is any scenario in which MCILS is paying for the same time twice. Our review of the attorney responses to the Executive Director's investigation into high billing attorneys and the results of the attorney's self-audit revealed three such scenarios. It also revealed concerns related to the agency's ability to identify double billing relying on the current system of voucher level review:

- Duplicate time entries—or the entering of the same work event more than once in Defender Data—can occur when more than one person (such as the attorney, office manager, and/or administrative assistant) all enter events into Defender Data, resulting in some overlap. For many work events, such as reviewing an email, or a phone call with a client, these instances are unlikely to be identified, flagged, and/or questioned by MCILS due to their routine nature. As observed by OPEGA in the attorney responses and the one attorney self-audit, only the attorney could accurately identify such instances.

- Overlapping time entries—or being paid for two different work events at the exact same time—can also occur under MCILS's current framework for the recording, billing, and approval for payment of attorney hours. Generally, attorneys submit a voucher containing all of the hours worked over the duration of a case at the conclusion of the case for MCILS approving payment. As work events are submitted at the voucher (or case) level—rather than an hourly accounting of time at the end of a day or week (like a traditional timecard)—it is difficult to identify when an attorney attributed the same exact hour(s) to two or more cases, and received payment for all. Reporting time at a voucher level either obscures or completely ignores the reality that attorneys may perform other, unrelated work events during lulls in other certain work events. Reporting this time accurately to avoid double billing requires adjustments to entries by attorneys, or their staff. For example, an attorney serving as lawyer of the day is paid for the entirety of their time spent at the courthouse with defendants, but during downtimes in the court throughout the day, the attorney may work on other indigent legal cases by emailing clients or reviewing case materials. Similarly, an attorney may be travelling for one client—which is billable time—but may be having phone conversations with other clients during that travel time, which is also a billable activity. If all of these events are recorded and entered without adjustment by either the attorney or attorney's staff, they will have been paid twice for their time. If the hours worked on a given day do not exceed 12 hours, the opportunity to observe these overlapping events and catch these occurrences will be very limited given the current system in place to record and bill for attorney hours and their subsequent review by MCILS for approval and payment.

- Over-allocation of time spent in court or travelling—or an attorney travelling to and being present in court for multiple cases, but billing the **entirety** (and not a portion) of that time to **each** of those cases—may be a less common occurrence than other examples of double billing. Regardless, these occurrences are at risk of being undetected by MCILS. In our review of attorney responses to MCILS, an over-allocation of time spent in court was

demonstrated by one particular attorney. In this instance, the attorney spent the day in court for multiple cases and sought to allocate their time by dividing the number of hours spent in court by the number of cases. However, some cases may be continued for a variety of reasons, and, as such, require only minutes of the attorney's time. In those cases, the attorney chose to not allocate the day's court time and removed them from the total cases for the day. For example, the attorney spent eight hours in court with 12 cases scheduled, but four were continued for various reasons. The attorney would then allocate their time to the eight remaining cases, resulting in one billable hour for each case. As explained in the attorney response, however, the attorney's staff would apply the hour per case to all 12 cases when entering vouchers in Defender Data. Thus, an eight-hour court day was turned into 12 billable hours. Again, while we have not confirmed the scope, or extent, to which this may occur, it appears as though if this scenario was known, it could be addressed in the near future—hence, its inclusion here.

Achieving Cost Savings – Financial Stewardship

Lastly, over the course of its broader, attorney voucher review in Defender Data, the agency's efforts have resulted in relatively few instances in which MCILS staff has manually adjusted a voucher total in response to an identified issue. We found only 1.1% of vouchers had totals overridden by staff, which represented an even smaller percentage—0.3% of total voucher expenditures. From FY10 to FY19, annual savings directly resulting from MCILS voucher overrides averaged just under $36,000—although this number does not capture voucher entries that are questioned by MCILS and later reduced by the submitting attorney. The average annual totals for voucher expenditures were roughly $13.5 million during that time. To whatever extent vouchers are being reviewed by staff, the process appears to be of limited effectiveness—particularly when viewed in light of the financial impact/realized savings.

- Assuming improvements are made to the overall quality of MCILS's attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.
    - The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation—high daily and annual hours worked by attorney.
    - The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.
    - The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS's purpose as discussed in Part III.

Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked. In the current voucher-based system, work events occur over the life of a case—which may last years—and are submitted at the conclusion of the case. Issues with billing errors may not be identified until well after the work events occur. Based on OPEGA's review of the data, it appears easy for attorneys to lose track of how many hours they worked/billed on a given day under such circumstances. Processing payments using a timecard-based system would require attorneys to log their daily work events and submit them for approval on a regular basis (such as every two weeks). As such, data entry would occur closer to the actual work events, putting MCILS staff in a better position to identify when high daily work hours occur and allow attorneys to see any potential duplicate or otherwise incorrect entries which could be addressed at that time.

Issue 4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.

Although total annual non-counsel service provider invoices are far smaller than attorney vouchers, both in terms of counts and total dollars, OPEGA explored areas of risk associated with this type of expenditure. Through this work, we found that neither MCILS's process for the review and approval of non-counsel invoices, nor the data generated from the entry of necessary information from these invoices into Advantage (the State's accounting and vendor-payment system) for payment processing is effective in identifying certain types of non-compliance.

MCILS staff's system of individual vendor invoice review (for non-counsel services) is unlikely to identify duplicate charges, high daily billing or duplicate invoices.

Non-counsel service provider invoices are first reviewed individually by MCILS's Accounting Technician for compliance with established rates, reimbursement limits, agency pre-approvals, and the accuracy of invoice calculations prior to approval by the MCILS Executive Director. Upon approval, a limited amount of information from each invoice—essentially just the information required for processing and payment through Advantage—is entered into the system.

As MCILS reviews and processes each non-counsel invoice individually, staff are unlikely to identify potential billing issues that span more than one invoice. For example, a non-counsel service provider (such as a private investigator) may be working on multiple cases for multiple attorneys, and, accordingly, submit multiple invoices—none of which raise any issues when reviewed individually. However, when reviewed together, the invoices may reflect potential issues such as daily billed hours that are exceedingly high or exceed 24 hours in a given day. Similarly, the data contained within Advantage is limited to only what is required for the State's accounting system. This data lacks key elements that would be critical to performing any vendor analysis across multiple invoices: detailed service descriptions, dates of those detailed services, who performed the detailed services, and for which case the services were provided. Together, MCILS's review process and the data available via Advantage are of limited effectiveness in identifying instances of high-daily billing hours (a similar

concern to that of attorneys), duplicate charges (the same charge or service appearing on multiple invoices), or duplicate billings (the submission and payment of the same invoice more than once).

To best determine whether these scenarios are occurring, OPEGA accessed the available data from Advantage to develop a universe of invoices paid by MCILS. Although we were limited by the details of the data, we performed some high-level data analysis which enabled us to select a judgmental sample of 235 invoices (roughly 1.5% of the total paid invoices) to review for the concerns noted above (and others).

In our review of a series of invoices spanning just over three months from a frequently used vendor—which appears to be a sole proprietorship with no other employees—we observed billing for a high number of hours on several days across multiple invoices. These potential red-flags are presented in Table 6.

Table 6: Instances of billing for a high number of hours across multiple invoices by one vendor

Date	Number of Hours Billed	Number of Invoices
7/14/2017	19	5
7/17/2017	18	6
8/25/2017	19	4
9/4/2017	16	4

Source: OPEGA analysis of MCILS vendor invoices obtained from Fortis.

It should be noted that MCILS did describe a one-time audit of private investigation services invoices that identified similar concerns related to high daily billing hours. Vendors were asked to provide contemporaneous time records for dates with high billing hours. An outcome of the audit was that one vendor did not provide sufficient records and is no longer approved for MCILS-paid private investigation services. Despite the fact that this one-time audit by the agency identified issues that merited such action to be taken, similar reviews such as the one conducted have not been formalized or become part of the agency's regular review and monitoring of other non-counsel invoices. (See appendix D for additional results of OPEGA's review of non-counsel invoices.)

- Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

Issue 5. Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent, and also of limited scope, depth and effectiveness.

As previously noted, MCILS lacks established policies and procedures governing the processing of vouchers, invoices, and expenditures. Similarly, the agency lacks defined policies and procedures for conducting audits and investigations of attorneys.

However, OPEGA did review three instances we were made aware of in which MCILS staff conducted an audit or investigation:

- A one-time review of private investigation services invoices;
- a review of one attorney's discovery materials to reconcile the volume of those materials with the hours billed for reviewing discovery; and
- an investigation into nine attorneys selected from the 6AC's reported highest billing attorneys.

For the last investigation listed above, OPEGA was able to assess the agency's procedures for audits and investigations which we describe as ad-hoc. We did this by accessing and reviewing the following materials:

- data provided by MCILS to the 6AC;
- data obtained by MCILS staff from its vendor and the subsequent data analysis they performed; and
- agency correspondence with two individual attorneys and correspondence to and from one firm (containing 3 of the 9 selected attorneys).

This investigation by the agency into the highest billing attorneys was limited to those 9 attorneys with over $150,000 in billings in any of the three fiscal years (FY16, FY17, and FY18) [8]. OPEGA found the scope of this internal agency investigation too limited to effectively identify the extent to which the issues raised by the 6AC[9] were occurring. For reference, the 6AC's evaluation covered all attorneys and spanned five years. OPEGA's own work for this report covered all attorneys spanning a period ten years—the entirety of MCILS's existence as an independent agency. The small data set used by MCILS limits the agency's opportunities to identify—and most importantly, correct, potentially problematic caseloads and/or billing practices of attorneys.

As a result of the agency's analysis on the high billing attorney data, the Executive Director wrote three letters: two to sole practitioners and one to a firm at which three of the high billing attorneys

[8] Ten attorneys were originally selected, with one of the ten excluded from further work, as the MCILS Executive Director had previously agreed to allow the submission and payment of many outstanding bills in a recent year from that attorney.
[9] The 6AC Report issued the following finding in regards to billing practices: "Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys."

worked. The letter informed the recipients that they were among the system's highest earners and provided the attorneys with their annual hours and high daily hours worked from the agency's records for reference. The Executive Director's letter also made the following request:

> *Please forward copies of any contemporaneous time records that you maintained outside of the Defender Data system for each day where total billing exceeded 16 hours. In addition, please provide any explanation you may have for the unrealistic billing totals and note that voucher ID and event information is provided for each of these days for assistance in identifying data errors, if any.*

Attorneys contacted as a result of an internal agency investigation into high billing provided various explanations – none of which were challenged by MCILS staff.

We observed that the Executive Director received three very different responses that varied in the extent to which they responded to the original request. The following responses to that request from the attorneys are intentionally described at a rather high-level in order to maintain confidentiality consistent with the manner in which MCILS treats investigative records:

Response 1:

- Respondent acknowledged billing errors related to dates billed, but did not believe bills were submitted for work that was not performed.
- Respondent stated steps were being taken to decrease the respondent's caseload and to implement a better record keeping system.
- Respondent did not provide contemporaneous time records.

Response 2:

- Respondent stated steps were being taken to decrease the respondent's caseload and to implement a better record keeping system.
- Respondent reported reviewing approximately 4,000 events (those provided by MCILS) and provided information (added a column to spreadsheet) to record correct event times. This respondent's self-audit identified roughly $35,000 in overbilling spanning a three-year period.
- Respondent provided the updated spreadsheets, but did not provide contemporaneous time records.

Response 3:

- Respondent acknowledged shortcomings with billing practices/record keeping.
- Respondent indicated that data provided by MCILS had been reviewed and that the respondent had identified some recurring issues:
    - large time entries being the aggregate time for several attorneys;
    - Defender Data defaulting to the assigned counsel on each billable entry, which requires a manual correction and leaves room for human error; and

    - included paralegal time for time spent working with attorneys, clients, courts, families, and service providers.
- Respondent identified a small number of duplicate entries and payments.
- Respondent did not provide contemporaneous time records, but did offer to make available to the Executive Director, summary spreadsheets reconciling time records with the agency's data.

OPEGA notes that no one provided contemporaneous time records and that, in general, the responses would not allow MCILS staff to independently confirm many of the claims made. We did not see that agency staff took steps to perform field audits or otherwise verify or challenge any of the responses. Similarly, we did not see evidence that MCILS took steps to quantify the potential areas of noncompliance (billing for paralegal time and duplicate payments) described in Response 3 or recoup any payments.

None of the attorneys included in the high billing investigation provided contemporaneous time records as requested by the Executive Director.

Additionally, based on the one case where an attorney responded with self-identified overbilling, it is apparent that there is no established agency process for determining, confirming, and/or agreeing upon a repayment amount. Further, there appeared to be little effort made by the agency to collect the overpayments, although this may have been partly due to the lack of an established mechanism to recoup these funds. There may also be a question surrounding where any repaid funds would go to either MCILS's account or the State's General Fund. OPEGA notes that the attorney's self-identified overpayment amounts were finalized on February 8, 2019 and at the time of this review, no reimbursement, or a plan for reimbursement payments, has been made.

Overall, the agency's audit/investigative process appeared informal and inconsistently administered. The process relied almost exclusively upon one self-audit by, and unverified responses from, only a few attorneys which were of varying quality. This information governed the agency's decisions (made at the discretion of the Executive Director) to pursue some overpayments and to not pursue other potential areas of noncompliance and overpayment. Together, these elements resulted in audit efforts of limited scope, depth, and effectiveness. Although the agency's enforcement actions, such as removing an attorney from the MCILS roster, in response to this information may otherwise appear to be straightforward decisions, OPEGA notes a complicating factor. A decision to remove an attorney from the roster may be first and foremost governed by a need to ensure an adequate number of attorneys sufficient to represent clients – particularly in certain regions of the state.

- Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:
    - how and when audits are to be conducted;
    - the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;

- a means of determining, confirming, and/or settling disputed overpayment amounts;
- a mechanism to recoup overpayments;
- penalties (including dismissal from the MCILS roster) for noncompliance; and
- consistent enforcement of all MCILS rules.

Data issues impede further analysis

At the outset of this review, OPEGA raised the possibility that our data analysis and follow-up work would allow us to separate instances of what appeared to be overbilling from actual overbilling. We anticipated this information could then be used to potentially identify likely overbilling attorneys for limited field audits of attorney billing and time records. Our work did reveal that the highest average weekly hours reported by the 6AC report and the media is much smaller than initially thought, yet the underlying issues and red flags remain. While we are unsure whether the desire for further work, or field audits, has decreased given awareness that the magnitude of the reported suspected overbilling was overstated, the selection of any attorneys for further work is problematic at this time due to underlying data issues.

Throughout our data analysis, we encountered numerous outlying event values that we later determined were false alarms based on the notes associated with those entries. The notes themselves indicated that attorneys and their staff were not always reporting time in discrete values by day and by attorney. This was a theme that extended throughout our review of MCILS's audit/investigative efforts revealing a significant level of inconsistency in the data entered into the billing system. In attorney responses to both MCILS Executive Director's high billing investigations and 12-hour alert notifications within the billing system, OPEGA observed that attorneys reported batching work events (such as aggregating the time spent on texts for the entirety of a case into one-time event on a single day) or combining the hours of multiple attorneys under one attorney on a single date. Working on this review clarified for us that the manner in which information is entered into Defender Data by attorneys, essentially serves the singular purpose of getting MCILS's approval and payment for the various events on a voucher. To achieve this purpose, the data does not necessarily need to be granular or subject to strict entry protocols. Consequently, the data does not allow for the type of broader analysis which would identify specific attorneys to review – those having potentially overbilled for payment of services – which was the kind of investigation OPEGA had originally envisioned.

Due to the data limitations noted here, an investigation into specific instances of potential overbilling would require labor-intensive field audits of event-level and records and possibly client files, in the possession of rostered attorneys. In consideration of the explanations provided to MCILS in the course of its own audit/investigative work, the relatively small number of identified overpayments, and the tremendous amount of resources required for field audits, the GOC and the Legislature may wish to consider foregoing this intense effort and to direct OPEGA to move forward with a focus on the potentially more-impactful work related to indigency determinations.

Part III. MCILS Structure of Oversight

Is the oversight structure of MCILS adequate?

OPEGA was tasked with determining the adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose. We identified several interrelated issues that contribute to a structure which fails to provide adequate oversight of MCILS's operations - and of the Commission's statutory purpose to efficiently provide high-quality legal representation to indigent clients. The interrelated reasons for this inadequate oversight structure will require a holistic approach to remedy.

OPEGA found that the following appear to be the main contributors to the weakness of the oversight structure.

- **The agency charged with administering MCILS's purpose is under-staffed.**
- **MCILS staff operates without clearly-defined roles and uses current staff inefficiently.**
- **The Commission receives insufficient support for necessary operations.**
- **A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.**

The agency appears to have little organizational structure, as staff have no established job descriptions, or other formal guidance, outlining job functions and responsibilities. Had such a structure, with clearly defined roles and responsibilities and written guidance, been established early on in MCILS's development, staff efforts might have been more appropriately focused on effectively and efficiently performing the agency's primary functions. This structure would have also possibly enabled the Commission to identify the specific functions that were inadequately covered in the agency so as to make targeted requests for additional staff.

OPEGA sees the function of establishing and maintaining a sufficiently resourced agency to effectively and efficiently achieve the organization's statutory purpose as a fundamental responsibility of any government entity. Despite a long-standing awareness at the agency level and among the Commission that staff levels were insufficient, it did not result in requests or substantive advocacy for an increase in staffing for the agency. Further, given this understanding that staffing was a concern, it appears that there has been little focus by the agency, or by the Commission, to identify how the organization should be structured to achieve its purpose.

Insufficient staff resources leave little opportunity for a focus on improvements to agency processes, systems, and broader structural issues.

In order to provide some context to this report's discussion of MCILS's oversight structure, it is important to note that MCILS's purview in providing legal services to the indigent (and partially

indigent) in Maine is extensive. The system is currently made up of 368 rostered attorneys appearing in courts throughout Maine. In FY19, rostered attorneys opened 27,437 cases, totaling approximately $17 million in attorney billing. In that year, MCILS processed and paid 32,575 attorney vouchers.

Issue 6. The agency charged with administering MCILS purpose is under-staffed.

OPEGA observed a lack of sufficient staff to adequately meet the full responsibilities of the agency. When we asked the Executive Director about review or improvements to specific agency operations, the Executive Director described that the current MCILS staff is the minimum necessary to allow the system to continue to function. Thus, there was little time available to consider new initiatives, or improvements, to wider substantive structural issues such as quality of representation, the lawyer-of-the-day program, or the use of single-source contracts to provide legal services. The Executive Director described that there was a general, ongoing awareness over the years amongst the Commission that the agency was short-staffed.

Although the agency's annual report is submitted to the Joint Standing Committee on Judiciary and the Governor in January of each year, the report does not appear to describe a staffing need (other than noting existing vacancies) or advocate for more staff. The report describes MCILS's office staffing as follows:

> *The Commission's central office staff consists of the Executive Director, the Deputy Executive Director, and an Accounting Technician. A fourth administrative support position remained vacant during 2017 as the remainder of the central office staff, by utilizing technology and sharing basic administrative tasks, was able to operate with this position vacant. The Commission believes that the administrative support position should be filled. There was no job turnover among central office staff during 2017.*

Although MCILS staff vacancies are mentioned, OPEGA notes that the annual reports do not describe an urgent need for the vacancy to be filled, express a need for additional staff, or indicate what functions, or statutory requirements, are not being attended to as a result of insufficient staffing.

It was expressed to OPEGA that requests for additional staffing resources would not be looked on favorably due to the focus on meeting current operating costs and addressing agency budget shortfalls. Thus, despite the apparent staffing needs, MCILS did not advocate, or make formal requests to the Legislature, for additional staff in prior budget cycles until the most recent supplemental budget request in early 2020.

Issue 7. MCILS staff operates without clearly-defined roles and uses current staff inefficiently.

The absence of a clear and effective agency structure with defined roles, responsibilities and expectations, contributes to what OPEGA observed to be an inefficient use of existing staff.

In discussions with agency staff about their roles and responsibilities, it appeared to OPEGA that a substantial portion of management staff time was being spent on day-to-day operations, including a significant amount of administrative-level work. Below are some of the areas where OPEGA observed inefficient use of agency staff.

Rostering

The Deputy Executive Director performs monthly updates of each attorney roster, which are divided by region and then further by practice specialty. This function requires keeping track of and responding to communications from attorneys who want to be removed from the roster or change case type assignments, and updating information such as when an attorney moves to another firm. The Executive Director and Deputy Executive Director advise attorneys on eligibility requirements, including whether to apply for a waiver on certain requirements. They also conduct analysis of geographic distribution of attorneys when an attorney requests a new court location. There is also a process requiring attorneys to renew their roster status annually. This is a paper-driven process, which is described as time-consuming by the agency's Deputy Executive Director. Though a portion, or certain elements, of this work may require a higher level of response by management, there does not appear to be any consideration of assigning roster-related tasks to administrative-level staff.

Attorney Voucher Approval

As noted in Issue 3 on page 8, the Executive Director and Deputy Executive Director spend a substantial amount of time reviewing and approving individual attorney vouchers. Although reviewing expenditures and processing payments is a primary and critical MCILS function, the method of voucher-level review is neither effective nor efficient, as discussed in Issue 3 on pages 8-16. As this report has stated, OPEGA notes that a more targeted, risk-based approach would allow for management staff time to be used more efficiently and to better recognize the qualifications and experience level of the Executive Director and Deputy Executive Director. For initial review and basic processing of attorney vouchers, written instructions and guidance could be used to support employees with qualifications better matched with this primarily administrative function.

12-hour Notification Follow-up

An element of the recently established system intended to monitor for potential overbilling by attorneys – the 12-hour notification system– requires follow-up with an attorney whose voucher submission generated a flag in the Defender Data system. (See page 12.) Staff described this process as time-consuming, requiring reaching out to individual attorneys and manually recording the information collected as part of the follow-up effort.

Agency management's focus on day-to-day administrative duties impacts the capacity to provide policy support and strategic direction to the Commission.

OPEGA considers it to be an inefficient use of staffing resources to have management level positions undertaking administrative level work. Whether the Commission, as the oversight body for the agency, shares this view about the mismatch between staff qualifications and the functions they perform is unclear. It does not appear to OPEGA that this has been an area of focus of the Commission and, given the absence of MCILS staff job descriptions (or any written description of roles, expectations and tasks), it would be difficult for the Commission to provide oversight as to whether the current staff are undertaking an appropriate level of activities or are sufficiently focused on mutually understood priorities. The Executive Director reported having not had any formal performance evaluations. An apparent consequence of management positions being focused on day-to-day functions, is that there is no remaining capacity to provide appropriate policy support and strategic direction to the Commission, which would guide the agency in meeting its purpose and also allow for oversight of the agency's operational structure.

Issue 8. The Commission receives insufficient support for necessary operations.

OPEGA observed inconsistency in expectations between the Commission and the Executive Director as to who should be assuming the initiative for providing policy direction and engaging in strategic planning.

Statute sets out specific requirements on the Commission (4 MRSA §1804) and the Executive Director (4 MRSA §§1805 and 1805-A). Many of these requirements relate to the original establishment of the Commission, setting out what the Legislature considered to be necessary for the newly established entity to commence operations. Other than statute, there is no written expectation of the Commission's role and new Commissioners are not provided with any sort of training to orient them to their functional role. Similarly, other than statute, there is no written expectation of the Executive Director (or other staff) in the form of a job description – something we've noted previously in this report.

The lack of mutual understanding between the Commission and the Executive Director regarding responsibilities and expectations creates a risk of insufficient accountability for the provision of indigent legal services.

OPEGA observed a lack of clarity between the Commission and the Executive Director about whose responsibility it is to drive the strategic and policy direction of the agency and Commission. For example, OPEGA observed differing perspectives on whether the Commission is largely responsible for rule making and budgets or for wide-ranging oversight of the provision of indigent legal services across the state, including oversight of the work of the agency. This lack of clarity and mutual understanding regarding roles, responsibilities and expectations between the Commission and the Executive Director creates a risk to MCILS, and to the State, of insufficient accountability for the provision of indigent legal services in the State.

OPEGA cites the following examples to illustrate how the lack of clearly defined roles and mutual understanding of responsibilities impacts what information is provided to the Commission and therefore impacts the Commission's ability to provide robust oversight.

Information Provided to the Commission

For any Commission, or similar body, to effectively exercise oversight of an administering agency and to make key strategic and policy decisions towards the Commission's objectives, a consistent flow of useful and appropriate information is necessary. For MCILS, statute sets minimum requirements for information and documents to be provided to the Commission on a monthly and annual basis (4 MRSA §1805(7)). It appears to OPEGA, that this minimum standard is met. However, although technically sufficient to comply with statute, it appears to OPEGA that the Commission requires additional information to be able to provide effective oversight and decision-making focused on the purpose of MCILS. For example, although the Executive Director provides information to the Commission when requested, the Commission does not always appear to know what information it should request.

Previously we noted the lack of mutual understanding regarding responsibilities (among the Commission or the Executive Director) which continued to be apparent as we looked at the substance, format and content of information or materials provided to the Commission. OPEGA observed that it is not clear as to who is responsible for identifying issues and determining what information should be distributed, or the type and level of information that should be routinely provided, to the Commission to ensure effective oversight.

- **Financial information:** A primary feature of each Commission meeting agenda is the monthly Operations Report from the Executive Director. This includes summary data, including the number of new cases opened, number and value of vouchers submitted and paid, average price per voucher, number of paid vouchers exceeding $5,000 (accompanied by a case summary), number of complaints about attorneys and a very brief summary, number of requests for co-counsel with a very brief summary, and budget account balances. Some of this information is specified by statute to be provided to the Commission and other information was requested by the Commission in previous years - such as vouchers exceeding $5,000 and information about complaints.

  Having reviewed a selection of Operations Reports and conducting interviews with the current and former Commission Chairs, OPEGA observed that what is typically provided in these reports does not appear to furnish the Commission with useful material to provide meaningful oversight or to make decisions based on the information given. Our review of Commission meeting minutes showed no evidence of decision-making as a result of the monthly

Operations Report data. The summary-level data in the reports, while providing an overview, does not appear to assist in identifying issues or concerns for the Commission.

- **12-hour daily billing flags:** Following the release of the 6AC report and the agency's internal investigation on potential attorney overbilling, MCILS implemented an alert system that is triggered if an attorney enters daily billing that exceeds 12 hours for the day, as described on page 12. This was implemented towards the end of the tenure of the last cohort of Commissioners, at a period of transition. OPEGA notes from the Commission meeting minutes in May 2019, that the Executive Director updated the Commission to note that the Commission's request to reduce the daily hours alert to be triggered at 12 hours (rather than 16 hours) per day. Thereafter, as of the time of OPEGA's review of meeting minutes through January 2020, it does not appear as though the Commission was given any formal briefings, or feedback, on how the system was working and what MCILS staff were learning about attorney billing. As this was a new system put in place to address a highly publicized concern around attorney over-billing, OPEGA would expect to see some mechanism to provide information to the Commission allowing it to provide oversight and assess whether the system is working as intended. OPEGA does note, however, that despite no formal information being presented to the Commission, the Commission's financial responsibility sub-committee, established in December 2019, began looking into the detail of this alert system.

- **Resource Counsel program:** The Resource Counsel program provides another example of an area where there is a lack of clarity about the role and responsibilities for identifying issues, documents and information that should be considered by the Commission – and where the information provided to the Commission may not be adequate for the Commission to execute proper oversight of the program.

  The Resource Counsel program was established by the Commission in June 2018 for the purpose of (according to the enacting document) providing *"mentoring, supervision and evaluation of private assigned counsel providing indigent legal services."* The enacting document noted that as the program was launched, mentoring would be the primary focus and, as the Commission gains experience with the program, it may be expanded to provide periodic supervision and evaluation of attorneys.

  It appears that as a mentoring program, it has the effect of being optional, as MCILS does not undertake any monitoring, or enforcement of new attorneys, to meet with Resource Counsel. The enacting document notes that the mentoring component requires Resource Counsel to meet with newly rostered attorneys three times within their first 6 months. OPEGA did not conduct a comprehensive evaluation of this program; however, we did hear some participant perspectives. An attorney assigned as Resource Counsel reported to OPEGA that although newly licensed attorneys on the MCILS roster are required to meet with Resource Counsel three times during the early period of their practice, the program had yet to have a new attorney follow through with these requirements. This Resource Counsel attorney added that

newly-licensed attorneys were being added to rosters and appointed to cases before the first required meeting had taken place.

This accords with what the Executive Director described to OPEGA - although new attorneys are informed by email that they are expected to meet with the Resource Counsel, there is no systematic follow-up of whether the requirement is met. The Executive Director noted that he hoped that the mechanism for the Resource Counsel to bill for their hours (capped at 10 hours per month) would provide MCILS with this information, but they found that not all Resource Counsel attorneys were billing for all their work, so it was not an effective feedback loop. It does not appear as though any action was taken to resolve this information gap.

The Commission has received no substantive information about the Resource Counsel program established in 2018 to provide mentoring, supervision and evaluation of rostered attorneys, or an assessment of the program as required by its implementing document.

The Resource Counsel policy notes that six months after the adoption of the policy, *"Commission Staff will report to the Commission on the operation of the Resource Counsel system."* As the document was adopted in June 2018, the program would have been due for review in December 2018. OPEGA is aware that there was a brief note submitted to the Commission at their October 2018 meeting in which MCILS noted that it had started receiving and paying Resource Counsel vouchers and that several Resource Counsel attorneys had brought issues related to attorney performance to the staff's attention seeking guidance. There did not appear to be any more detailed or comprehensive report or review of the system at subsequent meetings. The Executive Director acknowledged to OPEGA that, other than discussion in passing, there is no formal information that goes to the Commission about the program and there has not been a review of the system as required in the implementing document. OPEGA understands that the Resource Counsel policy document has not been provided to the current Commission, as of the time of OPEGA's review of meeting minutes through January 2020.

MCILS does not appear to have taken steps to gather adequate information to assess the program. In turn, no information has been provided to the Commission to allow it to assess whether the program is meeting its intended purpose.

Issue 9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.

The lack of a strong oversight structure and insufficient staffing has resulted in impacts to MCILS's statutory purpose. Statute provides that MCILS is "an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations" (4 MRSA §1801). OPEGA finds that the oversight of the operations in place for MCILS is inadequate to meet this stated purpose. OPEGA finds that the same is true for

other separately listed statutory requirements, beyond MCILS's stated purpose, which we also discuss in this section.

Quality Representation

It is central to the purpose of MCILS that "high-quality representation" is provided to indigent (and partially indigent) clients in the State. However, MCILS has no mechanism to measure attorney performance against practice standards or any other mechanism in place to formally measure, assess or oversee the quality of representation. OPEGA notes that we did not assess the extent to which attorneys are providing high quality representation – we looked at the extent to which the Commission and the Executive Director provide oversight of quality representation.

Despite identification by external evaluations as early as 2017 that MCILS does not provide systemic oversight and evaluation of attorneys, effective mechanisms to do so have not been implemented.

Issues related to a lack of oversight of quality representation were raised by both the 2017 Working Group and the 6AC. The 2017 Working Group noted that "the current program does not have systematic oversight and evaluation of attorneys[10]". The 6AC report noted that as there are no systems or capacity to provide oversight, it is difficult to know the extent of any potential problems with the quality of representation[11]. Despite these issues having been identified by external bodies, no formal evaluation mechanism has been put in place. The Executive Director described not having the staff available to monitor lawyers or review files. However, as noted above, prior to the most recent supplemental budget request, no requests have been made for additional staff.

MCILS described some informal mechanisms it uses to attempt to monitor quality. However, OPEGA sees these as insufficient to ensure high-quality representation. The mechanisms primarily included the Resource Counsel program and what might potentially be gleaned by the Executive Director and Deputy Executive Director as they conduct voucher reviews.

- **Resource Counsel:** MCILS described the Resource Counsel program, which was implemented in June 2018, as an attempt to monitor and evaluate quality. However, as we have noted, the program has not been reviewed as required by the implementing document, actions have not been taken to seek to extend it to supervision and monitoring of attorneys, and there is currently no monitoring or enforcement of the mentoring meeting requirements on new attorneys. Additionally, there has been no systematic collection feedback on issues raised through this system communicated up to the Commission for it to provide oversight.
- **Voucher review as a quality review:** The MCILS Executive Director described getting an impression of attorney quality by reviewing individual attorney vouchers for payment, because the reviewer is able to see actions taken (such as client meetings) and the case outcome. The Executive Director described attorney voucher review as a useful and

[10] 2017 Working Group report, page 1.
[11] Sixth Amendment Center report, pages 57-62.

meaningful quality review procedure. Though vouchers provide some level of review, OPEGA does not consider this to be an adequate measure of attorney quality. The review involves reviewing the time and activities billed, but as discussed on pages 10-11, there is no mechanism to confirm whether the activities billed in fact took place. Additionally, the process of voucher review does not include a systematic evaluation against the standards, nor is any information related to quality as gleaned from voucher review communicated up to the Commission for it to provide oversight.

- **Additional area of risk:** OPEGA also noted other areas of risk, including that MCILS does not have any formal mechanism to consider availability and quality of attorneys on a regional basis (other than a general awareness by Commission staff of the number and identity of attorneys in each region and thus there is no Commission oversight, or systematic consideration, of potential regional availability or quality issues. OPEGA did not conduct any regional quality assessment of attorney availability or distribution, but did hear anecdotal evidence from multiple sources raising concerns around availability of a sufficient number of quality attorneys in a number of rural counties. OPEGA notes that regional availability issues can impact cost effectiveness, as it requires engaging attorneys out of the area and paying increased travel costs.

The absence of formal, systematic mechanisms to monitor or evaluate attorney performance (and therefore no mechanism for the Commission to provide oversight) creates a risk that at least one primary purpose of MCILS as prescribed by statute - providing high quality representation - is not being met.

Screening for Indigence

MCILS's statutory purpose refers to the provision of legal services to indigent individuals. Different states have different policies, or mechanisms, to assess indigence. Maine has elected to use financial screeners, who are present in some (but not all) courts to interview individuals and gather information about income, assets and expenditures and to prepare a recommendation for judicial determination.

Where there is a financial screener, the screener meets with a client to collect information that is used to prepare a recommendation to the judge based on the client's reported income, assets and expenses, taking account of the MCILS Indigence Guidelines, which are a component of the MCILS rules. The judge is responsible for determining whether a defendant has sufficient means to employ counsel, based on listed factors, including income, credit, assets, living expenses, dependents, outstanding obligations and the cost of retaining services of competent counsel. If the judge determines that the defendant has sufficient means to pay a portion of the cost, counsel is assigned, but that assignment would be accompanied by an order to pay a portion of the costs.

For the purposes of this phase of the report, OPEGA only considered the financial screening function to the extent to which it is relevant to evaluating the overall oversight structure. Further examination of the screening function may be explored in the next phase of OPEGA's work for the

subsequent report. We note that a proposed amendment to LD 182 would, if passed, transfer the financial screening function from MCILS to the Judicial Branch. At the time of publication of this report, LD 182 was carried over to any Special Session of the 129th Legislature. Regardless of where the financial screening function resides, OPEGA would expect to see oversight of screening, including a shared understanding of the purpose, effectiveness and cost-effectiveness, and consistency of guidance and approach throughout the state. Although OPEGA did not, in this phase, conduct a full review of the screening function, we can make some observations based on our review of the relevant rules and guidelines, and based on interviews with MCILS stakeholders, including screeners, lawyers, and judges. These observations indicate a general lack of oversight attention paid to this function.

- **Inconsistent understanding of role:** OPEGA noted that there was an inconsistent perspective among those we interviewed about the purpose of the financial screening function – some considered that the purpose was to provide information to assist the judiciary in making its determination of indigence, but others considered that the primary purpose of the role is to collect as much money as possible from partially indigent clients.
- **Indigence Guidelines should be reviewed:** OPEGA notes that the Indigence Guidelines do not take into account the judicial requirement to consider the cost of retaining the services of competent counsel. Although the detailed work around consistency of indigence determination is part of the second phase of this evaluation, OPEGA did hear about inconsistencies in practice between screeners. OPEGA notes that the guidelines do not include any practical guidance on recommendations of partial indigence and that there is no current plan to review the guidelines.
- **Location and number of screeners:** OPEGA notes that screeners do not appear in every court, and this can have wider impacts. OPEGA heard that this may increase the time spent by judges in assessing screening information, and/or may impact the likely accuracy of the information provided directly by defendants, and/or may result in the Lawyer of the Day spending some time assisting clients completing screening forms.
- **Collections:** Collections from those determined partially indigent happen either by way of periodic payments directly from the client, by allocation of bail money, or by tax offsets (whereby the Maine Revenue Service withholds funds from tax returns if there are missed scheduled payments). OPEGA notes that there are no rules, or written guidance, that sets out information about collection mechanisms. The Commission does receive monthly totals of the amounts collected, but there is no information on regional variations to assess potential consistency issues. The Executive Director noted that MCILS may not have accurate regional collection information available, which raises questions about the mechanism to monitor and track relevant information. MCILS informed OPEGA that in courts where there is no screener, MCILS takes no action to follow-up on orders of partial indigence by tracking

monthly payments or tax-offsets, and this potentially creates regional inconsistency about how orders for partial indigence are enforced.

According to the Executive Director, MCILS processes about 2-6 overpayments by clients per month. As explained in more detail on page 6, issues around amounts that a client is due to pay may be impacted if attorney voucher amounts are inaccurate.

Increasing the number of screeners to provide them at each court location and adding a requirement that indigent or partially indigent clients be re-screened throughout the course of a case would require further analysis of staffing needs and cost effectiveness, as well as consultation with the Judicial Branch. OPEGA notes that the concerns we've raised here related to the screening function as part of the overall program of providing legal representation to indigent and partially indigent clients warrant further consideration and consultation. The absence of oversight of the screening function creates a risk of inefficiency, ineffectiveness and inconsistency potentially impacting indigent and partially indigent clients.

Meeting Statutory Obligations

Although required by statute since 2009, MCILS has not established standards for conflict of interest and counsel caseloads.

OPEGA observed that there has been insufficient oversight by MCILS to ensure that all statutory requirements are met. Maine statute requires the Commission to develop standards governing the delivery of legal services to indigent clients, to include specified matters listed below. These standards have not been developed and it does not appear to OPEGA that there are imminent plans to resolve non-compliance with these statutory requirements (either by meeting the requirements or advancing a proposal to amend statute):

- standards for counsel caseloads (4 MRSA §1804(2)(C));
- standards for the evaluation of counsel (4 MRSA §1804(2)(D));
- standards for independent, quality and efficient representation of clients whose cases present conflicts of interest (4 MRSA §1804(2)(E)); and
- procedures for handling complaints about the performance of counsel providing indigent legal services (4 MRSA §1804(3)(M)).

The requirements for case load and conflicts of interest standards were enacted by PL 2009, c. 419 and therefore have been in place for over a decade. The requirements for standards for the evaluation of counsel and requiring a complaint procedure were enacted more recently by PL 2017, c. 284. OPEGA acknowledges that there appears to be an unwritten, informal procedure in place where complaints are investigated and outcomes determined by the Executive Director. However, there is no written policy, procedure or criteria in place that sets out how complaints should be investigated or determined. Presumably, the establishment of such standards is intended not only to guide the agency (and the Commission) in processing and resolving complaints in a fair

and consistent manner, but also to inform the person making the complaint and the subject of the complaint about what to expect from the process.

Although the Commission is directed by statute to develop these standards and procedures, as staff, the Executive Director is required by statute to:

- ensure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards (4 MRSA §1805(1));
- assist the Commission in developing standards for the delivery of adequate indigent legal services (4 MRSA §1805(2)); and
- coordinate the development and implementation of rules, policies, procedures, regulations and standards adopted by the Commission (4 MRSA §1805(8)).

OPEGA has noted multiple times in this report that, overall, we found MCILS lacks adequate standard operating procedures and formal written policies to govern its primary functions. Similarly, OPEGA has found that even when standards are required to be established specifically in statute, MCILS relies on informal methods or does not address the standard at all.

Effectiveness and Efficiency of Financial Procedures

The lack of a robust oversight structure contributes to inadequate monitoring of the effectiveness and efficiency of financial procedures used by the agency. As described in pages 9-17, the procedures used by MCILS staff to monitor payments and expenditures associated with providing legal representation to indigent and partially indigent clients are inadequate. A robust oversight structure would be guided by a plan that clearly defines prioritized functions designed to meet MCILS's statutory purposes and obligations effectively and efficiently. As noted in this review, the agency operates without written job descriptions, only informal guidelines and with a lack of clarity regarding the roles and responsibilities of staff as well as those of the Commission.

Reports of summary data regarding expenditures provides no information about financial processes and systems used by the agency and does not appear to inform decisions or actions of the Commission.

Summary data regarding expenditures provided at monthly meetings does not provide the Commission with an understanding of the financial processes employed by the agency the Commission is charged to oversee and how those processes are working. Additionally, this summary data does not appear to be used to inform decisions or actions of the Commission. An understanding of the policies and procedures governing the agency's financial operations could serve as a framework for Commission oversight of these functions – but as noted in this report, such written policies and procedures do not exist. Adequate oversight goes beyond simply having knowledge of the number of vouchers submitted and the amounts paid - it requires an understanding of the processes used to administer those payments and the specific controls in place to ensure they are made appropriately. Although the process used to review expenditures and submit payment for vouchers comprises a majority of the agency's working hours, the Commission

appears to have dedicated little time to understand those processes and evaluate their effectiveness and efficiency.

- **Addressing the interrelated issues contributing to MCILS weak oversight structure will require a holistic approach.**

  This report identifies several issues which are interrelated in their contribution to MCILS's inadequate structure for oversight of its operations and statutory purpose. The establishment of a robust oversight structure for MCILS should begin with the development of a formal, strategic plan with a framework driven by and addressing each of the elements contained within MCILS's statutory purpose—to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. A focus on this purpose should result in a plan which would include clearly expressed priorities, articulated objectives for all of the processes and systems established to achieve those priorities, and well-defined roles and responsibilities for MCILS staff and the Commission itself. Adherence to a well-designed strategic plan could facilitate a structure for MCILS oversight and operations that is proactive in addressing issues of efficiency, effectiveness and potential misconduct—as opposed to the current posture of the structure, which is more reactive and shortsighted. Existence of this formal guiding document would provide the necessary foundation upon which the operations of the agency are designed, as well as, the benchmarks against which those operations can be measured and monitored by the Commission – and ultimately support effective oversight to ensure that MCILS's obligation to the People of the State of Maine is being met.

Appendix A

Project Direction Statement

Project direction statement: Maine Commission on Indigent Legal Services

Presented by OPEGA to the Government Oversight Committee - 129th Maine Legislature

December 10, 2019

Purpose of a project direction statement in the course of a full review

After the Government Oversight Committee (GOC) added a review of financial oversight and economic use of resources related to the Maine Commission on Indigent Legal Services (MCILS) to the Approved Project List, OPEGA assigned a team of Analysts to conduct preliminary research. The preliminary research stage of the evaluation process provides the team with a broad, but comprehensive understanding of the program. Once preliminary research is complete, the team reviews themes that have emerged and identifies areas that may be of future concern to the program. This work results in a proposed project direction statement for the GOC to consider. The statement suggests a framework that will guide OPEGA in the next phase of the evaluation process, fieldwork. This document represents that work and is respectfully presented for the GOC's consideration.

OPEGA recommends that the GOC direct a full evaluation of MCILS specifically related to financial oversight and the economic use of resources, and within the scope described in this statement.

Overview of MCILS

Establishment of MCILS and Organizational Structure

MCILS is a Commission that was established in 2009. The Commission is currently made up of nine members and is supported by an office staff of 4 who conduct the day-to-day operations. Its statutory purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. This representation is provided in accordance with requirements established in statute and both the federal and state constitutions. Maine statute specifies that the Commission shall work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. Prior to MCILS, indigent legal services were arranged and funded by the Judicial Branch.

An amendment to statute in 2018 increased the number of members appointed to serve on the Commission from five to nine. The membership must include one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are attorneys providing indigent legal services.

MCILS staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time remotely.

Determination as indigent or partially indigent

In Maine, services for those who have been determined indigent, or partially indigent, are provided by attorneys in private practice. The Court assigns representation to a person by selecting an attorney from a roster maintained by MCILS. In order to be listed on the roster, attorneys must meet certain requirements. If they provide specific types of services, or have a defense specialty, they are listed on specific rosters accordingly.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring representation. In some courts, a financial screener may be available. The screener interviews the client, gathers financial information, including the client's assets, income and expenses and makes a recommendation to the judge based on this information. The judge can deny representation at the public expense or make a determination that the person is indigent or partially indigent. A person determined partially indigent is ordered to make payments toward the assigned attorney's fees.

Attorney payments

MCILS is responsible for paying counsel fees and expenses to attorneys who have been assigned to indigent or partially indigent clients. Attorneys submit a voucher to MCILS through the electronic case management program, Defender Data. The MCILS Director and Deputy Executive Director review vouchers and approve attorney payments. Services provided by vendors hired by the attorney such as investigators, interpreters, and medical and psychological experts require advance notice and approval by MCILS. The vendor sends an invoice for the services provided to the attorney which is then submitted to and processed by MCILS who makes payment to the vendor.

Until June 30, 2019, one fixed fee contract existed to facilitate providing representation in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. At this time, MCILS has no contracted attorney services.

MCILS General Fund budget

The Legislature appropriated approximately $17.7 million for MCILS in FY20, and $17.6 for FY21.

GOC decision to consider review of MCILS

During the 128th legislative session, OPEGA received a request for a review of MCILS from a GOC member with concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a

portion of counsel fees. On February 17, 2017, the GOC voted unanimously to place the MCILS review request on OPEGA's Standby List.

The 2017 Working Group

While this topic was on the Standby List, the 128th Legislature created the Working Group to Improve the Provision of Indigent Legal Services (the Working Group) as part of the biennial budget. The purpose of the Working Group was to develop recommendations to improve the delivery of indigent legal services to eligible people by focusing on:

- ensuring adequate representation;
- increasing the efficiency in delivering legal services;
- verifying eligibility throughout representation; and
- reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

In December 2017, the Working Group issued its report containing nine recommendations— the following four are related to the current scope of this request.

- Recommendation 2: Enhance the MCILS staff to provide better financial accountability and quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director.
- Recommendation 4: Strengthen the financial eligibility screening procedure.
- Recommendation 5: Remove the collections function from the MCILS and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the Court to contribute to the costs of those services.
- Recommendation 7: Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternative methods of delivery would increase quality and efficiency.

Sixth Amendment Center report

Recommendation 7 directly led to a report from the Sixth Amendment Center evaluating the services provided by MCILS. Issued April 2019, this report contained eight findings and seven recommendations— the following, from that report, relate to the current scope of this request.

- Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.
- Recommendation 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

While the Sixth Amendment Center report was being finalized, a GOC member brought forward a request for a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services.

On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

Preliminary research conducted by OPEGA

During the preliminary research phase OPEGA:

- sought input from GOC members and Judiciary Committee members and staff on their questions and concerns regarding MCILS;
- reviewed statute, legislative history, rules and guidance related to MCILS;
- interviewed the State Auditor to understand any identified areas of concern;
- interviewed the MCILS Executive Director, Deputy Executive Director, Accounting Technician, a selection of screeners, and the screener/investigator;
- interviewed the Chief Justice and a selection of Judges;
- interviewed a selection of MCILS rostered attorneys working in different areas of law;
- reviewed the data provided to the Sixth Amendment Center on voucher payments based on assigned attorney;
- reviewed data on work performed over three years by nine attorneys and considered correspondence related to MCILS's investigation into high earning attorneys;
- considered the Sixth Amendment Center report "The Right to Counsel in Maine" (April 2019) and interviewed the Executive Director;
- considered the report of the Legislative Working Group to Improve the Provision of Indigent Legal Services (December 2017);
- reviewed a State Controller's report on MCILS's case management system; and
- reviewed reports regarding the provision of indigent legal services in other states.

Evaluation scope

OPEGA examined the various themes that emerged from preliminary research and identified the following areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.

1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
2. Reasonableness of and consistency in the application of standards, criteria and procedures which inform the determination of whether a defendant/client is indigent.
3. Reasonableness of and consistency in the application of criteria and procedures used in determining, ordering and monitoring payments towards counsel fees by those who have been determined to be partially indigent.

4. Sufficiency of response by MCILS, or MCILS staff, to internally identified concerns and to recommendations made in reports which examined or evaluated the operations of the Commission regarding financial oversight.
5. Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

If the GOC wishes to direct OPEGA to begin fieldwork for the purpose of conducting a full evaluation of, and report on, the financial oversight of MCILS, OPEGA proposes the areas listed above for the scope of that work. If approved, OPEGA Analysts will examine the effectiveness of MCILS's financial controls in the prevention, detection and correction of inappropriate or unnecessary expenditures and if those controls are adequate to guard against fraud, waste and abuse. Analysts will evaluate if the practices employed by MCILS staff (including screeners) relative to financial operations are being conducted in accordance with statute, rule and best practices, as well as whether they are effective, applied consistently, and when an appropriate standard, with efficiency. Generally, fieldwork will also evaluate the structure and management of the financial elements of the program and if the structure and management are appropriate and in alignment with the organization's purpose(s).

Although some of the areas noted in this statement have been examined to some degree by the Sixth Amendment Center Report and the 2017 Working Group, OPEGA's review will add to that work. With access to additional data, OPEGA will perform a more detailed analysis of attorney billing and expenditures made by MCILS for legal services. It is possible that this comprehensive analysis might allow for us to separate potential actual overbilling from outliers that may have been due to error or that just appear to be instances of overbilling. This work may also allow for a closer examination of the current systems employed to review billing and make expenditures to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

In consideration of the parameters cited when the GOC voted to include a review of the financial operation and oversight of MCILS onto the Approved Projects List, it is important to be clear about what this review will not evaluate. The proposed scope does not include an evaluation of:

- standards for attorneys to be on the MCILS rosters;
- quality of representation provided;
- attorney rates of pay; or
- whether or not a public defender office should be introduced.

OPEGA thanks the Committee for their consideration of this project direction statement for a full review of the financial oversight and economic use of resources by the Maine Commission on Indigent Legal Services.

Appendix B

GOC decision to consider review of MCILS

MCILS has previously been the subject of review by the Legislature and outside entities over the last three years. The GOC had also been asked to consider directing OPEGA to conduct a review of MCILS prior to the request that resulted in this review. In 2017, during the 128th legislative session, the GOC received a request for a review from a GOC member citing concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a portion of counsel fees. A full review was not approved by the committee at that time, but the request was added to GOC Stand-by List (pending a future vote to be added to the approved projects list/workplan) by a unanimous vote of the Committee.

A few weeks before completion of the 6AC report, a GOC member brought forward a request for the Committee to direct OPEGA to conduct a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services. On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

OPEGA presented a project direction recommendation which examined the various themes that emerged from preliminary research and identified several areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.[12] On December 10, 2019, the GOC unanimously voted to direct OPEGA to conduct a full review of MCILS with the scope outlined in the project direction statement.

The GOC later moved to expedite some elements of the review after receiving communication from the Chairs of the Joint Standing Committee on Judiciary requesting prioritization of the MCILS review. On January 10, 2020, the GOC directed OPEGA to expedite review of the following evaluation scope items:

- Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA conducted field work from January through March, 2020 using extensive quantitative analysis as well as more qualitative types of review. Some of that work included conducting interviews of MCILS staff and the current and former Commission Chairs, reviewing Commission meeting minutes, relevant statute and rules, and other relevant documents. OPEGA analyzed attorney billing data used by the agency, and data provided to 6AC, as well as our own data set obtained directly from the billing system proprietor. We also selected a sample of invoices from non-attorney service providers (i.e. private investigators, expert witnesses, interpreters, etc.) to test agency invoice review, approval, and audit practices.

[12] See Appendix A Project Direction Statement for full list of themes.

Appendix C

Comparison of Sixth Amendment Center and OPEGA review of attorney billing

One of the primary drivers for this review were the issues noted in the 6AC report—particularly the number of annual hours billed by rostered attorneys—that were later reported by the media as potential examples of overbilling and/or fraud. With access to additional data directly from the billing service provider, OPEGA was able to perform a more detailed analysis of attorney billing and payments made by MCILS for legal services. The intention of this comprehensive analysis was to identify and separate instances in which outlying values resulting from data input errors or inconsistencies that otherwise—and incorrectly—appear to be instances of overbilling from true, potential instances of overbilling within the dataset. This work allowed for the closer examination of the current systems employed by the agency to review billing and make expenditures, and to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

Sixth Amendment Center figures

In light of the published figures, the MCILS Executive Director worked with Justice Works (proprietor of Defender Data) to pull actual billing hour entries for the highest billing attorneys and undertook his own investigation in late August and early September of 2018. The Executive Director's analysis and correspondence with the attorneys in question led to the agency's conclusion that the figures reported in the 6AC report did not reflect hours worked by those attorneys. As part of our initial work, OPEGA sought to verify the figures in the 6AC report to identify whether there were any underlying issues that fully, or partially, explained the magnitude of the figures in the report.

We obtained and reviewed the data provided to the 6AC and found it captured annual (fiscal year) billings by the attorney originally assigned to the case by the Court, which the 6AC then used to calculate the average number of hours worked per week for that assigned attorney by using the appropriate attorney rate for each fiscal year and 52 weeks per year. We found those calculations to be mathematically correct.

We also obtained and reviewed the data later obtained by MCILS staff from Justice Works for its investigation, the agency's analysis related to that investigation, and resulting correspondence between MCILS staff and selected attorneys. Issues with the scope and depth of this investigation are noted in Issue 5 on page 18.

Lastly, we worked directly with Justice Works to obtain our own dataset. That data contained, not only payments to assigned counsel, but also the actual work events (standardized entries that describe the work performed such as preparing an email, file review, phone conference with client, etc.), the durations of those events (in tenths of an hour), the attorney who performed the work—regardless of assignment—and all associated payments for that work. After performing our own analysis and comparing the three sets of data, we were able to conclude that the data provided to the 6AC should not be used to calculate an attorney's hours worked. When that data is used, the calculation can drastically overstate an attorney's hours—particularly if that attorney works in a firm with other attorneys.

Upon further inspection, the data provided to the 6AC reflected all of the annual billings for attorneys listed as the court-assigned counsel. This was problematic for two reasons:

1. Not all billings are time events. Other billing categories, such as mileage and some copy expenses, may be reimbursed through vouchers via Defender Data. These types of expenses increase annual billing totals—and subsequent calculations of weekly hours worked using those annual totals—to whatever extent they occur and are then included in the data.
2. Of significantly greater importance is that while an attorney may be the Court-assigned counsel and always recorded as such in Defender Data, the reality is that the assigned counsel is not always the attorney actually performing the work and entering and billing for that work via Defender Data. It is unclear to OPEGA how or why the data provided to the 6AC was aggregated by annual billing dollars and attorneys listed as assigned counsel, but we note that using this data instead of timed events by work attorney to calculate attorneys' average weekly hours, inaccurately includes non-time expenses and potentially misattributes the work hour of several attorneys to only one attorney.

To illustrate the effect of misattributing the work hours of multiple attorneys working on a case to only the assigned attorney, we selected the most prominent example of high weekly hours cited in the 6AC report—Attorney 2 receiving $307,381 in annual pay from MCILS in FY16 representing 98.52 hours worked per week. Using the data provided to 6AC, we identified Attorney 2 and then queried the OPEGA-obtained data set to identify total FY16 payments for time events on cases in which that attorney was the assigned counsel and any other attorneys whose work or payments would be captured in that total (but misattributed to Attorney 2). The results of that query are presented in Table 1.

Table 1: Comparison of 6AC and OPEGA Example FY16 Attorney Billing Attributions

6AC		OPEGA		
Attorney	FY16 Annual Pay	Assigned Attorney	Work Attorney	FY16 Amount
Attorney 2	$ 307,381.00	Attorney 2	Attorney 2	$ 152,329.25
		Attorney 2	Attorney H	$ 41,381.25
		Attorney 2	Attorney I	$ 31,909.00
		Attorney 2	Attorney J	$ 18,688.25
		Attorney 2	Attorney K	$ 15,399.50
		Attorney 2	Attorney L	$ 12,674.00
		Attorney 2	Attorney M	$ 11,715.50
		Attorney 2	Attorney N	$ 10,676.75
		Attorney 2	Attorney O	$ 10,625.25
		Attorney 2	Attorney P	$ 3,382.25
		Attorney 2	Attorney Q	$ 240.00
		Attorney 2	Attorney R	$ 155.50
		Attorney 2	Attorney S	$ 137.50
		Total Paid on Vouchers In Which Attorney 2 Was The Assigned Attorney		$ 309,314.00

Source: FY16 Table on Page 81 of 6AC report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

In this case, analyzing FY16 payments by the assigned counsel and the attorney actually performing work on those cases, paints a very different picture of Attorney 2's actual hours worked. Over half of the payments—and hours calculated by the 6AC—were for work performed by other attorneys.

Overall, we observed that misattributed earnings impacted many of the attorneys listed in the 6AC report, which included a table showing the top ten earners over the period as calculated from the data they obtained. Using our data, we were able to remove payments for attorneys other than the assigned counsel working on those cases. The 6AC's five-year totals for their top ten earners, as well as our five-year totals for those same ten attorneys, are presented in Table 2.

Table 2: Comparison of 6AC and OPEGA FY14-FY18 Total Attorney Billing Attributions By Attorney

Attorney	6AC FY14 - FY18 Totals	OPEGA FY14 - FY18 Totals	Difference
Attorney 2	$ 1,189,361.37	$ 687,487.75	$ 501,873.62
Attorney 8	$ 793,967.06	$ 678,928.00	$ 115,039.06
Attorney 13	$ 745,311.76	$ 591,918.00	$ 153,393.76
Attorney 5	$ 665,058.50	$ 653,566.50	$ 11,492.00
Attorney 11	$ 662,753.12	$ 565,939.85	$ 96,813.27
Attorney 7	$ 658,486.60	$ 654,886.55	$ 3,600.05
Attorney 9	$ 657,896.39	$ 646,919.50	$ 10,976.89
Attorney 3	$ 621,673.26	$ 403,545.00	$ 218,128.26
Attorney 4	$ 618,086.99	$ 497,726.30	$ 120,360.69
Attorney 10	$ 610,092.76	$ 593,382.50	$ 16,710.26

Source: Five Year Summary Table on Page 83 of 6AC Report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

Because misattributed earnings were used to calculate hours per week, some of those figures—particularly among the highest reported—were also overestimated. Using a similar methodology as the 6AC to calculate average hours worked per week, we calculated figures based on work attorney earnings. Table 3 shows the number of instances in which an attorney was calculated to have worked more than 40 hours per week as calculated by 6AC compared to those instances we calculated using the OPEGA obtained data and stratified by ranges of hours.

Table 3: Comparison of 6AC and OPEGA Distributions of Attorney Average Hours Worked Per Week By FY

Average Hours Worked Per Week	FY14		FY15		FY16		FY17		FY18		5 YEAR TOTAL	
	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA	6AC	OPEGA
40-45	5	6	6	7	7	6	4	6	14	11	36	36
45-50	2	0	3	3	1	1	4		5	6	15	10
50-55	1	2	2	1		2	1	2		2	4	9
55-60				1	2		1	1	1	2	4	4
60-65	1				1	1			1	2	3	3
65-70	1	1							1	1	2	2
70-75	1			1			1		1		3	1
75-80											0	0
80-85										1	0	1
85-90									2		2	0
90-95			1								1	0
95-100					1						1	0
Total	11	9	12	13	12	10	11	9	25	25	71	66

Source: Annual Tables on Pages 80 - 82 of 6AC report "The Right to Counsel in Maine" and OPEGA analysis of MCILS voucher data obtained from Justice Works.

Appendix D

Additional results of OPEGA's review of non-counsel invoices

OPEGA also identified one instance in which an invoice for private investigation services was paid twice. Private investigation services, like other non-counsel services (expert witnesses, interpreters, etc.), are to be preapproved by either MCILS staff or the Court. The agency records these preapprovals in a series of spreadsheets with the court of record, docket number, attorney, defendant, vendor, and approved amount. These spreadsheets are intended to serve as a control as paid amounts and remaining balances are tracked and recorded. OPEGA reviewed 13 invoices comprising six different instances of potential duplicate (5 occurrences) or triplicate (1 occurrence) payments. Within these six instances, we identified the following scenario in which a (partial) invoice was paid more than once:

- 12/29/10: Court authorizes $1,000 for defendant to employ a private investigator.
- 3/16/11: The defendant's attorney submits the private investigator's invoice. The invoice total is $1,411,32.
- 4/5/11: MCILS Executive Director authorizes payment of $1,000 (presumably based on the 12/29/10 order).
- 4/12/11: MCILS Deputy Executive Director reviews the defendant's request for funds and authorizes the expenditure of up to $411.32 nunc pro tunc[13].
- 4/14/11: MCILS Executive Director authorizes payment of $411.32.
- 5/13/11: The defendant's attorney submits the private investigator's invoice with a note that the attached bill is for $411.32, as it is the remainder of the original invoice that had not been paid in full. The line item descriptions (people, places, dates, and services) referenced on the invoice are the same as those cited on the 3/16/11 invoice.
- 6/1/11: MCILS Executive Director authorizes payment of $411.32.

The preapproval spreadsheets have two entries for these services for this defendant and docket number: one for $1,000 and one for $411.32. For these transactions, the control (the spreadsheet and its review) did not appear to catch the duplicate payment of $411.32.

[13] This term is commonly used in the legal system to indicate a ruling or order applies retroactively to an earlier decision.

MAINE COMMISSION ON
INDIGENT LEGAL SERVICES
John D. Pelletier, Esquire
Executive Director

October 15, 2020

Senator Justin Chenette, Senate Chair
Representative Anne-Marie Mastraccio, House Chair
Government Oversight Committee

Dear Senator Chenette and Representative Mastraccio:

As chair of the Maine Commission on Indigent Legal Services (MCILS), I write to acknowledge receipt of OPEGA's Confidential Draft Report, pursuant to Title 3 §997(1) of OPEGA statute. I am pleased to offer this formal agency comment in advance of the report's submission to the Government Oversight Committee and subsequent public hearings.

The eight current members of MCILS, all appointed by the Chief Executive, have been in place since the fall of 2019. As we have undertaken to more fully understand the landscape of how indigent legal services are provided in the State of Maine, a consensus has developed within the Board that is largely consistent with the conclusions outlined by OPEGA staff. We wish to make the following summary reply:

1. The Commission has no disagreement with any of the actual facts stated in the report.
2. There is gross underfunding for appropriate agency staffing.
3. The significant inadequacies OPEGA has identified with respect to financial procedures and oversight structure cannot solely be attributed to inadequate funding.
4. More broadly, the five specific conclusions reached by OPEGA in Part II of its report are serious and require more urgent action by the Commission than that undertaken to date.
5. The Commission largely agrees with the conclusions of OPEGA in Part III of its report addressing structure and oversight.

As further background, I note that the "new" Commission has set up a number of Subcommittees tasked with particular areas of system operation. These include:

a. Subcommittee on Financial Oversight
b. Subcommittee on Practice Standards
c. Subcommittee on Training
d. Subcommittee on Public Defender

Before implementing any specific changes to current operations, the Commission wanted to have the benefit of this OPEGA report. Armed with this review, as well as the thoughtful analysis of the Sixth Amendment Center, the Commission feels well positioned to make the kinds of significant changes needed to accomplish its statutory mission.

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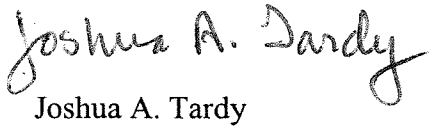
With specific reference to staffing, last October the Commission submitted its Supplemental Budget request to the Chief Executive to hire an additional attorney to enhance capacity for training and supervision of attorneys and a person with financial and audit skills to improve oversight of attorney billing. Further, a couple weeks ago, the Commission made a request to the Chief Executive for the upcoming biennial budget for additional staffing needed to fulfill our statutory mission. We are also looking at issues related to our current staffing.

The Government Oversight Committee should also understand that, consistent with key recommendations in the Sixth Amendment Center Report, the Commission has recommended establishing a Public Defender Office in one Maine county on a pilot basis. As Committee members may know, Maine is the only state in the country that does not provide indigent legal services through a public defender's office in at least a portion of the state.

Finally, we want to highlight that the current report addresses only two issues from OPEGA's work plan. The Commission's budget request addresses these issues, as well as the need to better ensure the quality of representation to meet the statutory obligation to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. We welcome the office's final report.

We thank you for your diligent interest in indigent legal services and look forward to participating in the public hearings around this report.

Respectfully submitted,



Joshua A. Tardy
Chair, Maine Commission on Indigent Legal Services