Filed: 03/19/2019 13:28:53
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Hoskins, Janet

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY

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

vs.

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

Case No. CV-OC-2015-10240

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT, RECOMMENDING PERMISSION TO APPEAL PURSUANT TO I.A.R. 12(c)(2), AND STAYING PROCEEDINGS

THIS MATTER comes before the Court on cross Motions for Summary Judgment, filed through counsel on November 20, 2018. A hearing was held on February 13, 2019, and the matter was taken under advisement. One of the central issues presented by the Motions is: what is the appropriate legal standard the Plaintiffs must meet in order to prevail on their systemic challenge to Idaho's indigent public defense system? Both sides urge the Court to adopt two very different standards and conclude that the evidence supports their respective Motions for Summary

Judgment.[1] There is no controlling precedent in Idaho on the issue, and other courts dealing with challenges to public defender systems have adopted widely varying standards. Accordingly, the Court finds that an immediate appeal is necessary to materially advance the litigation as there is substantial confusion over the standard to be applied and the issue presents a matter of first impression.

FACTS

This case is about whether Idaho's public defender system fails to meet constitutional requirements. The Plaintiffs allege Idaho's public defense system violates the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 13 of the Idaho Constitution. The Defendants include the State of Idaho and the members of the Idaho Public Defense Commission, in their official capacities.

In 2015, Plaintiffs' Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs") filed the instant suit on behalf of themselves and all other similarly situated indigent criminal defendants alleging Idaho's public defense system is inadequate under state and federal constitutional standards. Plaintiffs were represented by public defenders (or conflict counsel for the public defenders) in at least eight Idaho counties, including Bonner, Boundary, Kootenai, Shoshone, Ada, Gem, Payette, and Canyon counties. They alleged numerous instances of their

[1] In short, Plaintiffs contend they need only prove a risk of harm, whereas Defendants assert Plaintiffs must demonstrate actual harm to prevail on their claims.

public defenders' inadequate representation of them in their respective cases,[2] which amounted to "actual and constructive denials of counsel at critical stages of the prosecution."[3] They contend that "they exemplify the experiences of thousands of indigent defendants across the State, who have been denied their right to effective assistance of counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law."[4]

(1) Background

In Idaho, individual counties are tasked with the duty of administering and funding public defender services.[5] Counties have four options for providing public defender services. They may provide representation by (1) establishing and maintaining an office of public defender; (2) joining with the board of county commissioners of one or more other counties within the same judicial district to establish and maintain a joint office of public defender; (3) contracting with an existing office of public defender; or (4) contracting with a defending attorney. I.C. § 19-859.

[2] First Amended Class Action Compl. for Injunctive & Declaratory Relief & Suppl. Pleading ¶¶ 6—9 (filed Aug. 15, 2017) (hereafter, "Compl.").

[3] *Tucker v. State*, 162 Idaho 11, 20, 394 P.3d 54, 63 (2017).

[4] Compl. at ¶ 10.

[5] "The board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense." I.C. § 19-859. "The board of county commissioners of each county shall annually appropriate enough money to fund the indigent defense provider that it has selected under section 19-859, Idaho Code[.]" I.C. § 19-862.

As a result, the State has different systems with different standards, resources, and varying quality of services. Ada, Bannock, Bonner, Bonneville, Canyon, Gooding, Jefferson, Kootenai, and Twin Falls counties all have independent public defender offices. Cassia, Minidoka, Power, and Oneida utilize joint public defender offices. The remaining 31 counties provide public defense services by contracting with private attorneys.

About 10 years ago, the State commissioned a report on Idaho's public defender services, and in 2010, the National Legal Aid and Defender Association ("NLADA") issued a report after studying trial level indigent services offered in seven Idaho counties (hereafter, "NLADA Report").[6] The NLADA Report found there were no constitutionally adequate public defender systems in the sample counties and identified various areas of concern. The NLADA Report concluded:

> Though we find systemic deficiencies in the delivery of right to counsel services, we do not offer specific recommendations for reform.
>
> Our decision to exclude specific recommendations was made for two very specific reasons. First and foremost, Idaho is unique — any solution must necessarily take into account local cultures, court structures and other variances that are best debated by the citizenry of the state and their elected officials rather than outside observers. There is no single "cookie-cutter" delivery model (staffed public defender office, assigned counsel system, or contract defenders) that guarantees adequate representation. Rather, there are two primary factors that determine the adequacy of indigent defense services provided: (a) the degree and sufficiency of state funding and structure, and (b) compliance with nationally recognized standards of justice. So long as these two goals are met, Idaho policy-makers will have remedied the crisis.
>
> Second, if NLADA drafted a list of recommended solutions, a political debate would most likely ensue around the validity of the recommendations. NLADA hopes instead for statewide debate to center on the soundness of our assessment of the system. We have no power to compel change beyond our ability to hold a mirror up to the present system, make the case that Idaho is falling short on its

[6] http://nlada.net/sites/default/files/id_guaranteeofcounseljseri01-2010_report.pdf. The counties studied included, Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power. *Id.*

> constitutional obligations, and hopefully convince citizens and policy-makers to want to act. If there is consensus agreement that Idaho is failing to uphold one of the fundamental constitutional rights, we are confident that Idahoans — with more intimate knowledge of the local variances and the state's financial situation — can both construct an effective system and find the money to run it efficiently. In 2007, the Louisiana Legislature was able to quadruple funding for indigent defense services while overhauling their system despite the financial constraints of their post-Katrina reality.
>
> NLADA stands ready to assist state policymakers by providing advice about what has worked, been tried and failed in other states, should such assistance be sought. However, we do not have standing or the desire to dictate a single path to reform. We are confident that the people of Idaho have the will, experience and knowledge to fix this problem in a way that makes sense before others file a class action lawsuit and a Court imposes an "off the shelf" solution.[7]

(2) Public Defense Commission

In response to the NLADA Report, in 2014, the legislature created the Idaho Public Defense Commission ("PDC").[8] The PDC is a self-governing agency comprised of nine members,[9] which includes two representatives from the state legislature, one representative appointed by the chief justice of the Idaho Supreme Court, and six representatives appointed by the governor. I.C. § 19-849. The PDC is tasked with overseeing the delivery of public defender services in all of Idaho. The PDC is required to promulgate rules regarding the delivery of public defender services, make recommendations to the legislature concerning public defense, review and evaluate compliance with indigent defense standards and grants, and hold at least one meeting each quarter. The rules the PDC is tasked with promulgating include:

[7] *Id*. at p. 89. Obviously, the NLADA report drafters' hopes for a fix outside the court system did not come to fruition.

[8] The PDC and the rules and regulations enacted by it have gone through numerous revisions and additions since the PDC's inception. This decision will focus on the currently enacted rules and regulations.

[9] At the time it was created, the PDC consisted of seven members.

(i) Training and continuing legal education requirements for defending attorneys, which shall promote competency and consistency in case types including, but not limited to, criminal, juvenile, capital, abuse and neglect, post-conviction, civil commitment and criminal contempt;

(ii) Uniform data reporting requirements and model forms for the annual reports submitted pursuant to section 19-864, Idaho Code, which shall include, but not be limited to, caseload, workload and expenditures;

(iii) Model contracts and core requirements for contracts between counties and private attorneys for the provision of indigent defense services, which shall include, but not be limited to, compliance with indigent defense standards;

(iv) Procedures and forms by which counties may apply to the commission, pursuant to section 19-862A, Idaho Code, for funds to be used to bring their delivery of indigent defense services into compliance with applicable indigent defense standards;

(v) Procedures for administrative review and fair hearings in accordance with the Idaho administrative procedure act, which shall include, but not be limited to, providing for a neutral hearing officer in such hearings;

(vi) Procedures for the oversight, implementation, enforcement and modification of indigent defense standards so that the right to counsel of indigent persons, as provided in section 19-852, Idaho Code, is constitutionally delivered to all indigent persons in this state; and

(vii) Standards for defending attorneys that utilize, to the extent reasonably practicable taking into consideration factors such as case complexity, support services and travel, the following principles:

1. The delivery of indigent defense services should be independent of political and judicial influence, though the judiciary is encouraged to contribute information and advice concerning the delivery of indigent defense services.

2. Defending attorneys should have sufficient time and private physical space so that attorney-client confidentiality is safeguarded during meetings with clients.

3. Defending attorneys' workloads should permit effective representation.

4. Economic disincentives or incentives that impair defending attorneys' ability to provide effective representation should be avoided.

5. Defending attorneys' abilities, training and experience should match the nature and complexity of the cases in which they provide services including, but not limited to, cases involving complex felonies, juveniles and child protection.

6. The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.

7. There should be reasonable equity between defending attorneys and prosecuting attorneys with respect to resources, staff and facilities.

8. Defending attorneys should obtain continuing legal education relevant to their indigent defense cases.

9. Defending attorneys should be regularly reviewed and supervised for compliance with indigent defense standards and, if applicable, compliance with indigent defense standards as set forth in contractual provisions.

10. Defending attorneys should identify and resolve conflicts of interest in conformance with the Idaho rules of professional conduct and other applicable constitutional standards.

Violation of or noncompliance with the principles listed in this subparagraph does not constitute ineffective assistance of counsel under the constitution of the United States or the state of Idaho and does not otherwise constitute grounds for post-conviction relief.

(b) On or before January 20, 2015, and by January 20 of each year thereafter as deemed necessary by the commission, make recommendations to the Idaho legislature for legislation on public defense system issues including, but not limited to:

(i) Enforcement mechanisms; and
(ii) Funding issues including, but not limited to, formulas for the calculation of local shares and state indigent defense grants.

> (c) Review indigent defense providers and defending attorneys to evaluate compliance with indigent defense standards and the terms of state indigent defense grants.
>
> (d) Notwithstanding the provisions of paragraph (a)(iv) of this subsection, establish temporary procedures and model forms by which counties may apply to the commission for state indigent defense grants pursuant to section 19-862A, Idaho Code, to be utilized until rules promulgated pursuant to paragraph (a)(iv) of this subsection are in full force and effect. Such temporary procedures shall not be subject to administrative or judicial review.
>
> (e) Hold at least one (1) meeting in each calendar quarter.

I.C. § 19-850(1). The PDC has enacted rules and regulations concerning all the subjects set forth above. IDAPA 61.01.01—.08 *et seq*. The PDC also provides counties with supplemental resources for the delivery of indigent defense services:

> (2) On or before August 1, 2016, and by May 1 of each year thereafter, each county may submit to the commission an application for a state indigent defense grant that shall include a plan that specifically addresses how indigent defense standards shall be met and, if applicable under subsection (11)(a) of this section, how any deficiencies previously identified by the commission will be cured in the upcoming county fiscal year. The application shall also include a cost analysis that shall specifically identify the amount of funding in excess of the applicable local share, if any, necessary to allow the county to successfully execute its plan. In the event the commission has not yet promulgated any indigent defense standards, or the commission determines that the county can successfully execute its plan without exhausting the entirety of the grant for which it may be eligible, an application submitted pursuant to this section may request funding to be used for other improvements to its delivery of indigent defense services. Such other improvements may include, but are not limited to, funding for investigation costs, witness expenses and other extraordinary litigation costs.
>
> (3) The amount of a state indigent defense grant shall not exceed fifteen percent (15%) of the county's local share for said county fiscal year or twenty-five thousand dollars ($25,000), whichever is greater. If a county elects to join with the board of county commissioners of one (1) or more other counties within the same judicial district to establish and maintain a joint office of public defender pursuant to section 19-859(2), Idaho Code, each participating county shall be eligible for an additional twenty-five thousand dollars ($25,000) per year. The maximum amount of a state indigent defense grant shall remain in effect until July 1, 2019, unless otherwise addressed by the legislature prior to that date.

> (4) The commission shall approve an application submitted under subsection (2) of this section, in an amount deemed appropriate by the commission, if the application:
>
> > (a) Includes a plan that is necessary to meet or improve upon indigent defense standards; and
> > (b) Demonstrates that the amount of the requested state indigent defense grant is necessary to meet or improve upon indigent defense standards.

I.C. § 19-862A(2)-(4).

The PDC has enacted various regulations concerning training for public defenders, including, the allocation of training funds for public defenders, maintaining a roster of public defenders, types of training programs to benefit defending attorneys and staff, and scholarships. *See* IDAPA 61.01.01 *et seq*. In 2017, the PDC promulgated "Standards for Defending Attorneys – edition 2017" (hereafter, "PDC Standards"), which sets forth rules governing standards for public defenders and includes a requirement that defending attorneys complete seven hours of continuing legal educations courses relevant to the representation of indigent defendants. The PDC Standards includes many other training, performance, and qualification standards for public defenders.[10]

(3) Caseloads

The ABA National Advisory Committee ("NAC") promulgated national caseload standards in 1973. The NAC standards provide that a defending attorney's annual caseload should not exceed 150 felonies, 400 misdemeanors, or 200 juvenile cases per year, and that these numbers must be adjusted to account for factors including mixed caseloads, private caseloads, an

[10] https://pdc.idaho.gov/wp-content/uploads/sites/11/2018/05/Standards-for-Defending-Attorneys-edition-2017.pdf

attorney's non-representational duties, and the increasing complexity and time-consuming nature of public defense.

Currently, the PDC has imposed no numerical limits on caseloads; however, the PDC has proposed legislation that limits public defenders to handling no more than two active capital cases at a time, 210 non-capital felony cases annually, 520 misdemeanor cases annually, 232 juvenile cases annually, 105 child protection cases annually, 608 civil contempt cases annually, or 35 non-capital substantive appeal cases annually.

While the PDC's 2017 annual report indicated that 22 of the 44 counties exceeded NAC caseload standards, the former Executive Director of the PDC, Kimberly Simmons, testified in her November 20, 2018 declaration: "Based upon initial current 2018 information, it preliminarily appears that about 27 counties would be in immediate compliance with a 210 FCE [felony case equivalent] caseload standard, assuming 1) approval of the caseload standard numbers by the Legislature, and 2) that no attestations demonstrating justifiable reasons to exceed the caseload standard were submitted."[11] Based on the PDC's calculations, it appears that about 17 counties would have attorneys with excessive caseloads under the PDC's proposed workload standards.

A study was conducted by Boise State University concerning the workload of public defenders in Idaho ("BSU Workload Study"). It was published in March 2018 and concluded that, on average, Idaho public defending attorneys spend 3.8 hours to resolve felony cases, 2.2 hours to resolve misdemeanor cases, 2.6 hours to resolve juvenile cases, and 2.2 hours to resolve probation violation cases. It also concluded that the average time it should take an attorney to

[11] Simmons Decl. ¶ 17 (filed Nov. 20, 2018).

resolve the following cases is: 67.19 hours for felonies, 31.97 hours for misdemeanors, 24.7 hours for juvenile cases, and 13.77 hours for probation violation cases. Both sides have criticized the methodology used by the researchers in the BSU Workload Study, creating questions regarding its admissibility or weight.

At this juncture, there are genuine issues of material fact as to whether a constitutional workload limit should be established, and if so, what that limit should be, and how to account for individual variations, and whether some, most, or all public defenders' workloads in Idaho exceed the constitutional maximum.

(4) Initial Appearances

PDC Standard VI states as follows with respect to representation at initial appearances:

> The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.
>
> > A. A defending attorney should be appointed at the initial appearance and shall be immediately available in-person or through technology to an indigent defendant upon such appointment. At the initial appearance, the defending attorney should make efforts to preserve all of the defendant's constitutional and statutory rights, and seek pre-trial release at the initial appearance under conditions that serve the best interests of the defendant. Further, the defending attorney should encourage the entry of a not guilty plea in all but the most extraordinary of circumstances where a disposition at initial appearance is constitutionally appropriate.
> >
> > B. In order to successfully advocate on a defendant's behalf at an initial appearance, a defending attorney should obtain information relevant to pre-trial release pursuant to Idaho Criminal Rule 46, and if possible, discuss the charges and possible consequences with the defendant.

> C. Once assigned to a defendant's case, to the extent reasonably practicable, a defending attorney shall be present at all critical stages for that defendant. This is sometimes referred to as vertical representation.

Currently, at least four counties out of 40 are not in compliance with the above standard. Simmons testified that Benewah County has a "solution proposed and in progress," while Bear Lake, Franklin, and Caribou counties present "unique problems, given the low population density, low caseload, erratic first appearance scheduling by the courts, and limited number of out-of-county attorneys handling matters in those counties."[12] There were at least 18 reported instances of attorneys being appointed at the initial appearances, and in at least 20 counties, defending attorneys attend or will attend initial appearances by phone or videoconference.[13]

(5) Investigation and Expert Resources

The PDC has set forth the following standard with respect to access to investigative resources:

> VII. There should be reasonable equity between defending attorneys and prosecuting attorneys with respect to resources, staff and facilities.
> A. A defending attorney shall have equal access to investigators and experts as a prosecuting attorney. Reasonable requests for funds to retain an investigator or an expert must be funded as required by law.

In 2017, the Idaho Supreme Court also enacted the following rule allowing a public defender to submit a motion requesting public funds for investigative services:

> A defendant may submit a motion requesting public funds to pay for investigative, expert, or other services that he believes are necessary for his defense. The motion seeking public funds must be submitted to the court ex parte, except as provided in subsection (f) of this rule. The motion must be made before

[12] Simmons Decl. ¶ 24.

[13] Eppink Decl. Ex. J (filed Nov. 20, 2018). The Court notes that evidence regarding counsel being appointed prior to an initial appearance is irrelevant as there is no constitutional requirement that counsel be appointed prior to an initial appearance.

> the defense incurs the costs and requires prior approval of the court. The court must decide the motion on the basis of the record in the case and the information submitted by the defendant.

I.C.R. 12.2(a).

Public defenders' 2017 annual reports, which were submitted to the PDC, indicate that the 12 institutional offices in existence at the time together employed approximately 150 public defenders and 16 full or part time investigators. In 19 out of 44 counties, contract attorneys' 2017 fiscal year annual reports reflected zero dollars for attorney expenditures for investigative resources.[14]

(6) Qualifications, Training, and Supervision

The PDC has promulgated extensive standards and regulations concerning public defenders' qualifications, training, and supervision. As set forth previously, the 2017 PDC Standards require seven continuing legal education credits per year relevant to representing indigent (or other public-expense) defendants,[15] and three specialty continuing legal education credits if not previously acquired in the prior three years. The PDC Standards also specify:

> IX. Defending attorneys should be regularly reviewed and supervised for compliance with indigent defense standards and, if applicable, compliance with indigent defense standards as set forth in contractual provisions.

[14] Eppink Decl. Ex. X (filed Nov. 2018).

[15] "Defending attorneys shall annually complete seven (7) hours of continuing legal education courses relevant to the representation of indigent defendants or other individuals who are entitled to be represented by an attorney at public expense." VIII(A).

There is incomplete and conflicting information as to whether public defenders are currently meeting the minimum continuing legal education requirements set forth by the PDC. There is missing information from a reporting cycle and evidence that some reporting was prior to the March 31, 2018 enforcement of the PDC standard. This obviously creates genuine issues of material fact.

(7) Time with Clients and Confidential Meeting Space

The PDC Standards specify:

> II. Defending attorneys should have sufficient time and private physical space so that attorney-client confidentiality is safeguarded during meetings with clients.

Although Plaintiffs initially posited that at least 16 counties lack confidential meeting space, they have failed to specifically identify any county with a courthouse or jail that actually lacks confidential meeting space. Plaintiffs have "court observers" who have personally observed public defenders having conversations with clients outside of confidential meetings spaces in Jerome, Bonneville, Blaine, Bannock, and Gooding counties. Again, there are genuine issues of material fact on this matter.

(8) Contracts

Idaho Code § 19-859(4) provides that a county can provide public defender services in part by:

> Contracting with a defending attorney, provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney. The contract provisions of this

> subsection shall apply to all contracts entered into or renewed on or after the effective date of this act.

PDC Standard IV states, "Economic disincentives or incentives that impair defending attorneys' ability to provide effective representation should be avoided." Plaintiffs assert that 19 counties have impermissible "fixed fee" contracts, while the Defendants assert that they are permissible "flat fee" contracts.[16] Twenty-eight counties' contracts require the defending attorney to obtain permission to access investigative resources, and 38 counties' contracts permit private practice.[17] Here, there are more genuine issues of material fact.

(9) Political and Judicial Influence

The PDC Standards specify at Section I that "[t]he delivery of indigent defense services should be independent of political and judicial influence, though the judiciary is encouraged to contribute information and advice concerning the delivery of indigent defense services." Under Idaho Code §§ 19-859 - 860, the board of county commissioners of each county is responsible for determining the manner in which indigent public defense is provided and the hiring and compensation of the public defender. Prosecuting attorneys are charged with giving "advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers." I.C. § 31-2604(3). Meeting minutes from county commissioner meetings show that prosecuting attorneys advise counties on public defense.

[16] While the Supreme Court already noted that Plaintiffs' request for an injunction barring fixed fee contracts is moot since Idaho law prohibits the use of fixed fee contracts, to the extent the Plaintiffs argue that 19 counties entered into or renewed illegal fixed fee contracts after the effective date of the 2014 legislation, there are genuine issues of material fact.

[17] Eppink Decl. Ex. X (filed Nov. 20, 2018).

If a county chooses to establish a public defender officer or joint office, the public defender's compensation "shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law." I.C. § 19-860(1). In addition, the board of county commissioners shall:

> Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons, if that many are available, designated by a committee of lawyers appointed by the administrative judge of the judicial district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime.

I.C. § 19-860(2).

Idaho Code § 19-861(1) provides:

> If an office of public defender or a joint office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the board of county commissioners, as many assistant public defenders, clerks, investigators, stenographers, and other persons as the board considers necessary for carrying out his responsibilities under this act. A person employed under this section serves at the pleasure of the public defender.

While the Plaintiffs do not assert any of the above statutes are unconstitutional, they contend that the cumulative effect creates a risk of political and judicial interference that is unconstitutional. This is an issue for trial.

(10) Trial Rates

Plaintiffs rely on data from 2017, which shows that the Ada County Public Defender's Office resolved 2.48% of felony cases at trial (70 of 2,822). However, Ada County Chief Public

Defender Anthony Geddes testified that this number was inaccurate due to errors in reporting by Odyssey. Kootenai County reported similar numbers in 2017 (2.12%, 22 of 1,038 cases went to trial). In Bannock County only one case, out of 1,072 non-capital felony dispositions, went to a jury trial. Bonneville County reported no trials out of 495 felonies. Payette County had no trials in 2017.

PROCEDURAL HISTORY

On June 17, 2015, Plaintiffs filed the instant putative class action against the State of Idaho, Governor C.L. "Butch" Otter, and seven members[18] of the PDC seeking declaratory and injunctive relief to remedy the Defendants' failure "to provide effective legal representation to indigent criminal defendants across the State of Idaho, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, of Article 1, Section 13, of the Idaho Constitution, and Idaho statutes and regulations."[19]

Thereafter, this Court held that the claims were not justiciable and dismissed the Complaint based on standing, ripeness, and separation of powers.[20] On appeal, the Idaho Supreme Court held that the dismissal as to the Governor was proper, but that the suit could continue against the State and the individual members of the PDC.[21] The Supreme Court specifically held that this suit does not implicate *Strickland v. Washington*, 466 U.S. 668 (1984) or necessitate "case-by-

[18] The PDC now contains nine members.

[19] Compl. ¶ 170-183 (filed June 17, 2015).

[20] *See Mem. Decision and Order Granting Mot. to Dismiss* (filed Jan. 20, 2016).

[21] *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017).

case inquiries."[22] The Supreme Court also noted that the violations alleged by Plaintiffs are not unique to the individually-named Plaintiffs in this suit.[23]

After the case was remanded back to this Court, on August 15, 2017, the Plaintiffs filed a First Amended Class Action Complaint for Injunctive and Declaratory Relief and Supplemental Pleading against the State of Idaho and the (then) current seven members of the PDC in their official capacities.

On January 17, 2018, the Court granted Plaintiffs' Motion for Class Certification and certified a class of Plaintiffs defined as follows:

> all indigent persons who are now or who will be under formal charge before a state court in Idaho of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correction facility (regardless of whether actually imposed) and who are unable to provide for the full payment of an attorney and all other necessary expenses of representation in defending against the charge.[24]

Both Plaintiffs and Defendants filed cross Motions for Summary Judgment. A hearing was held on February 13, 2019, and the matter was taken under advisement. A 40 day court trial is scheduled to commence on April 22, 2019.

[22] *Id*. at 19-20, 394 P.3d at 62–63.

[23] *Id*. at 26-27, 394 P.3d at 69–70.

[24] *See* Order Granting Mot. for Class Certification (filed Jan. 17, 2018).

LEGAL STANDARD

Summary judgment may be entered only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The Court "liberally construes the facts and existing record in favor of the non-moving party" in making such determination. *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). "If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Moreover, "[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment." *Stafford v. Weaver,* 136 Idaho 223, 225, 31 P.3d 245, 247 (2001) (citations omitted).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. *See Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

A party opposing a motion for summary judgment "may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 114, 306 P.3d 197, 199 (2013). Such evidence may consist of affidavits or depositions, but "the Court will consider only that material . . .

which is based upon personal knowledge and which would be admissible at trial." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

The mere fact that the parties have filed cross motions for summary judgment does not necessitate a finding that there are no genuine issues of material fact; however, "[w]here the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp*., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Id*. "[W]hen an action will be tried before the trial court without a jury, the court can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. This is permissible because under such circumstances the court would be responsible for resolving the conflict between those inferences at trial. Even with this permission, however, conflicting evidentiary facts must still be viewed in favor of the nonmoving party." *Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 408 P.3d 68, 71 (2017).

ANALYSIS

In order to decide the pending Motions for Summary Judgment (and the entire case), the Court must first determine the standard Plaintiffs must meet in order to prevail on their class action suit against the State of Idaho and the PDC. Although the Supreme Court previously dealt with the instant case on appeal, that decision offered no clear guidance as to the standard Plaintiffs must meet in order to prevail in this action.[25] While similar lawsuits have popped up all over the

[25] The Supreme Court noted that this Court "erred by attempting to undertake case-by-case inquiries into Appellants' individual criminal cases" and by reading the "allegations as subject to *Strickland v. Washington*, 466 U.S. 668 (1984), which contemplates case-by-case analyses of ineffective assistance of counsel claims[.]" *Tucker*, 162 Idaho at 19, 394 P.3d at 62. The decision held that the Plaintiffs' allegations sufficiently alleged "actual and constructive denials of counsel at critical stages of the prosecution," and limited its decision "[r]ecognizing that our analysis at this juncture is simply whether Appellants have alleged injuries that are 'concrete and particularized' and 'actual or imminent,' we conclude the above allegations meet the injury in fact standard." *Id*. at 21, 394 P.3d at 64. Accordingly, the decision did not address the actual burden of proof Plaintiffs would be required to meet to prevail on their claims. Indeed, both parties read the Supreme Court decision in *Tucker v. State* as supportive of their diametrically opposed and proposed burdens of proof. *See* Pls.' Reply in Supp. of Mot. for Summ. J. pp. 26-27 (filed Jan. 18, 2019); Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. pp. 8-9 (filed Dec. 21, 2018).

Defendants assert:

> The Idaho Supreme Court defined the harm justiciable in this case to require more than proof of a "substantial risk" of the constructive denial of counsel. The Court defined the harm justiciable in this case based on the ACLU's allegations that structural deficiencies in Idaho's criminal defense system have actually resulted in "actual and constructive denials of counsel at critical stages of the prosecution" as defined in *United States v. Cronic*, 466 U.S. 648 (1984), for both the named Plaintiffs and "thousands of indigent defendants across the state…." The Court made clear that these allegations are essential elements of Plaintiffs' case. To meet the Supreme Court's standard, they must show (1) that the named Plaintiffs suffered an actual or constructive denial of counsel, (2) that instances of actual or constructive denial of counsel are currently widespread (pervasive) and systemic (persistent) throughout the State, and (3) that all instances are the result of systemic deficiencies caused by the PDC and the State.

Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. p. 8 (filed Dec. 21, 2018).

Plaintiffs contend:

> The State places great weight on its contention that the Idaho Supreme Court's decision in this case requires that the Plaintiffs must prove that individualized instances of actual or constructive denial of counsel are occurring across Idaho. In fact, however, the Idaho Supreme Court considered and rejected that very argument. The court held that "case-by-case inquires" are not appropriate because Plaintiffs' claims are based on "systemic, statewide deficiencies plaguing Idaho's public defense system." *Tucker*, 162 Idaho at 19, 394 P.3d at 62 (2017). Recognizing that Plaintiffs' claims emanate from the fundamental holdings in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *State v. Montroy*, 37 Idaho 684 (1923), that the State has the ultimate responsibility to

country, the United States Supreme Court has not weighed in on the standard to be applied in lawsuits challenging public defender systems, and the approach taken by lower courts varies widely. This decision will review the various standards adopted by different courts, set forth the genuine issues of material fact, and explain the need for an immediate appeal to the Idaho Supreme Court in order to advance the orderly progress of this litigation.

(1) Different Standards Implemented in Systemic Challenges to Public Defense

In *Luckey v. Harris*,[26] a class of indigent criminal defendants filed suit for injunctive relief alleging Georgia's public defender system was deficient. They alleged that systemic deficiencies including inadequate resources, delays in the appointment of counsel, pressure on attorneys to

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> provide constitutionally adequate public defense, *Tucker*, 162 Idaho at 19–20, 394 P.3d at 62–63, the Court observed that "systemic inadequacies" can be the cause of actual or constructive denials of counsel. In reaching this conclusion, the Court cited the Eleventh Circuit's analysis in *Luckey v. Harris*, which distinguished the showing required in retrospective, post-conviction cases, from that pertinent to systemic public defense litigation seeking prospective relief. 860 F.2d 1012, 1016–17 (11th Cir. 1988). Rather than requiring proof either of prejudice or inevitability of ineffective assistance articulated in *Strickland v. Washington*, 466 U.S. 668 (1983), and *United States v. Cronic*, 466 U.S. 648 (1984), the *Luckey* court instead held that "the plaintiff"s burden" in systemic relief cases "is to show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Id*. at 1017 (internal quotation marks omitted and emphasis added).

Pls.' Reply in Supp. of Mot. for Summ. J. pp. 26-27 (filed Jan. 18, 2019).

[26] The Idaho Supreme Court made clear that the instant action does not "implicate *Strickland*" and emphasized the systemic, state-wide allegations. *Tucker*, 162 Idaho at 19, 394 P.3d at 62. The Court then held "Alleging systemic inadequacies in a public defense system results in actual or constructive denials of counsel at critical stages of the prosecution suffices to show an injury in fact to establish standing in a suit for deprivation of constitutional rights" and cited ***Cf. Luckey v. Harris*, 860 F.2d 1012, 1016–17 (11th Cir. 1988), cert. denied, 495 U.S. 957, 110 S.Ct. 2562, 109 L.Ed.2d 744 (1990).** *Id.* at 20, 394 P.3d at 63. The signal "Cf." means:

> Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally 'cf.' means 'compare.' The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations (rule 1.5), however brief, are therefore strongly recommended.

The Bluebook: A Uniform System of Citation p. 59 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). Accordingly, the Court cannot conclude that the Supreme Court intended to adopt the standard set forth in *Luckey v. Harris* based on a "cf." citation with no parenthetical explanation.

hurry their clients' case to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent criminal defense system deny indigent criminal defendants their sixth amendment right to counsel, their due process rights under the fourteenth amendment, their right to bail under the eighth and fourteenth amendments and equal protection of the laws guaranteed by the fourteenth amendment. *Luckey v. Harris*, 860 F.2d 1012, 1013 (11th Cir. 1988). The Eleventh Circuit Court of Appeals held that a viable cause of action existed, and "[i]n a suit for prospective relief the plaintiff's burden is to show 'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'" *Id*. at 1017–18 (citing *O'Shea v. Littleton*, 414 U.S. 488, 502, (1974), *United States v. W.T. Grant Co*., 345 U.S. 629, 633 (1953)). The merits of the case were never reached as the Eleventh Circuit Court of Appeals ultimately concluded that the case must be dismissed based on the *Younger* abstention doctrine. *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992).

Kuren v. Luzerne County adopted the *Luckey*/*O'Shea* test and also delineated various factors the plaintiffs should focus on to demonstrate the "likelihood of substantial and immediate irreparable injury." Similar to *Luckey*, the Supreme Court of Pennsylvania in *Kuren* held that in a civil action for prospective relief based on the constructive denial of counsel the plaintiffs must demonstrate "(1) the likelihood of substantial and immediate irreparable injury, and (2) the inadequacy of remedies at law." *Kuren v. Luzerne Cty*., 146 A.3d 715, 744 (Pa. 2016) (citing *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). With respect to proving the first prong, the court advised the plaintiffs should focus on demonstrating the following factors:

> (1) when, on a system-wide basis, the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised; and (2) when substantial structural limitations—such

> as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices—cause that absence or limitation on representation.

Id. at 744 (citing Amicus Brief for the United States at 11).[27] In *Kuren*, the court found that the plaintiffs (a class of indigent criminal defendants) had sufficiently alleged a cause of action for prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office:

> [I]t is evident that Appellants have alleged that, on a system-wide basis, the traditional markers of representation being provided by the [Luzerne County Office of Public Defender] either are absent or significantly compromised. Furthermore, the limitations, and in some cases absences, of counsel are a result of the substantial structural deficiencies that result from a lack of adequate funding. Consequently, Appellants have demonstrated the "likelihood of substantial and immediate irreparable injury," and have stated a claim upon which relief can be granted. Further, based upon our discussion above, it also is clear that *Strickland* is not an available source of relief, and that no other remedy at law exists to redress Appellants' claims.

Id. at 748.

Hurrell-Harring v. State employed a different, more stringent, approach. In that case, a putative class of indigent criminal defendants filed suit for injunctive and declaratory relief against the State of New York alleging that the State's delegation of public defense services to the individual counties has functioned to "deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and statutorily guaranteed representational rights." *Hurrell-Harring v. State*, 930 N.E.2d 217, 219 (N.Y. 2010). The court held that the plaintiffs had a limited claim based on whether the State has met its obligation under *Gideon*:

[27] This same passage was in the United States' Amicus Brief (at p. 25) supporting the Plaintiffs in their appeal of this case in *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017).

> The questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under Gideon to provide legal representation.
> . . .
>
> The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed. *Strickland* itself, of course, recognizes the critical distinction between a claim for ineffective assistance and one alleging simply that the right to the assistance of counsel has been denied and specifically acknowledges that the latter kind of claim may be disposed of without inquiring as to prejudice:
>
> > "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United *States v. Cronic*, [466 U.S.] at 659, and n. 25 [104 S.Ct. 2039]. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658 [104 S.Ct. 2039]. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent" (466 U.S. at 692, 104 S.Ct. 2052).
>
> The allegations before us state claims falling precisely within this described category. It is true, as the dissent points out, that claims, even within this category, have been most frequently litigated postconviction, but it does not follow from this circumstance that they are not cognizable apart from the postconviction context. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason—and certainly none is identified in the dissent—why such a claim cannot or should not be brought without the context of a completed prosecution.

Id. at 221–26. After the case was remanded, the lower court denied the plaintiffs' motion for class certification. On appeal, the court of appeals reversed the lower court's decision on class certification and also noted that

> We also find that proceeding in the absence of class action status would subject the prosecution of this case to significant discovery challenges. Plaintiffs claim

> that their constitutional right to counsel, as well as that of all other indigent criminal defendants in the counties, are being systemically denied due to deficiencies in the public defense system. ***It follows that, in order to prove their claim, plaintiffs will be saddled with the enormous task of establishing that deprivations of counsel to indigent defendants are not simply isolated occurrences in the case of these 20 plaintiffs, but are a common or routine happenstance in the counties.*** Supreme Court found that plaintiffs can call current indigent defendants as nonparty witnesses and rely on the histories of their criminal proceedings in order to prove their claim, yet, without class action certification, the hurdle of ascertaining the identity of those indigent defendants and/or accessing the histories of their criminal proceedings may prove insurmountable.

Hurrell-Harring v. State, 914 N.Y.S.2d 367, 372 (N.Y. 2011) (emphasis added).

In *Duncan v. State*, a class of indigent criminal defendants filed suit against the State of Michigan claiming the public defense system in three counties was unconstitutional. The trial court granted the plaintiffs' motion for class certification and denied the defendants' motion for summary disposition. The Michigan Court of Appeals affirmed the trial court:

> We affirm, holding that defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.

Duncan v. State, 774 N.W.2d 89, 97–98 (Mich. App. 2009). The court of appeals specifically defined the justiciable harm and the standard the class of plaintiffs would have to meet in order to prevail on their systemic challenge:

> We hold that, in the context of this class action civil suit seeking prospective relief for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation falls below an objective standard of reasonableness (deficient performance) and results in an unreliable verdict or

unfair trial, when a criminal defendant is actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings, or when counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, e.g., unwarranted pretrial detention. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs. Plaintiffs must additionally show that instances of deficient performance and denial of counsel are widespread and systemic and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures. If the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate of harm.

Plaintiffs will no doubt have a heavy burden to prove and establish their case, but for now we are only concerned with whether plaintiffs have sufficiently alleged supportive facts. While we leave it to the trial court to determine the parameters of what constitutes "widespread," "systemic," or "pervasive" constitutional violations or harm, the court must take into consideration the level or degree of any shown harm, giving more weight to instances of deficient performance that resulted in unreliable verdicts and instances where the right to counsel was denied, with less weight being given where there is mere deficient performance. We find that the allegations in plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical.

To summarize the approach to be taken on remand, **plaintiffs must show [1] the existence of widespread and systemic instances of actual or constructive denial of counsel and instances of deficient performance by counsel, which instances may have varied and relevant levels of egregiousness, [2] all causally connected to defendants' conduct.** Furthermore, because the proofs could be so wide ranging, it would reflect poor judgment on our part to set a numerical threshold with respect to the court's determination of whether the instances of harm, if shown, are sufficiently "widespread and systemic" to justify relief. The trial court is in a better position to first address this issue, subject of course to appellate review.

Id. at 123–24 (2009) (emphasis added).

The above cases demonstrate a few, but not all, of the different approaches taken by courts dealing with systemic challenges to public defender systems.

Plaintiffs urge the Court to adopt a risk based test. They contend their burden is to establish that Defendants' policies and practices have created a substantial risk that indigent defendants' rights under the Sixth Amendment or Idaho Constitution will be violated.[28]

Defendants argue that Plaintiffs must show much more than a "risk" of harm. Defendants assert that Plaintiffs are required to show that "actual or constructive denials of counsel did in fact occur, and are occurring throughout the state of Idaho."[29]

The proposed standards could easily lead to different results in this case. Therefore, at this juncture, due to the confusion over the standard to be applied, the Court finds there are genuine issues of material fact precluding summary judgment.

Here, there is significant confusion on both sides as to how to interpret and apply the facts given the unknown standard Plaintiffs must meet. It is unknown whether each individually named Plaintiff must show, for example, that they personally suffered some or all of the harms identified (i.e. an attorney with an excessive caseload, who lacked training and investigative resources, operated under an improper contract, subjected to political/judicial influence, failed to appear at initial appearances, failed to take the case to trial, and/or did not utilize or have confidential meeting space); whether the harm is "widespread" or actually occurring in all the

[28] Pls.' Mem. in Supp. of Summ. J. p. 33 (filed Nov. 20, 2018).

[29] Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. p. 9 (filed Nov. 20, 2018).

counties in Idaho (i.e. do Plaintiffs have to demonstrate a certain deficiency exists in at least half of the counties to show a systemic violation, or would less than half suffice); whether Plaintiffs have to show the State and the PDC are the cause of all the deficiencies; or whether, on balance, the identified deficiencies merely create a risk that indigent defendants' constitutional rights are being or will be violated.

Based on the wide array of standards that could potentially be adopted, it is impossible at this juncture to meaningfully proceed with the litigation until this issue is resolved. It would be extremely inefficient for this Court to pick a standard, apply that standard throughout the upcoming scheduled 40-day court trial, render a decision that will undoubtedly be appealed, where the Supreme Court could ultimately and easily choose a different standard, given the wide array of options, and order a new trial, as facts will have undoubtedly changed by then. Therefore, this Court seeks guidance from the Supreme Court as to the applicable standard so as to not waste time with multiple trials.

(2) Recommending Permission to Appeal Pursuant to I.A.R. 12(c)(2)

Idaho Appellate Rule 12(a) provides:

> Permission may be granted by the Supreme Court to appeal from an interlocutory order or judgment of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

Idaho Appellate Rule 12(c)(2) provides:

> A district court or administrative agency may enter, on its own initiative, an order recommending permission to appeal from an interlocutory order or judgment. The court or agency shall file a certified copy of its order with the Supreme Court and serve copies on all parties. The order recommending permission to appeal shall constitute and be treated as a motion for permission to appeal from the interlocutory order or judgment under this rule.

A denial of summary judgment by the district court is not appealable unless the district judge or the Supreme Court grants permission to appeal. *N. Pac. Ins. Co. v. Mai,* 130 Idaho 251, 252, 939 P.2d 570 (1997). "Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation." *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990). "[T]he intent of I.A.R. 12 [is] to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved." *Aardema v. U.S. Dairy Sys., Inc.,* 147 Idaho 785, 789, 215 P.3d 505, 509 (2009) (citation omitted). A permissive appeal pursuant to I.A.R. 12 is "an unusual posture." *Winn v. Frasher,* 116 Idaho 500, 501, 777 P.2d 722, 723 (1989). Due to "the unusual posture of the case, [the Supreme Court is] constrained to rule narrowly and address only the precise question that was framed by the motion and answered by the trial court." *Id.*

"Any appeal by permission of an interlocutory order or judgment under this rule shall not be valid and effective unless and until the Supreme Court shall enter an order accepting such interlocutory order or decree as appealable and granting leave to a party to file a notice of appeal within a time certain." I.A.R. 12(d).

The Court considers the following factors in deciding whether to accept or reject an application for permissive appeal:

> [T]his Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification.

Budell v. Todd, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983). Thus, although the decision to grant or deny a motion for (or here, recommend) permissive appeal is a discretionary one, the granting of such motion should be reserved for the "exceptional" case.

Here, the specific issue this Court recommends permission to appeal is: what is the appropriate legal standard the class of Plaintiffs must meet in order to prevail on their systemic challenge to Idaho's indigent public defense system?

The following factors weigh in favor of a permissive appeal: the issue is one of first impression in Idaho; the issue is a controlling issue of law; and the resolution of the issue would materially advance the orderly resolution of the litigation. Currently, this case is set for a 40 day court trial. At this juncture, it is unclear what standard Plaintiffs must meet in order to prevail and it is unclear what standard Defendants must defend against. If this Court were to adopt a standard,

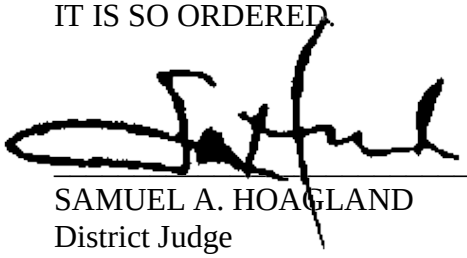
later deemed incorrect, it could necessitate a whole new trial. Moreover, although this Court could ultimately analyze the evidence under various legal standards and make conclusions under those standards, there is a risk the appellate court could choose a standard not listed in this Order. It would be inefficient to proceed in this manner and would create moving targets for both parties during the 40 day trial. To this end, this Court has concluded the most efficient path for all parties involved is to recommend an immediate appeal to gain clarity as to the legal standard to be applied in this case.

The Court recognizes that the factors weighing against a permissive appeal include, a delay in the proceedings, which prejudices the Plaintiffs from the timely resolution of their case as trial is set for the end of April, and there is a likelihood of a second appeal following the court trial.

Rule 12 mandates that a permissive appeal should issue when the controlling question of law presents "***substantial grounds*** for difference of opinion **and** in which an immediate appeal from the order or decree may ***materially advance the orderly resolution of the litigation***." Here, there are substantial grounds for different opinions on the issue, as evident by the various standards adopted by courts across the United States and by the parties' proposed standards. An immediate appeal from this Order will materially advance the orderly resolution of this litigation in that the parties will know the standard they must meet or defend against, and a second trial could potentially be avoided.

Based on all the above reasons, the Court finds that this is an exceptional case that warrants exceeding the normal time standards for processing a case.[30] Because this issue could be dispositive of the case and a permissive appeal would materially advance the orderly resolution of the litigation, the Court finds that it is in the best interest of all parties to recommend an immediate appeal, pending the Supreme Court's approval. Accordingly, the Motions for Summary Judgment are DENIED, the Court hereby recommends permission to appeal, and proceedings are STAYED pending a decision from the Supreme Court.

IT IS SO ORDERED.



Signed: 3/19/2019 01:09 PM

SAMUEL A. HOAGLAND
District Judge

Date

STATE OF IDAHO } ss
COUNTY OF ADA

I, PHIL McGRANE, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original filed in the above entitled action. As witness I have set my hand and affixed my official seal.

DATED
Signed: 3/19/2019 01:39 PM

PHIL McGRANE, Clerk of the District Court

By _____ Deputy

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO

[30] *See* I.C.A.R. 57.

CERTIFICATE OF MAILING

I hereby certify that on Signed: 3/19/2019 01:29 PM, I served a true and correct copy of the within instrument to:

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