IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,

Plaintiffs/Appellants

vs.

STATE OF IDAHO, et al.,

Defendants/Respondents.

Supreme Court No. 43922

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada
Trial Court No. CV-OC-2015-10240

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Honorable Samuel A. Hoagland, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES & AUTHORITIES

Page

Cases

Constitutions and Statutes

Court Rules

Other Authorities

Websites:

STATEMENT OF THE CASE

A. Nature of the Case. The Complaint in this case challenged a "statewide system" of public defense services that does not exist. Plaintiffs alleged that they were denied public defense services in four different counties at various stages of their criminal prosecutions. They sued (1) the State of Idaho, (2) the Governor in his official capacity, and (3) the seven Public Defense Commission members in their official capacities for prospective relief, including: (a) declaring Idaho's "statewide system" of public defense services unconstitutionally deficient, and (b) enjoining Defendants to propose, develop and implement, with District Court monitoring and approval, changes to the "statewide system." Defendants moved to dismiss. The District Court granted the Motion and entered Judgment for Defendants. Plaintiffs appealed.

B. Statement of the Facts. The Complaint was dismissed under Rule 12(b)(6). R., p. 475. Thus, the facts before the Court are those alleged in the Complaint. *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 782, 331 P.3d 523, 524 (2014). According to the Complaint, each Plaintiff appeared in court on criminal charges for which he or she could be imprisoned. Complaint, ¶¶ 4-7; R., pp. 8-12. The Complaint's allegations include:

Plaintiff Tracy Tucker was arrested in Bonner County, had bail set at $40,000 without representation by counsel, could not afford to post bond, was held in jail awaiting trial, was represented at arraignment by a "substitute" attorney who was unfamiliar with his case and who did not advocate in his favor, was able to contact his public defender only three times for 20 minutes before a scheduled trial, eventually pleaded guilty, and awaited sentencing. Complaint, ¶¶ 4, 63-68, 110, 117-118, 126, 129, 156; R., pp. 8-9, 27-29, 39, 41-42, 45, 52.[1]

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[1] The Appellants' Brief says at p. 16 that "formal judgment was entered against Mr. Tucker and he was sentenced to a suspended prison term of two years fixed, plus two additional years indeterminate." None of this is in the appellate record. See also App.Br., pp. 31-32, further discussing Mr. Tucker's case, which also is not in the appellate record, either.

Plaintiff Jason Sharp was arrested in Shoshone County, had bail set at $50,000 without representation by counsel, could not afford to post bond, had bail reduced to $5,000, still could not afford to post bond, was released before trial by the efforts of his employer without the assistance of the public defender, was unable to obtain discovery materials from his public defender, was unable to persuade his public defender to file motions on his behalf, met with his public defender for only 90 minutes over 13 months, and was scheduled to go to trial. Complaint, ¶¶ 5, 68-74, 111, 115, 126, 130, 157; R., pp. 9-10, 29-30, 39-40, 45-46, 52-53.

Plaintiff Naomi Morley was arrested in Ada County, had counsel when bail was set at $15,000 (but had not been able to speak with her public defender, who later decided he had a conflict of interest and could not represent her), could not afford to post bond, remained in jail for three weeks until her bail was reduced, was told by conflict counsel that she would have to pay for expert drug testing, obtained on her own and without counsel's help an affidavit from another person that drugs found in the car were not Ms. Morley's, was unable to communicate with conflict counsel about her the police investigation or about her car, and feared that conflict counsel would not be able to adequately prepare for trial because of his workload. Complaint, ¶¶ 6, 75-79, 112, 117, 127, 130, 133, 158; R., p. 10-11, 30-31, 39, 41, 45-46, 53.

Plaintiff Jeremy Payne was arrested in Payette County, had bail set at $30,000 without representation by counsel, could not afford to post bond, remained in jail for over four months until the State failed to timely take his case to trial, met with his public defender outside of court only twice, had not been able to discuss discovery or strategy with his public defender, who in turn had not been able to meaningfully investigate his case, and was scheduled for trial after waiving his preliminary hearing. Complaint, ¶¶ 7, 80-84, 113, 126, 129, 136, 142, 159; R., pp. 11-12, 32-33, 40, 45-47, 49, 54.

Defendants are (1) the State of Idaho, (2) Governor C.L. "Butch" Otter in his official

capacity, and (3) the seven Idaho Public Defense Commission (PDC) members in their official capacities.[2] Complaint, ¶¶ 85-87; R., pp. 33-34. The Complaint did not allege specific actions that the Defendants took regarding any of the four Plaintiffs' criminal cases. *Id.*

The Complaint repeatedly stated that public defense services in Idaho are provided under an unconstitutional system. Complaint; R., *passim* at pp. 6-59. The constitutionality of the "system", however, is a conclusion of law, not an allegation of fact that the Court must accept as true on a Motion to Dismiss. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005). Thus, the conclusory legal statements at App.Br., pp. 7-9, about the unconstitutionality of Idaho's "statewide" system of public defense are rhetorical at this stage of the case.

Nevertheless, Defendants acknowledge the seriousness of the issues described in the Complaint. The rights of indigent criminal defendants to effective assistance of counsel provided at public expense are recognized under the State and Federal Constitutions and underlie the Idaho Public Defense Act. The rights to counsel are judicially enforceable in criminal defendants' individual cases. The Complaint, however, proposes a judicially unmanageable and unenforceable solution to the problems that it identifies. That is why Defendants moved to dismiss in the District Court and why they urge this Court's affirmance of the District Court's judgment.

C. Course of the Proceedings. Defendants' Motion to Dismiss the Complaint, R., pp. 154-155, was briefed and argued. The District Court granted the Motion to Dismiss and entered Judgment for Defendants. R. pp. 468-501. Plaintiffs timely appealed. R., pp. 502-507.

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[2] Defendants-Respondents Sara B. Thomas and William H. Wellman, who are members of the PDC, are separately represented and have filed their own Respondents' Brief because of "the inherent conflict of interest in having the Attorney General represent two active public defense attorneys and the problems associated with discovery." Brief of Respondents Sara B. Thomas and William H. Wellman (Thomas-Well Respondents' Brief). This Brief is filed on behalf of the other Defendants-Respondents.

ADDITIONAL ISSUES ON APPEAL

Are the Governor and the Public Defense Commission members causally connected to Plaintiffs' alleged injuries in fact (denial of public defense services) and/or do they have statutory or constitutional authority to redress Plaintiffs' alleged injuries in fact, *i.e.*, are the second and third elements of standing present?

May the State of Idaho be sued for declaratory and injunctive relief to change the statutes that make counties primarily responsible for provision of public defense services?

STANDARDS OF REVIEW

Free Review

The Court has free review over a dismissal under Rule 12(b)(6), *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010), and free review over issues of justiciability, including standing, *State v. Philip Morris, Inc.*, 158 Idaho 874, 879-80, 354 P.3d 187, 192-93 (2015). See also Standard of Review in Thomas-Wellman Respondents' Brief, pp. 5-6.

Affirmance on Alternative Grounds

When a judgment on appeal reaches the correct result, but employs reasoning that this Court does not accept, this Court may affirm the judgment on alternative grounds. "[T]he Court will uphold the decision of a trial court if any alternative legal basis can be found to support it." *Syringa Networks, LLC v. Idaho Dep't of Administration*, 159 Idaho 813, 817, 367 P.3d 208, 222 (2016) (internal punctuation omitted), quoting *Daleiden v. Jefferson Cty. Joint Sch. Dist. No. 251*, 139 Idaho 466, 470-71, 80 P.3d 1067, 1071-72 (2003).

ATTORNEYS' FEES ON APPEAL

The Defendants do ***not*** seek attorneys' fees on appeal. They oppose the award of attorneys' fees to Plaintiffs for the following reasons.

Plaintiffs Will Not Be Entitled to Attorneys' Fees If the Judgment Is Affirmed

The judgment should be affirmed, in which case Plaintiffs would not be entitled to attorneys' fees under Federal or State law. *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 200, 233 P.3d 118, 131 (2010), *abrogated on other grounds*, *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011).

Plaintiffs Would Not Be Entitled to Attorneys' Fees Under Federal Law if the Case Were Reversed and Remanded

Plaintiffs' Federal law request for attorneys' fees is under 42 U.S.C. § 1988. App.Br., pp. 11-12. The State is not a "person" against whom attorneys' fees may be awarded under § 1988 because it is not a person that can be sued and prevailed against under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 71, 109 S.Ct. 2304, 2308, 2312 (1989). Thus, attorneys' fees cannot be awarded against the State under § 1988.

42 U.S.C. § 1988 allows attorneys' fees to be awarded to "prevailing part[ies]." If this case were reversed and remanded under Federal law, Plaintiffs would not be prevailing parties against the Governor and/or the PDC members because there would be no ruling on the merits on which they had prevailed, *i.e.*, Plaintiffs would not have materially altered the legal relationship between these parties. *E.g.*, *Hanrahan v. Hampton*, 446 U.S. 754, 758-759, 100 S.Ct. 1987, 1990 (1980) (plaintiffs who reversed summary judgment on appeal had not prevailed on the merits any more than if they had defeated a summary judgment motion in the trial court; they were not entitled to attorneys' fees on appeal as a prevailing party).

Plaintiffs Would Not Be Entitled to Attorneys' Fees Under State Law If the Case Were Reversed and Remanded

The Court need not address whether fees may be awarded under State law in this appeal under the private attorney general doctrine for the same reason that relief is unavailable under

§ 1988: Reversing and remanding would not resolve the ultimate substantive issues. *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 285, 912 P.2d 644, 653 (1996) (*ISEEO II*) (no fees awarded under the private attorney general doctrine when there was no resolution of substantive issues; reversing summary judgment and remanding did not resolve the merits and did not support a private attorney general fee award).

Attorneys' fee should not be awarded under Idaho Code § 12-117 or § 12-121, both of which require prevailing party status on the merits, not merely reversing and remanding to determine the merits. *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 579-80, 300 P.3d 1058, 1067-68 (2013) (§ 12-117); *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 269, 297 P.3d 222, 232 (2012) (§ 12-121). Further, for fees to be awarded under § 12-117, the non-prevailing party must have acted without a reasonable basis in fact or law, and under § 12-121, the non-prevailing party must have prosecuted or defended frivolously, unreasonably, or without foundation. This case was not so defended.

Moreover, under both § 12-117 and § 12-121, the Court does not ordinarily award attorneys' fees in a case of first impression, which this case is. *Doe v. Doe*, 2016 Opinion No. 56, pp. 9-10, — Idaho —, —, — P.3d —, — (May 27, 2016).

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL SHOULD BE AFFIRMED

A. No Plaintiff Has Standing to Sue the Governor or the Public Defense Commission Under Federal or State Law

The District Court's dismissal of the Governor and PDC members should be affirmed because no Plaintiff has standing under State or Federal law to sue them. Idaho law generally uses a three-part test for standing. To have standing a litigant must:

> "... allege [1] an injury in fact, [2] a fairly traceable causal connection between the claimed injury and the challenged conduct, and [3] a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Knox v. State ex rel. Otter*, 148 Idaho 324, 336, 223 P.3d 266, 278 (2009).

Rich v. State, 159 Idaho 553, 554-55, 364 P.3d 254, 255-56 (2015) (bracketed numbers added). This is also the standing test used under Federal law. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. —, —, 134 S. Ct. 2334, 2341 (2014). The Governor and PDC members (the Official Capacity Defendants) initially make the same arguments under both Federal and State law that Plaintiffs do not have standing to sue. Then they further address Plaintiffs' State law standing arguments under *Coeur d'Alene Tribe v. Denney*, 2015 Opinion No. 106, — Idaho —, — P.3d — (November 20, 2015).

The Official Capacity Defendants argue that the second and third elements of standing are missing.[3] Thus, they need not address whether each Plaintiff alleged an injury in fact and/or whether each had a ripe claim.[4] The Motion to Dismiss was not based on lack of injury in fact or on lack of ripeness; neither is this Brief.[5] Thus, Defendants do not address the injury-in-fact ar-

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[3] Plaintiffs say "standing ... [was] never raised, briefed, or argued by either side." App.Br., p. 14. Defendants disagree. Admittedly, the word "standing" was not used in the Motion to Dismiss. R., p. 154.

However, Defendants briefed standing, particularly its second and third elements, in their Memorandum in Support of Motion to Dismiss, R., pp. 164-166 ("there were no injuries in fact caused by or redressable by the defendants; these essential elements of standing were absent"); p. 171 ("One aspect of justiciability is redressability"); also Reply Memorandum in Support of Motion to Dismiss, R, pp. 433, 437, 439, 442, 444, 445 (redressability, standing, and causation mentioned).

As for standing being argued, redressability was a recurring theme from Defendants' opening remarks, Tr., p. 64:3-17, to their closing comments: "[I]n closing, I'm like a broken record. Redressability, redressability, redressability. And these aren't the defendants who can provide redress, and until such defendants are sued, this case should be dismissed." Tr., p. 111:20-24.

[4] Defendants did not contest that the Complaint alleged injuries in fact in briefing and arguing their Motion to Dismiss. Neither did they contest ripeness.

[5] By not contesting that each Plaintiff alleged some injury in fact, Defendants do not concede that an injury in fact can be proven. Neither do Defendants concede that any Plaintiff is an appropriate class representative or has established typicality or commonality of his or her claim.

gument at App.Br., pp. 16-23, or the ripeness argument at App.Br., pp. 30-33. Instead, Defendants' standing arguments are based on (1) the absence of a causal connection between Plaintiffs' alleged injuries in fact and the Official Capacity Defendants' actions or inactions, and (2) the Official Capacity Defendants' legal inability to redress the alleged injuries in fact.

1. There Is No Causal Connection Between the Governor and the Public Defense Commission and Plaintiffs' Alleged Injuries in Fact

The Complaint does not allege facts connecting the Governor or PDC members to any injuries in fact. ¶ 87, pp. 33-34. Thus, the Court should affirm the judgment because the Complaint lacks the second element of standing to sue the Governor or PDC members: causal connection between the alleged injuries in fact and these Defendants.

Plaintiffs say, App.Br., p. 23, that Memorandum Decision & Order (MD&O) contradicted itself when it said that (1) "the Governor and the PDC members have a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho," R., p. 485, but (2) "the connection of the claimed injury to the Governor and the PDC are too remote to be fairly traceable" to the Governor and the PDC, R., p. 490. Plaintiffs would resolve this inconsistency by arguing that the first conclusion of law is correct and the second one is not. The Official Capacity Defendants take the position that the first statement is incorrect.

The MD&O cited no authority for its legal conclusions that the Governor and PDC have enough connection to indigent defense services to be sued. It said:

> Under the *Ex parte Young* doctrine, the Court finds that the Governor and the PDC members have a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho. [1] The Governor has a duty to ensure that the Constitution and laws are enforced in Idaho. [2] The Governor also has direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system. [3] The PDC was specifically saddled with the responsibility of creating rules regarding

> training and education of defense attorneys and making recommendations to the legislature for improving public defense in Idaho. [4] The fact that the legislature has delegated public defender services to individual counties does not abdicate the Defendants' responsibility to indigent criminal defendants in the State of Idaho.

MD&O, R., p. 485 (bracketed numbers added). There is no basis for the MD&O's four legal conclusions that there is a sufficiently close connection between the Governor and PDC and the public defense system in Idaho. The four conclusions of law are analyzed in turn.

First, the Governor's charge under Idaho Constitution, Article IV, § 5, and Idaho Code § 67-802 to "see[] that the laws are faithfully executed" has never been held to impose upon him the responsibility to see that every State and local official complies with every State and Federal law. The cases are legion in which a governor has been dismissed when sued under § 1983 because a generalized duty to enforce State law is insufficient causal connection to sue a governor. *E.g.*, *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), *cert. denied* — U.S. —, 135 S.Ct. 398 (2014) (California governor dismissed because he had no direct connection with enforcement of anti-*fois gras* statute); *Ariz. Contractors Ass'n v. Napolitano*, 526 F.Supp.2d 968, 983 (D. Ariz. 2007), *aff'd on other grounds*, 558 F.3d 856 (9th Cir. 2008), *aff'd*, 563 U.S. —, 131 S.Ct. 1968 (2011) (Arizona governor dismissed when enforcement power was in county attorneys, not in the governor); *Animal Legal Def. Fund v. Otter*, 44 F.Supp.3d 1009, 1016-17 (D.Idaho 2014) ("plaintiff ... is not free to randomly select a state official to sue in order to challenge an allegedly unconstitutional statute"; Governor dismissed for lack of connection to enforcement of a criminal statute). A generalized duty to faithfully execute the law does not create a sufficient connection to sue the Governor.

Second, the MD&O did not identify those over whom the Governor "has direct supervisory authority ... to establish standards for a constitutionally sound public defense system." Who are they? If they are Magistrates and District Judges, the Governor does not supervise

them; the Supreme Court does. Idaho Constitution, Article V, § 2 and § 9. [6] If they are county officials, county offices are created by Idaho Constitution, Article XVIII, § 5, and no statute or constitutional provision subjects them to the Governor's supervision. If they are the Public Defense Commission, no statute or constitutional provision gives the Governor supervisory authority over the PDC. The last point is elaborated in the next paragraph.

The PDC is an Executive Agency in the Department of Self-Governing Agencies, and its members are appointed by all three Branches of State Government. Idaho Code § 19-849(1). It should be self-evident that the PDC is self-governing and not subject to Gubernatorial supervision, especially when two PDC members are Idaho Legislators and one is appointed by the Chief Justice. It would raise separation-of-powers issues if the Governor supervised representatives of the Legislative and Judicial Branches and told them what to do. Further, one PDC member represents defense attorneys and another represents the State Appellate Public Defender. It would intrude upon their positions as defense attorneys if the Governor supervised them and told them what to do. *Cf.* Thomas-Wellman Respondents' Brief, p. 4., regarding conflict of interest. But telling subordinates what to do is what supervision entails: "**supervision** ... *esp* : a critical watching and directing (as of activities or a course of action)." *Merriam-Webster's Collegiate Dictionary*, p. 1255 (11 ed. 2007). This Court should hold that the PDC as an agency is not subject to supervision by officers of any Branch of State Government.

Third, the PDC's responsibilities when judgment was entered were to promulgate rules for criminal defense attorney training and data reporting and to make recommendations to the

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[6] Plaintiffs say that "this Court has an enhanced responsibility to take remedial action in this case" and that "this Court could take remedial action on its own." Given this Court's constitutional supervisory power over the lower courts, Idaho Constitution, Article V, § 2, there are no constitutional impediments to this Court issuing remedial directions to District Judges and Magistrates regarding public defense. *See, e.g., Gideon v. Wainwright*, 153 So.2d 299 (Fla. 1963).

Legislature on public defense issues. That was all. Idaho Code § 19-850(1) (2015 Supp.). Like any statutory agency, the PDC has only the authority given to it by statute. "An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers." *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996), cited in *In re Wright*, 148 Idaho 542, 548, 224 P.3d 1131, 1137 (2010).[7] There was no causal connection between the PDC's duties and the alleged injuries recapped at pp. 1-2, *supra*.

Fourth, the MD&O said that delegation of responsibility for public defense services to the counties "does not abdicate the Defendants' responsibility to indigent criminal defendants." That begs the question: What are Defendants' responsibilities to indigent criminal defendants? The Governor has no specific responsibilities. The PDC members' responsibilities are those given to them by statute — nothing more. In short, there was no basis for the MD&O's legal conclusion that "the Governor and the PDC members have a more than sufficiently close connection ... to the enforcement of public defense in Idaho." R., p. 485.

Fifth, Plaintiffs seem to argue that if they "allege longstanding, statewide deficiencies in the Idaho system, which result in actual and constructive denial of counsel across the state," App.Br., p. 25, then some State officer(s) — the Governor and/or PDC members — must be subject to suit. That argument in effect requires the Court to create a "default" defendant if no defendant responsible for the alleged injuries in fact and with authority to redress them can be found. No principle of standing law requires creation of a "default" defendant. *Animal Legal Def. Fund*, *supra*. The District Court's dismissal of the Governor and the PDC members should

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[7] The 2016 Legislature amended Idaho Code § 19-850 to give the PDC increased rulemaking authority and to give it enforcement authority for the first time. This Brief addresses these statutory changes in Part I.A.4 of this Argument, pp. 19-22, *infra*.

be affirmed because neither has any causal connection to Plaintiffs' injuries in fact.

2. *Idaho Law Does Not Give the Governor or the Public Defense Commission Authority to Redress Plaintiffs' Alleged Injuries in Fact*

a. The Governor Is Not Responsible for Preventing and Remedying Violation of Constitutional Rights Everywhere in Idaho

The Governor is a constitutional Executive Officer. Idaho Constitution, Article IV, § 1. "The supreme executive power is vested in the governor, who shall see that the laws are faithfully executed." Article IV, § 5. The supreme executive power and the duty to faithfully execute the laws are general; no court has held that they obligate a Governor to supervise and be responsible for every State and local official's exercise of authority that may implicate a constitutional or statutory right. In particular, the Governor has no statutory or constitutional authority over County Commissioners or public defenders that allows him to redress Plaintiffs' alleged injuries. The following example shows the overreach of the argument that the Governor is responsible in his official capacity for the "State's" denial of Sixth Amendment public defense services.

Section 1 of the Fourteenth Amendment expressly prohibits the "State" from denying three sets of constitutional rights:

> No State shall [a] make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [b] deprive any person of life, liberty, or property, without due process of law; nor [c] deny to any person within its jurisdiction the equal protection of the law.

(Bracketed letters added.) Taking Plaintiffs' argument that the Governor is responsible for preventing the State's deprivation of the right to counsel to its logical end, then the Governor would also to be responsible under the Fourteenth Amendment, § 1, for preventing every State and local officer and agency from:

(a) making or enforcing any Idaho law or local ordinance abridging privileges or immun-

ities of citizens of the United States;

(b) depriving any person of life, liberty, or property without due process of law; and

(c) denying equal protection of the law to any person in Idaho.

No statutory or constitutional provision has ever been held to make a governor responsible for every violation of Federal law in his or her State, but that would be the logical outcome of Plaintiffs' argument that the Governor is obligated under the Sixth Amendment and/or Article I, § 13, to guarantee that the State must provide effective counsel to indigent defendants. The Court should reject Plaintiffs' unprecedented argument that the Governor can be sued to "require[e] the State to actually implement effective reform," App.Br., p. 26, and affirm his dismissal under the third element of standing because he has no ability to redress Plaintiffs' grievances any more than he could redress every Fourteenth Amendment violation in the example above.

Plaintiffs cite *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), to counter such redressability arguments. App.Br., p. 24. In this judicial *tour de force*, the County Bar challenged a statute setting the number of judges in Los Angeles County under a theory that "a shortage of state court judges causes inordinate delays in civil litigation, depriving litigants of access to the courts." *Id.* at 699. The Ninth Circuit did not require dismissal of the Governor, who could not create judgeships, but who would appoint judges to new positions, or the Secretary of State, who could not create judgeships, but who would certify new positions in future elections; neither could increase the number of judges in the county. But, the Court said it was likely that the California Legislature, which was not a party, would abide by a decision to increase judgeships if one were made. *Id.* at 701. To say that this stretches redressability for standing is an understatement. But, *Eu* insulated its overreach by denying relief on the merits, thus precluding further review by the Governor or Secretary of State because there was no judgment against them. *Eu* cannot be squared with recent cases like *Canards* or *Napolitano, supra.*

b. The Governor Cannot Expand His or Other Officers' Authority by Executive Order or by Exercising His Supervisory Powers

Plaintiffs argue that the Governor "has the power to redress the alleged injuries, both by issuing executive orders that can impact indigent defense" and by using his supervisory powers. App.Br., p. 27. It was shown earlier that the Governor has no direct supervisory powers over judges, county officials, or the PDC. See pp. 9 -10, *supra*. That discussion is not repeated. This Brief now explains why the Governor's authority to issue executive orders does not allow him to redress Plaintiffs' injuries in fact by giving agencies extra-statutory authority.

The Governor's authority to issue executive orders is granted "within the limits imposed by the constitution and laws of this state." Idaho Code § 67-802. Nevertheless, Plaintiffs cite three Executive Orders to support their position that the Governor may redress their injuries by Executive Order, even without statutory authority to do so.

The first Executive Order is No. 2015-11, Idaho Administrative Bulletin (IAB),[8] Vol. 15-12, pp. 27-28. Plaintiffs say EO No. 2015-11 tasked the Juvenile Justice Commission (JJC) with ensuring compliance with the Juvenile Justice & Delinquency Act of 2002, 42 U.S.C. §§ 5601 *et seq*., and authorized the JJC to take remedial action for violations. App. Br., p. 27. They are correct; Federal law requires just that.

EO 2015-11, ¶ 2.d, directs the JJC to "Ensure compliance with the core protections of the JJDPA by jurisdictions with public authority in Idaho through education, technical assistance, monitoring and remedial actions for violations." That is what 42 U.S.C. § 5633(a)(3) mandates: There must be an advisory group like the JJC to assure compliance with the JJDPA's requirements to separate adult and juvenile detainees and not to confine status offenders, § 5633(a)(11)-(13), and to equitably treat those in the juvenile justice system on the basis of gender, race, fami-

[8] Executive Orders are published in the Idaho Administrative Bulletin, Idaho Code § 67-5203(4)(a), which is on-line at http://adminrules.idaho.gov/bulletin/index.html.

ly income, and disability, § 5633(a)(15), including monitoring facilities to see that § 5633(a)(11)-(13)'s requirements are met, § 5633(a)(14).[9] When the State accepts Federal funds it is common that it must designate a body to monitor that those funds are spent in accordance with Federal law. EO 2015-11 implements these statutory and regulatory requirements of the JJDPA, but it does not create authority not based on Federal law.

The second Executive Order is No. 2016-01, IAB Vol. 16-6, pp. 15-17, which Plaintiffs say "empowered an executive branch council to play an expanded role beyond its statutory authority and tasked it with the duty of aligning policy and funding systems." App.Br., p. 27 (internal punctuation omitted). Plaintiffs do not say how EO No. 2016-01 expands the Early Childhood Coordinating Council's role "beyond its statutory authority." Quite the contrary, the first sentence of Idaho Code § 16-106 provides: "(1) The council shall have the following authority, duties and responsibilities, and ***such other functions as may be assigned by executive order.***" Emphasis added. Thus, when the Governor assigned tasks to the Council in EO No. 2016-01, he was doing what was authorized by statute, not expanding the Council's statutory authority.

The third Executive Order is No. 2015-10, IAB Vol. 15-12, pp. 23-26, which continues the Idaho Criminal Justice Commission (CJC). Plaintiffs blithely say: "If other bodies and procedures are failing to bring Idaho's indigent defense system up to constitutional muster, the Governor can expand the CJC's role to include enforcement powers, as he has with the Idaho Juvenile Justice Commission. *See* Executive Order No. 2015-11." App.Br., p. 28. However, as already shown, the Governor did not ***expand*** the JJC's powers to include enforcement; enforcement was required by Federal law. When it comes to substantive law, an agency has only the

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[9] See also 28 C.F.R. § 31.303(a): when the State receives JJDPA funds, it must have a body to certify various things, including de-institutionalization of juvenile status offenders, § 31.303(c), separation of confined juveniles from adults, § 31.303(d), removal of juveniles from adult jails, § 31.303(e), monitoring of juvenile facilities, § 31.303(f), and compliance with these requirements, § 31.303(g).

authority given to it by law. *Welch*, *supra*, 128 Idaho at 514, 915 at (1996); *Wright*, *supra*, 148 at 548, 224 P.3d at 1137. Therefore, the Governor's Executive Orders do not show that he can or does create authority in an agency where there is none.

Plaintiffs contend that the Governor "has broad executive authority that enables him to ***influence*** statewide policies and procedures, including those related to public defense." App.Br., p. 27 (emphasis added). Defendants agree. The Governorship is a bully pulpit; the Governor's ability to ***influence*** policies and procedures played no small part in amending the public defense statutes in 2016. 2016 Idaho Senate Journal, pp. 7- 8 (Governor addressed public defense in the State of the State speech). But the ability to ***influence*** legislation is not the authority to ***enact*** legislation. The District Court cannot realistically order the Governor "to ***influence*** statewide policies and procedures" and then hold him accountable for lack of ***influence***. The political ability to ***influence*** is not the legal ability to ***redress*** an injury in fact. The Governor appreciates Plaintiffs' crediting him with the appropriation of funds for trial-level public defense, App.Br., p. 47, but in the end Plaintiffs are complimenting his powers of persuasion, not his legal "authority to take concrete steps to reform the system," *id.*, through legislation.

Plaintiffs cite *Utah v. Evans*, 536 U.S. 452, 122 S.Ct. 2191 (2002), and say that even if Defendants cannot redress Plaintiffs' injuries, "it is enough that the practical consequence of a court decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redressed the injury suffered." App.Br., p. 28 (internal punctuation omitted). This case is not like *Evans*. *Evans* stated that if the Secretary of Commerce were ordered to resubmit a census report showing one member of the House of Representatives should be reassigned from North Carolina to Utah (which the Court could order), then the President likely would perform his statutory duty to transmit that report to Congress (which the Court could not order), and the Clerk of the House of Representatives likely would perform his statu-

tory duty to so notify the Governors of North Carolina and Utah (which the Court could not order): "[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision even though they would not be directly bound by such a determination." 536 U.S. at 460, 122 S.Ct. at 2197, quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803, 112 S.Ct. 2767, 2777 (1992). Thus, Utah had standing to sue the Secretary of Commerce because it was "substantially likely" that the other officers involved would perform their ministerial tasks regarding census reports if the Secretary were ordered to resubmit a census report. 536 U.S. at 460-64, 122 S.Ct. at 2197-99.

If only this case were that simple. If a letter from the Governor or the PDC would have cured the problems identified in the Complaint, the standing issue would be great simplified, if not wholly eliminated. But, as explained in Part I.C. of this Argument on Separation of Powers, *infra* at p. 23-32, legislation is necessary to provide the redress requested in the Complaint, and redress cannot be achieved by two ministerial acts like those in *Evans*: forwarding revised census reports to Congress and to the affected States.

Plaintiffs casually dismiss lack of redressability by positing without further explanation: "Plaintiffs' injuries are directly redressable by both the Governor and the PDC." App.Br., p. 28. Again, they beg the question: Under what authority? For example, can the Governor or the PDC tell the counties to spend more money than already appropriated for public defense? Can they actively manage the counties' public defender contracts? This remedial list can go on, but only the Legislature can select the appropriate remedies. If Plaintiffs know how the Governor and the PDC can provide the redress they seek, they needed to explain how. They did not. The District Court's dismissal of the Governor and PDC should be affirmed for lack of redressability.

3. *Coeur d'Alene Tribe Did Not Relax the Causation and Redressability Elements of Standing*

Plaintiffs argue that *Coeur d'Alene Tribe v. Denney*, 2015 Opinion No. 106, — Idaho —, — P.3d — (2015), has relaxed standing requirements under State law, so their Complaint should be heard because it raises significant constitutional issues. App.Br., p. 29. Plaintiffs are correct that *Coeur d'Alene Tribe* discussed circumstances under which the Court may relax the first element of standing (distinct, palpable injury in fact personal to a plaintiff), but it did not discuss relaxation of the second and third elements (causation and redressability), nor did it relax them. This first element is not at issue in this appeal; the second and third are.

After a statute authorizing betting on historical horse races was repealed by the Legislature, *Coeur d'Alene Tribe* decided whether the repealing bill (1) was not timely returned to the Senate with the Governor's objections and became law, or (2) was timely returned with the Governor's objections and thus was vetoed. *Coeur d'Alene Tribe* said, "the Tribe has not demonstrated a 'distinct and palpable' injury sufficient to confer standing" regarding repeal or veto, but "it is not necessary that a citizen show a special injury to himself or his property ... to compel public officers to perform non-discretionary ministerial duties" because "[t]he public has a significant interest in the integrity of Idaho's democratic government." 2015 Opinion No. 106 at 5, 7. The significant interest was whether the repeal had been vetoed in the manner required by law. The first element of standing — requiring a personal, distinct and palpable injury — was relaxed because "there would be no one to enforce the important constitutional provisions involved ... or to ensure that the integrity of the law-making process" if the Tribe did not have standing. *Id.* at 7. *Coeur d'Alene Tribe* did not, however, hold that causation and redressability were not necessary elements of standing. Although not they were discussed, both elements were present.

Coeur d'Alene Tribe analyzed the Secretary of State's statutory, ministerial duties. Idaho

Code § 67-505 gave him a ministerial duty to certify as law a bill that became law when the Governor did not return it to the originating house within five days. 2015 Opinion No. 106 at 8. When the Secretary of State did not certify the repeal as law, there was causation because the repeal was not on the books. Moreover, he could redress the injury by certifying the repeal as law. *Id.* at 17-21. Thus, the elements of standing missing here — causation and redressabilty — were present in *Coeur d'Alene Tribe*. Its standing analysis for injury in fact does not help Plaintiffs because they still lack two of the three elements of standing.

Plaintiffs exaggerate when they say that if they "cannot bring this lawsuit, there will be no one to enforce this essential right against continued inaction and delay ... ." App.Br., p. 29. Plaintiffs do not lack standing because there is no one else who could sue; they allege just the opposite, that "thousands of indigent defendants" are in similar circumstances, all of whom presumably could sue. Complaint, ¶ 8; R., p. 12. Plaintiffs lack standing because they sued Defendants who did not cause and cannot redress their injuries by a ministerial action.

4. The Public Defense Commission's New Duties Do Not Put It In Charge of Remedying Constitutional Violations, and It Cannot Be Enjoined to Do So

When this case was before the District Court, the Public Defense Commission had a duty (1) to promulgate rules for required training and continuing education for public defenders and rules for uniform data reporting for public defense and (2) to make recommendations to the Legislature. Idaho Code § 19-850 (2015 Supp.). That was all. Provision of public defense services was and still is the counties' responsibility. Idaho Code § 19-859.[10]

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[10] Idaho Code § 19-859 imposes upon County Commissioners the obligation to provide for indigent criminal defense and prohibits future "fixed-fee" contracts:

> **§ 19-859. Public defender authorized — Joint county public defenders.** — 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. The board of county commissioners of each county shall provide this representa-

In 2016 the Legislature amended § 19-850 to give the PDC new rulemaking authority over public defense services. 2016 Idaho Session Law, Chapter 195, Section 1. [11] Sections 2, 4 and 5 amended Idaho Code § 19-851 and § 19-862[12] and added a new § 19-862A to provide that the PDC may provide grants to assist with counties' public defense, may require counties to comply with the indigent defense standards that the PDC adopts, and may remedy a county's willful and material failure to comply with indigent defense standards at county expense. See especially newly enacted Idaho Code § 19-862A(11)-(12). Neither Chapter 195 nor any other 2016 Session Law amended § 19-859, which keeps primary responsibility for public defense with the counties.

This is a case for injunctive relief. R., p. 59. Under both Federal and State law, claims for injunctive or other prospective relief are adjudicated under the law in effect when the court decides the case, be the case before the trial court or an appellate court, because such relief operates *in futuro*. *Landraf v. USI Film Products*, 511 U.S. 244, 273-274, 114 S.Ct. 1483, 1501 (1994); 511 U.S. at 293, 114 S.Ct. at 1525-1526 (Scalia, concurring in the judgment); *Adams*

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tion by one (1) of the following:

(1) Establishing and maintaining an office of public defender;

(2) Joining 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 an agreement authorized under section 67-2328, Idaho Code;

(3) Contracting with an existing office of public defender; or

(4) 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.

[11] 2016 House Bill 504, 2016 Idaho Session Law, Chapter 195, is an appendix to this Brief. It is not surprising that "even with additional authority recently granted by statute," there was no "actual change on the ground." App.Br., p. 7. The Act became effective July 1, 2016, over two months after Appellants' Brief was filed. Idaho Code § 67-510. Of course there was no change when Appellants' Brief was filed because this amendment had not yet taken effect.

[12] Idaho Code § 19-862 was also amended by 2016 Senate Bill 1362, 2016 Idaho Session Law, Chapter 214. See http://www.legislature.idaho.gov/sessioninfo/2016/codeindex.htm, which lists all Idaho Code sections affected by 2016 legislation.

County Abstract Co. v. Fisk, 117 Idaho 513, 515, 788 P.2d 1336, 1335 (Ct. App. 1990) (entitlement to writ of mandamus decided under most recent amendment to law).

The 2016 amendments to § 19-850 give the PDC many additional duties effective July 1, 2016. Here, Plaintiffs can only speculate that the PDC will act inconsistently with its new authority. If Plaintiffs had sued under the Administrative Procedure Act to require the PDC to adopt rules or to take other actions required by § 19-850, either before or after the 2016 amendments, they might have a case for judicial review under the APA. See Idaho Code § 67-5201(3) ("agency action" includes "failure to issue a rule" and "failure to perform, any duty imposed by law"); § 67-5270 (persons aggrieved by final agency actions may petition for judicial review).

Plaintiffs are not asking for judicial review under the APA, however. They are suing under § 1983 to enforce Sixth Amendment rights and under Article I, § 13 to enforce State constitutional rights. Claims for Relief and Prayers for Relief; R., pp. 56-58. The relief sought is constitutionally adequate public defense services. How the PDC will implement its new authority under the 2016 amendments with regard to constitutionally required public defense services is not yet ripe for review on this record and should not be considered on appeal.

These APA ripeness concerns become even more evident when the PDC's new authority under amended § 19-850 is considered. The new authority, once brought to bear, will promote improved public defense services, but the PDC is still not statutorily obligated to provide constitutionally adequate public defense services itself. Initial responsibility stays with the counties. Idaho Code § 19-859. The PDC can provide public defense services only if it finds under § 19-862A(11)(b) that a county "has willfully and materially failed to comply with [the PDC's] indigent defense standards"; until that happens, the counties are responsible for providing constitutional public defense services. Section 19-862A(11)(b)'s direction for the PDC to provide public defense services only when a county has willfully and materially refused to do so shows that the

PDC has no general statewide mandate to ensure the constitutional adequacy of public defense services; if it did, this section would not be necessary.

Suing the PDC to take responsibility for the counties' provision of public defense services is like suing the farmer who grows the wheat to force the baker who uses the wheat to make better bread. The farmer would be only indirectly responsible for the quality of the baker's bread (no direct causation) and not capable of making the baker improve his bread (no ability to redress injury). Thus, the 2016 amendments to § 19-850 do not confer standing upon Plaintiffs to sue the PDC because, like the farmer and the baker, the amendments allow the PDC to improve inputs to counties' public defense services, but do not cure the absence of injury in fact caused by the PDC (which does not provide public defense services) and the PDC's inability to redress the alleged injuries in fact. Rather than "resolv[ing] all doubt that the PDC and Governor have more than enough authority to remedy the Plaintiffs' grievances," App.Br., p. 47, amended § 19-850's precise circumscription of the PDC's authority to provide public defender services under extreme, limited circumstances shows that the PDC has only the authority given to it, which does not include a general charge to remedy all denials of indigent defendants' right to counsel. Nothing in this record shows that the PDC will not carry out its new responsibilities.

B. The State Cannot Be Sued for Injunctive Relief under Federal or State Law

The District Court's denial of injunctive relief against the State should be affirmed. Plaintiffs conceded that Idaho is not a "person" who can be sued under § 1983. R., p. 406, n.2; p. 481. *E.g.*, *Will v. Michigan*, *supra*, 491 U.S. at 69, 109 S.Ct. at 2311 (a State is not a person that can be sued for damages under § 1983); *Lucchese v. Colorado*, 807 P.2d 1185, 1194 (Colo. App. 1990) (a State is not a person who can be sued for injunctive relief under § 1983).

That leaves the question of whether Idaho may be sued for injunctive relief under State

law. Idaho Rule of Civil Procedure 3(b) answers that question in the negative:

> **Rule 3(b). Designation of party**
>
> ... Provided, all civil actions by or against a governmental unit or agency, ... shall designate such party in its governmental ... name only, and individuals constituting the governing boards of governmental units ... shall not be designated as parties in any capacity ***unless the action is brought against them individually or for relief under Rules 65 or 74***.

Emphasis added.

Weyyakin Ranch Property Owners' Assoc., Inc. v. City of Ketchum, 127 Idaho 1, 896 P.2d 327 (1995), holds that the general rule that suit is brought against a government entity in the name of that governmental entity and not against its officers does not apply when the suit is for an injunction. To obtain an injunction, Rule 3(b) requires the Complaint to name specific officers to be enjoined because the government entity itself cannot be enjoined.

> This action for injunctive relief pursuant to I.R.C.P. 65 ... sought to enjoin the "City of Ketchum" from taking any further action to complete the proposed annexation. ***The designation of the "City of Ketchum," rather than the elected officials individually, violates I.R.C.P. 3(b).*** Because the temporary restraining orders failed to name the elected officials individually, the trial court never obtained jurisdiction over them, and therefore did not have the authority to find them in contempt.

127 Idaho at 2-3, 896 P.2d at 328-329 (emphasis added). Accordingly, Idaho cannot be sued for injunctive relief under State law. The Court should affirm dismissal of all claims for injunctive relief against the State.

C. Separation of Powers Precludes the District Court from Providing the Remedies Sought in the Complaint

This Court should affirm the District Court's dismissal of the Complaint on separation-of-powers grounds. The MD&O explained how Plaintiffs did not challenge the constitutionality of

existing statutes, but asked the District Court to reshape Idaho law to transfer responsibility for indigent public defense from the counties to the State. Its spot-on analysis is quoted at length:

> ... [T]he Idaho legislature has delegated the duty to provide indigent criminal defense to the counties. See I.C § 19-859. Plaintiffs ask the Court to override this system and reshape the system of indigent criminal defense in Idaho. ... [I]t would invade the province of the legislature to do so.
>
> Plaintiffs do not argue that ... delegating ... public defense [to the counties] is unconstitutional. They ... argue that the county commissioners ... fail[] to protect their constitutional rights to counsel and a fair trial. Instead of [suing] ... counties ..., they [sued] the State, the Governor, and the PDC. Plaintiffs ... do not argue that the statute establishing the PDC is unconstitutional. They argue ... that the PDC is ... ineffective and inadequate ... to redress ... inadequate or ineffective assistance of public defense counsel. ***Instead of seeking to have an act declared unconstitutional, they ask ... to declare inaction to be unconstitutional*** [and] to declare the whole system ... unconstitutional and ... establish standards or guidelines ... that the Governor, the PDC, the legislature, and all counties (whom they have not sued ...), must follow. ***Plaintiffs ask this Court to mandate that the Governor and the PDC (and the legislature and counties) must enact ... legislation, ordinances, or rules to meet those standards, and to provide adequate funding therefore.*** This Court does not have the power or jurisdiction to do so under the established principles of separation of powers ... in the federal and state constitutions.
>
> ....
>
> ... [I]t is not the role of courts, but that of the political branches, to shape the ... government ... to comply with ... the Constitution. Accordingly, the Court finds the case violates the separation of powers doctrine.

MD&O; R., pp. 496-98 (emphasis added).

Statute requires counties to provide public defense. Idaho Code § 19-859. Plaintiffs' Prayers for Relief ask the District Court to enmesh itself in the Legislative function by enjoining

the State to modify, subject to the Court's approval and monitoring, what are innocuously called "specific modifications to the structure and operation of the State's indigent defense system." The "specific modifications" prayed for would be statutes changing the public defense system:

> C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated by the State on an ongoing basis, and ***provide a deadline for the State to move this Court for approval of specific modifications to the structure and operation of the State's indigent-defense system***;
>
> ...
>
> E) Enter an injunction ***requiring the State to propose***, for this Court's approval and monitoring, ***a plan to develop and implement a statewide system of public defense*** that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;

Complaint, Prayers for Relief, R., p. 58 (emphasis added).

The District Court concluded that the Prayers for Relief would require statutory changes to implement. R., p. 497. Idaho Constitution, Article II, § 1, provides for separation of powers, and Article III, § 1, places the Legislative Power in the Legislature and the people, not in the Governor, the PDC, or the District Court. Given this separation of powers, the District Court held that it cannot "mandate that the Governor and the PDC (and the legislature and counties) ... enact ... legislation." R., p. 497. That legal conclusion is correct. "[M]andamus will not lie to compel the Legislature to enact any legislation. ... [A] judicially compelled enactment of legislation ... is the very exercise of legislative power itself." *County of San Diego v. State*, 164 Cal.App.4th 580, 594, 79 Cal.Rptr.3d 489, 501 (2008) (decided under California's similar separation-of-powers article). "[C]reation of a new county is an exercise of legislative power ... ; the Legislature cannot be compelled to form a new county." *Cedar County Committee v. Munro*, 134 Wash.2d 377, 380, 950 P.2d 446, 447 (1998) (decided under Washington's similar separation-of-

powers article). Plaintiffs are candid that a judicial order to pass legislation is exactly what they seek: "The court would ... enter any appropriate order to set the other branches into motion to correct deficiencies." App.Br., p. 44. Such a judicial order would violate separation of powers.

1. Plaintiffs Cite No Authority that the District Court May Enjoin Defendants to Enact New Statutes

How do Plaintiffs respond to the MD&O's separation-of-powers analysis that the District Court does not have authority to compel the enactment of legislation? In Part IV.B.3.a of their Argument, App.Br., pp. 34-39, they avoid the issue of whether the District Court has authority to order a change in the statutes, which is the only way that a "statewide system" of indigent public defense can be created. When Plaintiffs say that "alleged, with particularity, that ... ongoing constitutional violations are due to failures at the state level that the individual counties alone cannot remedy," App.Br., p. 34, and thus the State can be sued, they beg two questions: (1) Can a given county's failure to deliver public defense services be remedied at the county level?, and (2) Does the District Court have authority to order and monitor a Statewide (*i.e.*, legislative) restructuring of public defense services until that restructuring meets with its approval? No case discussed in Part IV.B.3.a addresses whether the District Court may order the Legislature to pass additional statutes that meet with the District Court's approval, especially when the Complaint does not even pray for a declaration that the existing statutory scheme of county-provided public defense services is unconstitutional.

2. Plaintiffs Cite No Authority That Exercising Discretion How to Tackle and Solve a Problem Is Subject to Mandamus or Injunction

In Part IV.B.3.b of Appellants' Brief, pp. 39-42, Plaintiffs summarize that "[t]he main principle to be distilled from the precedent set forth [in Part IV.B.3.a] is that the separation of powers doctrine only limits judicial review of other branches' discretionary acts." App.Br., p. 39.

Plaintiffs' theme in Part IV.B.3.b is that complying with the Sixth Amendment and with Article I, § 13, are not discretionary acts, but are mandatory and may be compelled by the District Court. Defendants agree that it is not discretionary ***whether*** to comply with the Sixth Amendment, Article I, § 13, or any other constitutional provision; compliance with constitutional provisions is mandatory. But the decision ***how*** the State will structure the institutions of Idaho government to comply with the Sixth Amendment and with Article I, § 13, is discretionary because, unlike the situations in *Coeur d'Alene Tribe* or *Evans*, there is no ministerial act like filling out a form to certify a bill as law or forwarding a census report that will result in compliance.

Defendants ***do not*** argue that it would violate separation of powers for an Idaho court to decide if a Plaintiff were denied rights to counsel secured by the Sixth Amendment and/or by Article I, § 13. Defendants ***do*** argue that it would violate separation of powers to grant the Complaint's Prayers for Relief to restructure the State's public defense statutes because only the Legislature can provide that remedy. *Gideon v. Wainwright*, 153 So.2d 299 (Fla. 1963), cited App.Br., p. 40, the Florida Supreme Court's decision on remand from *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), supports this position. Upon remand, the Florida Supreme Court acted in the only way that it could, by modifying the criminal rules applied by the lower Florida courts, not by ordering the Legislature to "fix the system." 153 So.2d at 300.

The Idaho cases cited at Part IV.B.3.b, App.Br., pp. 39-42, of the Argument do not support Plaintiffs' implicit position that the District Court can require the revision of the public defense statutes.[13] If Plaintiffs wish to sue the State actors responsible for providing public defense

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[13] These are the Idaho cases cited in Part IV.B.3 of Appellants' Brief, pp. 39-42:

- *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995), upheld amended statutes governing the Snake River Basin Adjudication; it did not require the Legislature to modify them.
- Judge Burnett's concurrence in *State v. Garza*, 112 Idaho 778, 785-86, 735 P.2d 1089, 1096-97 (Ct.App. 1987), reconciled possibly conflicting statutes and court rules for search warrants by

services under § 19-859 and ask for injunctive relief, they may do so without violating separation of powers. They have not. Instead, they sued Executive officers and asked for injunctive remedies available only from the Legislature. Granting that relief would violate separation-of-powers principles by the District Court ordering executive officers to make legislative changes.

3. The District Court's Concerns About Separation of Powers Were Not Misplaced

In Part IV.B.3.c of their Argument, App.Br., pp. 42-45, Plaintiffs say that the District Court's separation-of-powers analysis "expressed misplaced concern" about "reshaping the system of indigent criminal defense in Idaho." Not to worry: "[T]he judiciary has a fundamental responsibility to override other branches' failure to act and to remediate unconstitutional state systems." App.Br., p. 42 (some internal punctuation omitted). In support of this position, they cite *Coeur d'Alene Tribe*, two *ISSEO* cases, and *Hellar v. Cenarrusa*, *supra*.

None of these cases stands for the proposition that the District Court can require the Legislature to enact a new statutory structure for public defense services. *Coeur d'Alene Tribe* required the Secretary of State to perform a ministerial statutory duty: fill out a form to certify an act as law. It did not require enactment of a new statute. *Idaho Sch. for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 583-84, 850 P.2d 724,734-35 (1993) (*ISSEO I*), accepted

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construing the statute not to conflict with the rule; he would not order passage of a new statute.

- *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975), articulated the standards to be used to determine whether retained trial counsel had provided reasonably competent assistance of counsel; it did not address whether the public defense statutes must be changed.
- *Bement v. State*, 91 Idaho 388, 422 P.2d 55 (1966), decided whether a young, uneducated defendant was properly informed of his statutory right to counsel; it did not order a statutory change.
- *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 718 P.2d 1129 (1986), decided whether an emergency clause making an act immediately effective would override another statute that provided that laws subject to a referendum would not take effect until after the referendum; it did not involve a request to order the enactment of another statute.
- *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989), was a straightforward challenge to a statute's constitutionality; it did not request enactment of other statutes.

existing statutory and rulemaking definitions for curriculum and books, facilities, and transportation as consistent with the constitutional definition of a thorough education; it did not require new statutes to be enacted to meet a judicial definition of thoroughness. *Idaho Sch. for Equal Educational Opportunity v. State*, 142 Idaho 450, 459-60, 129 P.3d 1199, 1208-09 (2005) (*ISEEO V*), did not order the Legislature to enact new statutes to cure constitutional deficiencies in funding safe school facilities whose safety was adjudicated under existing statutes and State Board of Education rules. *Hellar* affirmed the District Court's holding the statute apportioning the Legislature was in violation of the Idaho Constitution and ordered that the next Legislature be elected under an apportionment adjudicated in the District Court as complying with the State and Federal Constitutions. 106 Idaho at 573-76, 682 P.2d at 526-29. *Hellar* shows that the District Court could order Secretary of State Cenarrusa to perform the ministerial act of conducting an election under a previously devised plan. It did not order the Legislature to devise a plan. In short, none of these cases holds that the District Court may compel the Legislature to enact new laws on a given subject.

Plaintiffs assure the Court that "the remedy [they] seek respects separation of powers": they "ask for [1] a declaratory judgment that Idaho's system violates the right to counsel"; "[2] an injunction requiring that the State develop and propose a plan to implement a constitutional system" under which "the executive and legislative branches ...would determine [a] whether new legislation would be best or [b] whether, instead, the Governor and the PDC would use their existing authority to impose reforms." App.Br., pp. 42-43 (bracketed numbers and letters added). In other words, the District Court would enter a declaration judgment that the current system is unconstitutional and enjoin the State to fix it by legislation or through executive power.

These solutions are not compatible with separation of powers. ***First***, Part I.D of this Argument, pp. 32-33, *infra*, shows that the State has sovereign immunity from suit unless statute

waives immunity, and the State has not waived immunity here. The District Court cannot enter declaratory judgment against the State because of its sovereign immunity. ***Second***, the District Court cannot order the Legislative Branch to enact legislation. See pp. 25-26, *supra*. ***Third***, the District Court cannot order the Governor and/or the PDC to exercise executive authority that they do not have. See pp. 14-18, *supra*.

Plaintiffs cite *Harrell-Harring v. State*, 15 N.Y.3d 8, 26, 930 N.E.2d 217, 227 (2010) (*H-H*), which was a challenge to the provision of public defense services in five New York counties, to support their position that "the fact that the court's ruling may necessitate some action on the part of the legislature does not absolve the court from issuing such a ruling." App.Br., p. 44, quoting *H-H*. Indeed, *H-H* refers to possible reordering of legislative priorities, but it is likely that the legislatures referred to are county legislatures, not the New York State Legislature. The legislative body in many New York counties is called the county legislature, McKinney's County Law, § 150-a, not the board of county commissioners as in Idaho. It seems that the quoted paragraph referred to county legislatures and their priorities when the next paragraph refers to the "five subject counties."[14] Ordering counties to comply with State law does not implicate separation of powers.

4. Separation of Powers Suggests That This Is Not a Case for Equitable Relief

Defendants agree that the Legislature and the Governor "are not the final arbiters of whether their acts or omissions are constitutional." App.Br., p. 45. But Plaintiffs have not challenged the constitutionality of statutes placing responsibility for public defense in the counties;

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[14] As shown by their websites, three of the five counties sued have county legislatures:
Onondaga County: http://www.ongov.net/legislature/
Schuyler County: http://www.schuylercounty.us/266/Legislature
Suffolk County: http://legis.suffolkcountyny.gov/legislators.html

they have skipped over the issue of whether those statutes can be administered in a constitutional manner to argue that the failure to direct or supervise public defense services at the State level is unconstitutional. There is simply no precedent for this under Federal law, and there is no reason to create a precedent for it under State law when Plaintiffs have ignored their obvious remedy: suing a county over the specifics of what the county is or is not doing.

Article XVIII of the Idaho Constitution is called "County Organization"; § 5 provides for the Legislature to establish a system of county government; § 11 provides that "County, township, and precinct officers shall perform such duties as shall be prescribed by law." Section 22 of the Idaho Admission Act provided: "All acts or parts of acts in conflict with the provisions of this act, whether passed by the legislature of said territory or by Congress, are hereby repealed." Given the Idaho Admission Act's and the Idaho Constitution's recognition that the Legislature may devolve duties upon the counties, it would violate separation of powers for the District Court to grant equitable relief under Federal or Idaho law to prevent the Legislature from assigning public defense duties to the counties.

This brings Defendants to another point. Plaintiffs are asking for an equitable remedy. Equity is practical; equitable remedies are not given as a matter of right, but only as a matter of sound judgment and discretion. *E.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 724-25, 116 S. Ct. 1712, 1724-25 (1996) (under Federal law, there is no entitlement to equitable relief if there is a violation of a federal legal right, but a court should exercise its sound discretion to decide whether to grant equitable relief or abstain from exercising jurisdiction); *Chavez v. Barrus*, 146 Idaho 212, 222, 192 P.3d 1036, 1046 (2008) (similar exercise of judgment for right of redemption of property); *Chatterton v. Luker*, 66 Idaho 242, 258, 158 P.2d 809, 816 (1945) (similar exercise of judgment for specific performance). Given the entanglement with the Legislature process that would ensue if the District Court were to grant the equitable relief requested, even if

the District Court's separation-of-powers analysis were incorrect (it is not), this would be an appropriate case for the District Court to withhold injunctive relief.

There is another reason to be cautious. Plaintiffs made no secret below of their goal to halt criminal prosecutions of all indigent defendants:

> [The District] Court's declaration that Idaho's system is currently operating below constitutional thresholds would have a direct effect on the plaintiff class because it would require the State to meet those thresholds before it could continue to prosecute indigent criminal defendants. Class members could obtain immediate further relief based on the judgment, ***through stays and other appropriate temporary relief in their criminal proceedings until the State dispatched the resources and rules needed for constitutional compliance.***

Response to Defendants' Motion to Dismiss, R., p. 426 (emphasis added). According to Plaintiffs the District Court would enter an injunction and a judgment requiring every class member's criminal proceeding in every State court in Idaho to be stayed "until the State dispatched the resources and rules needed for constitutional compliance." Equity should not restrain criminal proceedings throughout the State.

In summary, for the reasons stated in Parts I.C.1-4 of this Argument, the Court should affirm dismissal of the Complaint on separation-of-powers grounds.

D. The State Has Sovereign Immunity from Suit, Including Immunity from Declaratory Judgment

The District Court's dismissal of claims for declaratory judgment against the State should be affirmed. Idaho is a sovereign State of the Union. Idaho Admission Act, 26 Stat. L. 215, ch. 656. Section 1 of that Act "declared Idaho to be a State of the United States of America ... admitted into the Union on equal footing with the original States" and "the constitution which the people of Idaho have formed for themselves ... is hereby accepted, ratified and confirmed."

"States entered the Union with their sovereign immunity intact." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253, 131 S. Ct. 1632, 1637 (2011). Idaho retains its sovereign immunity unless the Legislature waives it by statute. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244-45, 141 P.3d 1108, 1113-14 (2006). Thus, the threshold issue when the State is sued is: Has statute waived the State's sovereign immunity not to be sued in this case? The answer is no. Thus, no declaratory judgment may be entered against the State of Idaho.

Further, even if statute had waived immunity from suit, Idaho Code § 10-1206 authorizes the District Court to decline to issue a declaratory judgment "if it would not terminate the uncertainty or controversy giving rise to the proceeding." A naked declaratory judgment against the State without enforcement power against the Legislature would not end the controversy. This is another reason why declaratory judgment should not be issued against the State.

II. DOJ'S AMICUS DOES NOT ADDRESS TWO ELEMENTS OF STANDING — CAUSATION AND REDRESSABILITY — AND URGES ADOPTION OF AN UNPRECEDENTED THEORY OF EXECUTIVE RESPONSIBILITY FOR PUBLIC DEFENSE SERVICES THAT FEDERAL PUBLIC DEFENSE SERVICES CANNOT MEET

The United States Department of Justice (DOJ) Amicus argues issues that are not before the Court —"Whether indigent criminal defendants may bring a civil, pre-conviction claim for declaratory and injunctive relief based on constructive denial of counsel under the Sixth Amendment and *Gideon v. Wainwright*, 372 U.S. 335 (1963)," DOJ Amicus, p. 7, and, "whether plaintiffs can bring such a constructive-denial-of-counsel claim in a pre-conviction civil action seeking prospective injunctive relief ... ," *id.* at 19 — while ignoring whether such a claim can be brought against the State, the Governor and the PDC Members. DOJ does not grapple with the § 1983 case law to address the real issue before the Court: When Idaho statute provides that the counties are responsible for public defense services, can State executive officers be sued for

alleged failings of that system?[15]

Further, DOJ does not confine itself to issues of Federal law in which DOJ and the Federal Government have an interest; it also strays into issues of State law that are none of its concern. And, most importantly, DOJ supports a Complaint based upon an unprecedented theory of centralized State control and responsibility for indigent defense services that is inconsistent with Federal law and Federal practice, which, like Idaho, provides a decentralized system of public defense that is not the Chief Executive's responsibility or subject to his supervision.

A. DOJ's Cases Do Not Hold That There Is a Federal Constitutional Right to Sue an Entire State's System of Providing Public Defense Services

DOJ makes several misstatements at the outset:

> [1] [T]he district court effectively held that the sole recourse plaintiffs have to redress the systemic deficiencies in Idaho's public defense system is through piecemeal, post-conviction litigation of individual ineffective-assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984). ... [2] Rather, as [New York] correctly recognized in [*H-H*], indigent criminal defendants may challenge systemic *Gideon* violations through pre-conviction, civil constructive-denial-of-counsel claims seeking prospective injunctive relief.
>
> ... [3] In ruling that courts are powerless to hear such claims, the district court has deprived indigent defendants in Idaho of this essential tool, well-grounded in the law.

DOJ Amicus, pp. 1-2 (bracketed numbers added).

DOJ is wrong. ***First***, the District Court did not hold that Idaho Courts are powerless to hear Plaintiffs' claims against individual county systems of public defense services.[16] ***Second***, as

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[15] DOJ recognizes that State cannot be sued under § 1983. DOJ Amicus, p. 11, n.18.

[16] The MD&O did not explicitly rule that Plaintiffs could sue county officers, but it did observe: "Instead of filing suit against those counties where they believe their constitutional rights have been violated, they brought this action against the State, the Governor, and the PDC." MD&O, R., p. 496. Regardless

explained below, *H-H's* ultimate ruling was not based solely on Federal law, but grounded in whole or in part in State law, and it did not involve a challenge to a "statewide" system of public defense services; it involved a challenge to public defense services in five counties. ***Third***, even if Defendants are wrong and the MD&O could be interpreted to preclude systemic challenges to a county's public defense services, Defendants do not take that position.

As for *H-H*, its remedies were not exclusively based upon Federal law and did not involve a statewide challenge to public defense services. New York's State legislature, like Idaho's, delegated responsibility for public defense to the counties. 15 N.Y.3d at 15, 930 N.E.2d at 219. Criminal defendants in five New York counties sued because they alleged that the county-based system "functioned to deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and ***statutorily*** guaranteed representational rights." *Id.* (emphasis added). *H-H* called the case a "Sixth Amendment-grounded action," *id.* at 19, 930 N.E.2d at 222, which stated "cognizable Sixth Amendment claims," *id.* at 20, 930 N.E.2d at 222, but did not ground its remedial authority in § 1983; it fact, it did not mention § 1983 at all. *H-H* was based upon a mix of Federal constitutional and State statutory claims: "[N]othing in the ***statute*** may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable ... ." *Id.* at 21, 930 N.E.2d at 223 (emphasis added). "We have consistently held that enforcement of a clear constitutional or ***statutory*** mandate is the proper work of the courts." *Id.* at 27, 930 N.E.2d at 227 (emphasis added). *H-H* does not explain how the State or the Governor may be sued under § 1983 or under State law.[17] Thus, *H-H* is not a "clean" Sixth

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of whether the MD&O explicitly held that a class action suit could be brought against the counties, it did not hold that a class action lawsuit could not be brought against the counties or their officers.

[17] Both the State and the Governor were sued in *H-H*, see *Hurrell-Harring v. State*, 66 A.D.3d 84, 85, 883 N.Y.S.2d 349, 350 (2009), but the New York Court of Appeals' opinion does not explain the basis for suing either of them under Federal law or State law.

Amendment ruling, and it is difficult to know how much, if any, of its remedy is under § 1983 and how much of its remedy is under New York law.

DOJ pats itself on the back for its role in various cases regarding public defense services, DOJ Amicus, pp. 3-5, but omits the important fact that none of these cases challenged an entire State's system of public defense services, and none of them resulted in a judgment on a Federal claim against an entire State, a Governor, or a Statewide agency regarding a statewide claim. If DOJ is seeking to use Idaho as a guinea pig to see whether it can expand the scope of these kinds of cases from local to statewide, at least it should have said so. It did not.

B. DOJ Addressed Issues of State Law for Which There Is No Federal Interest

DOJ stated an Issue Presented on Appeal based on the Sixth Amendment, DOJ Amicus, p. 7, but as explained in this section of the Brief, it has also discussed matters of purely State law. There is no reason for DOJ to weigh in on State law. It is settled law that there is no Federal interest in using Federal Courts to vindicate State law against State officials.

> A federal court's grant of relief against state officials on the basis of state law ... does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984). Likewise, DOJ's references to the proper construction or administration of State law does nothing to advance Federal Supremacy under Article VI, § 2, and, like *Pennhurst*, it is difficult to think of a greater intrusion on state sovereignty than when DOJ instructs this Court how to make Idaho Executive Officers conform their conduct to state law. Nevertheless, DOJ repeatedly refers to State law in its brief:

- DOJ states that Plaintiffs alleged lack of counsel at initial appearances as required by State law: "Unlike the federal system, Idaho Criminal Rule 44(a) entitles indigent defendants to appointed counsel at their initial appearance." DOJ Amicus, p. 8, n.15.
- DOJ states that "there is continued use in many areas of 'fixed-fee' " public defender contracts, "despite the fact that such contracts are prohibited by Idaho Code § 19-859(4)." DOJ Amicus, p. 10.[18]
- DOJ states that Plaintiffs allege that the PDC failed to meet its State law requirements for rulemaking or legislative recommendations. DOJ Amicus, p. 10, n.17.

There is no Federal interest in these issues regarding enforcement or application of Idaho statutes or court rules. DOJ has overstepped its interest in Federal supremacy.

DOJ also opined on State law separation of powers principles. DOJ Amicus, pp. 23-24. While the question of whether Idaho's provisions for separation of powers would violate the Federal Constitution in a given fact situation may be a Federal question, there is no Federal interest in the purely State law issue of how Idaho separates powers among its branches of government and among State and local governments. *Cf Pacheco v. Dugger*, 850 F.2d 1493, 1495 (11th Cir. 1988), *cert. denied*, 488 U.S. 1046, 109 S.Ct. 878 (1989) (distribution of powers among agencies and branches of state government does not implicate Federal issues). But DOJ weighs in anyway and weighs in incorrectly.

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[18] This reference is particularly egregious because DOJ did not undertake a reasonable inquiry to see whether fixed fee contracts do indeed violate § 19-859(4) or whether they are still in use. The 2014 amendment to subsection (4) provided that ***future*** public defender contracts could not be fixed fee: "The contract provisions of this subsection shall apply to all contracts entered into or renewed on or after the effective date of this act." 2014 Idaho Session Law, Chapter 247, § 5.

Unsurprisingly, fixed fee contracts in place in 2014 when this amendment was passed were not made unlawful, and they took a while to cycle out of the system. The fixed-fee contract issue became moot at the end of June 2016. See Minutes of Public Defense Reform Interim Committee: http://legislature.idaho.gov/sessioninfo/2015/interim/150918_pdef_other_meet_time-Minutes.pdf.

DOJ says: "Courts are not powerless to compel action by other branches of government in order to remedy a constitutional violation. To the contrary, courts have long recognized the necessity of systemic equitable relief to correct unconstitutional conduct." DOJ Amicus, p. 23. To support of this statement, DOJ cites *Brown v. Plata*, 563 U.S. 493, 131 S.Ct. 1910 (2011), and *H-H*. Neither case supports the kind of relief sought here. *H-H* was discussed earlier; it did not require the New York State Legislature to take any action. See p. 30, *supra*.

Brown is inapposite. *Brown* was an appeal from two consolidated cases, one concerning whether California prisons were providing required mental health services to seriously mentally ill inmates, and another concerning whether California prisons were providing necessary medical services to prisoners with serious medical conditions. Plaintiffs in the first case sued a number of prison officials with statewide authority, including the Director of the California Department of Corrections (DOC), the Assistant Deputy Director for Health Care Services for the California DOC, and the Chief of Psychiatric Services for the California DOC. *Coleman v. Wilson*, 912 F.Supp. 1282, 1293 (E.D. Cal. 1995), *appeal dismissed*, 101 F.3d 75 (9th Cir. 1996) (Table).[19] Unlike this case, the California prison officials in *Brown* were sued over conditions in facilities that they administered (*i.e.*, there was causation), not for conditions in county jails that they did not oversee. Further, the *Brown* defendants could implement the remedy themselves by releasing prisoners or providing more services (*i.e.*, there was redressability). Thus, these cases offer no insight on the separation-of-powers issue before this Court: May the District Court issue an order that as a practical matter requires legislation to implement because the Defendants sued did not cause and cannot remedy the alleged injuries in fact?

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[19] The Governor was also sued. The reasons for keeping him in the suit, 912 F.Supp. at 1317, were not based upon his official duties vis-à-vis California's prisons, but upon his "awareness" about conditions in them. This analysis is not consistent with more recent cases like *Canards* or *Napolitano, supra*.

DOJ's next cases and argument are no more instructive. DOJ begins with the sophistry that the Complaint's "request for relief does not ask the court to enact legislation," but rather "seek[s] injunctions 'requiring the State to propose' a plan for reforming its public defense system," under which the District Court "would ... approve and monitor the State's plan to assure that its meets constitutional standards." DOJ Amicus, p. 24. If this would be possible to implement without legislation, DOJ does not explain how. DOJ then cites two cases — *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267 (1971), and *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122 (W.D.Wash. 2013) — that were brought against local governments, that did not seek statewide relief, and did not require the State Legislature to act to implement their remedies. These cases do not address the separation-of-powers issue here: Can the District Court order relief that, even if not explicitly requiring legislation to implement, can only be achieved by legislation? As explained earlier, the answer is no. See pp. 23-26, *supra*.

Lastly, DOJ purports to offer a way out of the separation-of-powers problem that it does not otherwise acknowledge or discuss: "In any event, any concerns regarding the court's role vis-à-vis the legislature at most go to the scope of relief the court might fashion; they do not render the claim nonjusticiable, as the court ruled here." DOJ Amicus, p. 24. In other words, DOJ proposes to read redressability out of the standing requirements for justiciability. Unsurprisingly, DOJ cites no cases for removing the third standing requirement from justiciability.

C. No Court Has Issued a Judgment Requiring a State to Restructure Its Entire Public Defense System on the Basis of the Sixth Amendment

The DOJ Amicus cannot cite any case in which there was a final judgment requiring an entire State to revamp its public defense system. The reason why, to the best of Defendants' knowledge, is that there is no such case. DOJ, like the Plaintiffs, is asking this Court to make Idaho the test case in its experiment to force a statewide public defense solution.

Defendants have already explained why *H-H* is not such a case. Neither are *Duncan v. State*, 284 Mich.App. 246, 774 N.W.2d 89 (2009), and *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), which are cited at DOJ Amicus, pp. 21-22. DOJ does not even inform the Court that *Duncan's* 2009 Michigan Court of Appeals decision went to the Michigan Supreme Court the next year and that the ultimate *Duncan* decision was not grounded in § 1983.

Duncan's sinuous history is reviewed in *Duncan v State*, 300 Mich.App. 176, 832 N.W.2d 761 (2012), an opinion on remand from the last of three Michigan Supreme Court decisions on appeal from the 2009 decision that DOJ cited. The 2009 Court of Appeals decision allowed the State and the Governor to be sued over provision of public defense services in three Michigan counties. 284 Mich.App. at 253-254, 774 N.W.2d at 97. The State was sued under the Michigan Governmental Tort Liability Act, *id.* at 266-271, 774 N.W.2d at 104-106, and the Governor was sued under § 1983, *id.* at 271-276, 774 N.W.2d at 106-109, without any discussion of his authority to redress plaintiffs' claims. The Michigan Court of Appeals was then affirmed, reversed, and affirmed by the Supreme Court of Michigan in that order:

- *Duncan v. State*, 486 Mich. 906, 906, 780 N.W.2d 843, 844 (2010) (*Duncan I*) (affirming "result only of the Court of Appeals majority for different reasons" and "it is premature to make a decision on the substantive issues");
- *Duncan v. State*, 486 Mich. 1071, 1071, 784 N.W.2d 51, 51 (2010) (*Duncan II*) (reversing *Duncan I*: "The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable"); and
- *Duncan v. State*, 488 Mich. 957, 866 N.W.2d 407 (2010) (*Duncan III*) ("we REINSTATE our order" from *Duncan I* affirming in result only),[20]

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[20] The last decision was issued not long before some members of the majority left office and were replaced with the winners of an intervening election. As a dissenter to the last opinion explained:

as explained in *Duncan v. State*, 300 Mich.App. at 183-184, 832 N.W.2d at 765.

Like the New York Court of Appeals in *H-H*, the Michigan Supreme Court never ruled whether § 1983 gave the plaintiffs the right to sue the State or the Governor. DOJ may be right that *Duncan* stands for the proposition that "plaintiffs state a valid civil claim where they allege an actual denial of counsel, a constructive denial of counsel, or conflicted counsel," DOJ Amicus, p. 21, but it is not clear whether *Duncan* is grounded in Federal or State law or whether *Duncan* is based at all upon § 1983 or whether it would sanction a Statewide suit. What a slender reed for DOJ to grasp!

Luckey is no better. The *Luckey* plaintiffs sued the Governor of Georgia, two chief judges of Georgia judicial circuits, and "all Georgia judges responsible for providing assistance of counsel to indigents criminally accused in the Georgia courts." 860 F.2d at 1013. The Eleventh Circuit ruled that the defendants were proper because "the governor is responsible for law enforcement ... and is charged with executing the laws faithfully ... [and] has the residual power to commence criminal prosecutions ... and has the final authority to direct the Attorney General to 'institute and prosecute' on behalf of the state. ... Judges are responsible for administering the system of representation for the indigent criminally accused." *Id.* at 1016. The Court did not explain how the Governor could wear two hats and be responsible for prosecution and for public defense. In the end, however, this case never proceeded to judgment. Four years later the Eleventh Circuit affirmed the District Court's decision to abstain from considering the *Luckey* complaint and to dismiss the complaint. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). Like *Eu*,

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> The majority has decided to grant the motion for reconsideration, and to reverse our previous order, without affording disagreeing Justices sufficient time to adequately respond to this decision. Instead, the majority has now decided to expedite the release of its order ... . The Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011 from considering a motion for reconsideration.

Duncan III, 488 Mich. 957, 958, 866 N.W.2d 407, 407-408 (2010) (Corrigan, J., dissenting).

this is another case where no Governor was ordered to do anything in the end.[21] DOJ has not found any cases in which a judgment explicitly grounded in § 1983 ordered a Governor or another Statewide officer to remedy a supposedly unconstitutional system of public defense administered at the local level. In the absence of binding precedent from the United States Supreme Court that such a judgment is possible under the law, this case should not be the first.

As for cases like *H-H* or *Duncan* being "correctly reasoned," DOJ Amicus, p. 20, that view is not universal. *Flora v. Luzerne County*, 103 A.3d 125, 134-137 (Pa.Commw. 2014), noted that *H-H* was a 4-3 decision and that *Duncan* was 2-1 in the Court of Appeals and concluded that the dissents were better reasoned, in part because:

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[21] Unlike *Duncan*, DOJ acknowledges *Luckey's* subsequent history — dismissal on grounds of abstention — but assures that Court that *Luckey's* "initial opinion remains good law." DOJ Amicus, p. 22, n.20. DOJ cites nothing to back up that statement. This is how *Harris v. McDonnell*, 988 F.Supp.2d 603 (W.D.Vir. 2013), analyzed *Luckey's* "good law"; after reviewing pages of cases holding that a Governor cannot be sued just because he or she is the Chief Executive when the plaintiff claims that a state law is unconstitutional, the court addressed the anomalous *Luckey* opinion:

> Plaintiffs also cite *Luckey* ..., ... which ... held that the ... Governor was a proper party under *Ex parte Young* for a suit challenging the adequacy of the state's indigent defense funding. It is difficult to square ... *Luckey* with Fourth Circuit precedent, and it is questionable whether the Fourth Circuit would have reached the same result. Regardless, even in the Eleventh Circuit, *Luckey* has not been read to apply the *Ex parte Young* exception to a Governor where there is a less senior state official with more direct responsibility for the challenged action. See *Women's Emergency Network v. Bush*, 214 F.Supp.2d 1316, 1317-18 (S.D.Fla. 2002) (dismissing the Governor ... and finding the Executive Director of the [Highway Department] the proper defendant for *Ex parte Young* purposes in a suit challenging the issuance of certain state license plates). Indeed, ... the Eleventh Circuit in *Women's Emergency Network* held, consistent with the court's ruling herein, as follows:
>
> > A governor's "general executive power" is not a basis for jurisdiction in most circumstances. If a governor's general executive power provided a sufficient connection to a state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant. Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction.
>
> 323 F.3d 937, 949-950 (11th Cir. 2003) (internal citations omitted).

988 F.Supp.2d at 610-611, n.3. *Luckey's* status as "good law" is highly questionable.

> First, there is no precedent from the United States Supreme Court acknowledging that a constructive denial of counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as opposed to relief to individual indigent criminal defendants. *Strickland*, *Cronic*, and *Gideon* were all cases where the defendants sought a new trial. As explained in the *Duncan* dissent, the "United States Supreme Court in *Gideon* and *Strickland* was concerned with results, not process. It did not presume to tell the states how to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan*, 774 N.W.2d at 153 (Whitbeck, J., dissenting). It is unclear that such a claim will be held cognizable in any state.

103 A.3d at 136. Thus, in the end there is no basis for allowing suit against ***some*** State officer just because Plaintiffs have alleged a statewide, systemic problem. Instead, Plaintiffs must show that their suit satisfies the causation and redressability element of standing to see these Defendants. They have not. This Court should affirm the District Court's dismissal of the Complaint.

D. The Federal Public Defense System, Like Idaho's, Is Decentralized and Not Answerable to the Chief Executive or Any Other Executive Officer

One of the ironies of DOJ's Amicus is that it supports a challenge to Idaho's organization of public defense services that parallels the Federal organization for public defense services. Both systems are decentralized: Idaho's system is organized by county, although counties may band together to provide public defense services. Idaho Code §§ 19-859 through 19-861. The Federal system is organized by judicial district, although public defender services may be provided for part of a judicial district or for adjacent judicial districts. 18 U.S.C. § 3006A(g)(2)(A). Neither the Chief Executive (the Governor or the President) nor any other Executive Officer with sovereign-wide authority is responsible for supervising public defense services. In Idaho, county commissioners are responsible for seeing that public defense services are provided. Idaho Code §§ 19-859 through 19-861. Federal public defense services "shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit." 18 U.S.C. § 3006A(g)(2)(A).

Given the peculiar posture of DOJ's support of a Complaint that challenged a public defense structure so much like that of the Federal system, Defendants posed the following question in response to DOJ's Motion for Leave to File Brief as Amicus Curiae:

> ... [A]n analogous suit in the federal system ... would be four plaintiffs, each from a different State or Territory, claiming that they were denied various pre-trial constitutionally required public defender services, and they would sue the United States of America, the President, and some statutory officers that the plaintiffs claimed were responsible for public defender services in all States and Territories of the United States. The United States could illuminate the issues that will actually be before the Court on appeal by briefing each of the following three questions:
>
> > (a) Would the United States of America be subject to a suit claiming a systemic nationwide failure to provide constitutionally required public defender services ... ?
> >
> > (b) Would the President of the United States be subject to a suit claiming a systemic nationwide failure to provide constitutionally required public defender services ... ? If so, under what statutory or constitutional provisions would such a suit be brought?
> >
> > (c) Is there an officer or are their officers of the United States who would be subject to a suit claiming a systemic nationwide failure to provide constitutionally required public defender services ... ? If so, who are they, and under what statutory or constitutional provisions would such a suit be brought?

Defendants-Respondents' Response to United States of America's Motion for Leave to File Brief as Amicus Curiae, pp. 3-4.

Rather than address these important parallels between the Idaho and Federal systems for public defense services and provide this Court with any insights that it might have, DOJ filed a Supplemental I.A.R. 8 Motion for Leave to File Brief as Amicus Curiae, which was accompanied by DOJ's boilerplate brief that ignored the most important issue before the Court: Are there any

officers who can be sued in an attempt to create a sovereign-wide challenge to a decentralized system of public defense? DOJ's telling omissions are all the more reasons to affirm the District Court, in no small part because the decentralized Federal system for providing public defense services is organized so much like the Idaho system.

III. THE NACDL/IACDL AMICUS DOES NOT ADDRESS THE STANDING ELEMENTS OF CAUSATION AND REDRESSABILITY

The National Association of Criminal Defense Lawyers (NACDL)/Idaho Association of Criminal Defense Lawyers (IACDL) Amicus (CDL Amicus) focuses on one element of standing — injury in fact — that Defendants do not contest while ignoring the two elements of standing that are central to this appeal — causation and redressability. CDL Amicus, pp. 6-19. Further, NACDL and IACDL do not address whether it is possible to sue the State for injunctive relief under Idaho or Federal law. They say that "in similar cases, plaintiffs have been allowed to pursue such claims in both federal and state courts." CDL Amicus, p. 6. But, the cases that they cite are not similar because they do not involve Statewide challenges to public defense services brought against executive officers based upon § 1983 or State law that is comparable to Idaho's.

For purposes of this appeal, the Court may assume that the injuries in fact described at CDL Amicus, pp. 6-19, would satisfy the first element of standing if the Complaint had been brought against persons who caused the injuries in fact and who could redress the injuries in fact. Those pages of the CDL Amicus are not further discussed.

H-H, discussed at CDL Amicus, pp. 19-20, is not explicitly grounded in § 1983, did not discuss what Federal or State law principles allowed suit against the State or the Governor, and was not a Statewide challenge to a public defense system. See discussions, pp. 30, 34-35, 42, *supra*. It is not similar to this case. Neither is *Duncan*, 284 Mich.App. 246, 774 N.W.2d 89, discussed at CDL Amicus, pp. 20-21; *Duncan* was not explicitly grounded in § 1983 by the

Michigan Supreme Court, did not discuss what Federal or State laws allowed suit against the State or against the Governor, and was not a Statewide challenge to the public defense system. See discussions, pp. 40-41, *supra*. *Luckey*, discussed at CDL Amicus, p. 21, did not lead to a judgment with Statewide effect; in fact, it led to no judgment at all when it was dismissed on abstention grounds. See discussion, pp. 40-42, *supra*. *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122 (W.D.Wash. 2013), and *Phillips v. California*, Cal.Sup.Crt., Fresno County, Case No. 15CECG02201 (2016), discussed at CDL Amicus, pp. 21-22, involved public defense services in a city and a county, respectively, not a Statewide challenge to public defense services. Thus, the CDL Amicus does not identify any "similar cases" in which plaintiffs "have been allowed to pursue such claims in both federal and state courts." The CDL Amicus does not make arguments overlooked by the Plaintiffs and the DOJ, and it should not be the basis for reversing and remanding.

CONCLUSION

The Court should affirm the District Court's Judgment of dismissal. R., p. 500. Ordinarily, the conclusion to a brief is nothing more than a simple declarative sentence like the preceding one. This is not an ordinary case. It is the unusual one where further comment is in order.

Plaintiffs say that "separation of powers ... does not absolve this Court of its fundamental responsibility to examine and decide complaints alleging the violation of individual rights." App.Br., p. 41. Yes, if a case is brought against proper defendants and asks for relief that does not intrude upon the Legislative Power. Before a Court can vindicate rights, however, it must determine that the controversy is between the parties before it, not with some other parties. "A plaintiff's failure to name the proper defendant is fatal to the claim." *HealthNow New York, Inc. v. New York*, 739 F.Supp.2d 286, 295 (W.D.N.Y. 2010), *aff'd*, 448 F.App'x 79 (2nd Cir. 2011)

(citation and internal punctuation omitted) (complaint dismissed because New York Attorney General did not have enforcement power for statute that was the subject of the suit). Likewise, this Complaint should be dismissed for lack of proper defendants. No case holds, in Plaintiffs' words, that "the question is which state official can be sued when the State fails to meet its constitutional obligation." App.Br., p. 46. No case holds that the State is constitutionally required to have an officer at the State level who can be sued to implement a constitutional right.

In the end, Plaintiffs' argument is that two constitutional wrongs make a right. Their claim of constitutionally inadequate public defense services is the first constitutional "wrong". The remedy of suing Executive Officers to obtain Legislative remedies is the second constitutional "wrong". Together, under Plaintiffs' theories, these two constitutional "wrongs" make a constitutional "right". They do not. The Complaint should be dismissed because Plaintiffs have sued the wrong Defendants — Defendants who did not cause the injuries that Plaintiffs identified and who cannot provide the relief they seek.

Dated this 12th day of July, 2016.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 

MICHAEL S. GILMORE
Deputy Attorney General
Attorney for Defendants State of Idaho, Hon. Molly Huskey, Darrel G. Bolz, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry

OFFICE OF THE GOVERNOR

By 

for CALLY YOUNGER
Attorney for Defendant Governor Otter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2016, I caused to be served two true and correct copies of the foregoing by the following methods to:

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Appendix

2016 House Bill 504,

2016 Idaho Session Law, Chapter 195

LEGISLATURE OF THE STATE OF IDAHO

Sixty-third Legislature Second Regular Session - 2016

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 504

BY JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO PUBLIC DEFENSE; AMENDING SECTION 19-850, IDAHO CODE, TO REVISE POWERS AND DUTIES OF THE PUBLIC DEFENSE COMMISSION, TO PROVIDE THAT THE COMMISSION SHALL HAVE CERTAIN DUTIES AND TO PROVIDE THAT THE COMMISSION SHALL HAVE CERTAIN POWERS; AMENDING SECTION 19-851, IDAHO CODE, TO DEFINE TERMS; AMENDING SECTION 19-853, IDAHO CODE, TO REVISE TERMINOLOGY; AMENDING SECTION 19-862, IDAHO CODE, TO REVISE A PROVISION REGARDING APPROPRIATION FOR INDIGENT DEFENSE PROVIDERS AND TO PROVIDE THAT THE BOARD OF COUNTY COMMISSIONERS IS NOT REQUIRED TO EXPEND ITS FULL LOCAL SHARE UNDER CERTAIN CONDITIONS; AMENDING CHAPTER 8, TITLE 19, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 19-862A, IDAHO CODE, TO REQUIRE COMPLIANCE WITH INDIGENT DEFENSE STANDARDS, TO PROVIDE FOR INDIGENT DEFENSE GRANTS, TO PROVIDE APPLICATION PROCEDURES FOR INDIGENT DEFENSE GRANTS AND TO PROVIDE PROCEDURES FOR NONCOMPLIANCE WITH INDIGENT DEFENSE STANDARDS; AND AMENDING SECTION 19-864, IDAHO CODE, TO REVISE REPORTING REQUIREMENTS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 19-850, Idaho Code, be, and the same is hereby amended to read as follows:

19-850. POWERS AND DUTIES OF THE STATE PUBLIC DEFENSE COMMISSION. (1) The state public defense commission shall:

(a) Promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, establishing the following:

(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~~,~~ ~~capital~~ and ~~civil~~ criminal contempt; ~~and~~

(ii) Uniform data reporting requirements and model forms for the annual reports submitted pursuant to section 19-864, Idaho Code~~.~~ ~~The data reported~~, 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 constitutions 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) ~~Core requirements for contracts between counties and private attorneys for the provision of indigent defense services and proposed model contracts for counties to use;~~

~~(ii) Qualifications and experience standards for the public defender and defending attorneys;~~

~~(iii)~~ Enforcement mechanisms; and

(~~iv~~ii) Funding issues including, but not limited to~~:~~, formulas for the calculation of local shares and state indigent defense grants

~~1. Training and continuing legal education for defending attorneys;~~

~~2. Data collection and reporting efforts; and~~

~~3. Conflict cases~~.

(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.

(2) The state public defense commission may:

(a) Hire an executive director who shall be responsible for the performance of the regular administrative functions of the commission and other duties as the commission may direct. The executive director shall be a nonclassified state employee and shall be compensated as determined by the commission.

(b) Employ persons in addition to the executive director in other positions or capacities as it deems necessary to the proper conduct of commission business and to the fulfillment of the commission's responsibilities. The employees of the commission other than the executive director shall be classified employees and shall receive as compensation an annual salary payable on regular pay periods, the amount of which shall be determined by the commission.

(c) Provide an office, office equipment and facilities as may be reasonably necessary for the proper performance of its duties or the duties of the executive director and other personnel.

(d) Provide training and continuing legal education for indigent defense providers and defending attorneys in order to assist them in satisfying requirements promulgated pursuant to subsection (1)(a)(i) of this section, and use moneys received from a grant or trust or otherwise received and appropriated to provide such training and continuing legal education.

(e) Establish procedures by which indigent defense providers may apply to the commission for funds to be used for extraordinary litigation costs including, but not limited to, expert witnesses, evidence testing and investigation, but not including expenses associated with capital crimes.

(f) Hire private counsel to represent the commission in hearings held in accordance with the Idaho administrative procedure act and the rules promulgated pursuant to subsection (1)(a)(v) of this section.

SECTION 2. That Section 19-851, Idaho Code, be, and the same is hereby amended to read as follows:

19-851. RIGHT TO REPRESENTATION BY COUNSEL -- DEFINITIONS. In this act, the term:

(1) "Commission" means the state public defense commission as created pursuant to section 19-849, Idaho Code;

(2) "Defending attorney" means any attorney employed by ~~the office of public defender, contracted by the county~~ an indigent defense provider or otherwise assigned to represent adults or juveniles at public expense;

(~~2~~3) "Detain" means to have in custody or otherwise deprive of freedom of action;

(~~3~~4) "Expenses," when used with reference to representation under this act, includes the expenses of investigation, other preparation and trial;

(5) "Indigent defense provider" means any agency, entity, organization or person selected by a board of county commissioners in accordance with section 19-859, Idaho Code, or a designee of the commission if the commission's actions to remedy specific deficiencies pursuant to section 19-862A(11)(b), Idaho Code, involve the direct provision of indigent defense services, as a means to provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense;

(6) "Indigent defense standard" means any rule promulgated by the commission pursuant to section 19-850(1)(a), Idaho Code;

(~~4~~7) "Indigent person" means a person who, at the time his need is determined pursuant to section 19-854, Idaho Code, is unable to provide for the full payment of an attorney and all other necessary expenses of representation;

(8) "Local share" means the benchmark figure calculated by the commission to determine the minimum amount of county funding that shall be maintained by a county and to determine the award amount of state indigent defense grants for which a county may be eligible pursuant to section 19-862A, Idaho Code. For any given county fiscal year, a county's local share shall be the median of the annual amount in county funds expended by that county for indigent defense during each of the first three (3) of the preceding five (5) county fiscal years, as certified by the county clerk. In calculating this amount, county indigent defense expenditures shall not include:

(a) Amounts received from the public defense commission; and

(b) Amounts expended for capital cases by those counties participating in the capital crimes defense program in excess of premiums and deductibles required by guidelines approved by the Idaho capital crimes defense fund board of directors;

(~~5~~9) "Serious crime" means any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment or detention in a correctional facility, regardless of whether actually imposed;

(10) "State indigent defense grant" means the state funding a county may be awarded pursuant to section 19-862A, Idaho Code.

SECTION 3. That Section 19-853, Idaho Code, be, and the same is hereby amended to read as follows:

19-853. DUTY TO NOTIFY ACCUSED OR DETAINED OF RIGHT TO COUNSEL. (1) If a person who is being detained by a law enforcement officer, or who is confined or who is the subject of hospitalization proceedings pursuant to section 66-322, 66-326, 66-329, 66-404 or 66-406, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing, as the case may be, shall:

(a) Clearly inform him of his right to counsel and of the right of an indigent person to be represented by an attorney at public expense; and

(b) If the person detained or charged does not have an attorney, notify the ~~defending attorney~~ indigent defense provider or trial court concerned, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer.

(2) Upon commencement of any later judicial proceeding relating to the same matter including, but not limited to, preliminary hearing, arraignment, trial, any post-conviction proceeding or post-commitment proceeding, the presiding officer shall clearly inform the person so detained or charged of his right to counsel and of the right of an indigent person to be represented by an attorney at public expense. Provided, the appointment of an attorney at public expense in uniform post-conviction procedure act proceedings shall be in accordance with section 19-4904, Idaho Code.

(3) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the ~~defending attorney~~ indigent defense provider.

(4) Upon notification by the court or assignment under this section, the ~~defending attorney~~ indigent defense provider shall represent the person with respect to whom the notification is made.

SECTION 4. That Section 19-862, Idaho Code, be, and the same is hereby amended to read as follows:

19-862. APPROPRIATION FOR PUBLIC DEFENDER -- PRIVATE CONTRIBUTIONS. (1) The board of county commissioners of each county shall annually appropriate enough money to ~~administer~~ fund the ~~program of representation~~ indigent defense provider that it has ~~elected~~ selected under section 19-859, Idaho Code, and, except as provided in subsection (2) of this section, shall maintain not less than its local share.

(2) The board of county commissioners is not required to expend its full local share if it can comply with indigent defense standards for less than that share.

(3) If the board of county commissioners of a county elects to establish and maintain an office of public defender or a joint office of public defender, the county may accept private contributions toward the support of the office.

SECTION 5. That Chapter 8, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-862A, Idaho Code, and to read as follows:

19-862A. COMPLIANCE -- INDIGENT DEFENSE GRANTS. (1) All counties, indigent defense providers and defending attorneys shall cooperate and participate with the commission in the review of their 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.

(5) The commission shall approve or disapprove the application submitted under subsection (2) of this section within sixty (60) days of the submission of the application. If the commission disapproves the application, the county shall consult with the commission and submit a revised application within thirty (30) days of the mailing date of the official notification of the commission's disapproval. If after two (2) revisions a resolution is not reached, any dispute shall be resolved in accordance with the Idaho administrative procedure act and rules promulgated by the commission pursuant to section 19-850(1)(a)(v), Idaho Code.

(6) On October 1, 2016, or as soon thereafter as is practicable, and on October 1 of each year thereafter, or as soon thereafter as is practicable, the commission shall distribute the approved state indigent defense grant to a county if:

(a) The most recent annual report required by section 19-864, Idaho Code, has been filed, to the satisfaction of the commission;

(b) The county has filed, to the satisfaction of the commission, its most recent application for a state indigent defense grant required by subsection (2) of this section; and

(c) The county has cured, to the satisfaction of the commission, any material breach of the terms of a previously approved state indigent defense grant.

(7) On or before September 1, 2016, and by September 1 of each year thereafter, the commission shall submit a report with its annual budget request to the office of the administrator of the division of financial management and the legislative services office requesting the appropriation of funds necessary to provide state indigent defense grants to counties as approved by the commission. The information used to create this report shall be made available to the administrator of the division of financial management and the legislative services office.

(8) A county may be required to provide indigent defense funds in excess of its local share in the event the cost of successfully executing its plan submitted pursuant to subsection (2) exceeds the sum of its local share and the maximum state indigent defense grant for which it may be eligible in a given county fiscal year.

(9) By March 31 of each year, all counties shall be in compliance with indigent defense standards that were in full force and effect as of May 1 of the prior year.

(10) Each application submitted pursuant to subsection (2) of this section after March 31, 2017, shall contain an attestation stating whether the county has complied with indigent defense standards as required by subsection (9) of this section and, if not, a specific explanation for its failure to do so.

(11) In the event the commission determines that any county has failed to materially comply with indigent defense standards, the commission shall:

(a) Require the county's upcoming state indigent defense grant application to specifically address how the noncompliance will be cured in the upcoming county fiscal year as provided in subsection (2) of this section; or

(b) If any county has willfully and materially failed to comply with indigent defense standards, notify the county in writing of its de-

termination and intent to remedy specific deficiencies at the expense of the county to the extent necessary to comply with indigent defense standards. Within thirty (30) days of the date of said notice, the commission and the county or their designees shall attempt to meet at least once to resolve the issues of the noncompliance. If the commission and the county are unable to resolve the matter through this meeting process, the commission and county shall mutually set a date for mediation within forty-five (45) days, with the cost of mediation to be paid equally by the parties. If after mediation the commission and the county are unable to come to a resolution, the commission shall provide written notice to the county of its decision to remedy specific deficiencies at the expense of the county to the extent necessary to comply with indigent defense standards. This decision is subject to administrative review as provided in subsection (13) of this section. If the county does not timely request administrative review or if the administrative review process affirms the commission's determination, the commission shall remedy specific deficiencies at the expense of the county to the extent necessary to comply with indigent defense standards.

(12) If the commission acts to remedy specific deficiencies as provided in subsection (11)(b) of this section, the county shall pay to the commission, notwithstanding the county's applicable local share, the amount incurred by the commission in remedying specific deficiencies as billed by the commission on a semiannual basis coinciding with the county fiscal year. Such amount shall be paid to the commission within sixty (60) days of the date of the billing. If the county fails to provide the commission with the funds billed pursuant to this subsection within sixty (60) days of the date of the commission's billing, the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county pursuant to section 63-3638, Idaho Code, and apply the intercepted payments to reimburse the commission for the costs incurred in remedying specific deficiencies as billed pursuant to this subsection. The foregoing intercept and transfer provisions shall operate by force of law and no consent thereto is required of the county in order to be enforceable. The commission and the state have no obligation to the county or to any person or entity to replace any moneys intercepted under the authority of this subsection.

(13) A county aggrieved by a decision made by the commission pursuant to subsection (11)(b) of this section shall be afforded reasonable notice and opportunity for a fair hearing in accordance with the Idaho administrative procedure act and rules promulgated by the commission pursuant to section 19-850(1)(a)(v), Idaho Code.

(14) If the commission's actions to remedy specific deficiencies, pursuant to subsection (11)(b) of this section, involve providing indigent defense services on behalf of a county, the county may submit an application for a state indigent defense grant in accordance with subsection (2) of this section and request to resume providing indigent defense services. The commission may approve the application and permit the county to resume providing indigent defense services in the event the county has demonstrated that it has cured or will cure any material noncompliance with indigent defense standards to the satisfaction of the commission.

(15) Failure to comply with the standards promulgated pursuant to section 19-850(1)(a), Idaho Code, or the terms of a state indigent defense grant does not constitute ineffective assistance of counsel under the constitutions of the United States or the state of Idaho.

SECTION 6. That Section 19-864, Idaho Code, be, and the same is hereby amended to read as follows:

19-864. RECORDS OF DEFENDING ATTORNEYS -- ANNUAL REPORT OF DEFENDING ATTORNEYS. (1) ~~A~~ Indigent defense providers and defending attorneys shall keep appropriate records respecting each person whom ~~he~~ they represent~~s~~ under this act.

(2) On or before November 1 of each year, indigent defense providers and any d~~D~~efending attorney~~s~~ whose information is not otherwise included in a report from an indigent defense provider shall submit an annual report to the board of county commissioners ~~and~~, the appropriate administrative district judge ~~showing the number of persons represented under this act, the crimes involved and the expenditures, totaled by kind, made in carrying out the responsibilities imposed by this act~~ and the commission in conformance with the rules promulgated pursuant to section 19-850(1)(a)(ii), Idaho Code.