THE STATE OF IDAHO
SUPREME COURT

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REMARKS BY CHIEF JUSTICE ROGER BURDICK TO PUBLIC DEFENDER INTERIM COMMITTEE AUGUST 15, 2013

I would like to thank the interim committee for inviting me to talk about the public defender system in the State of Idaho. My comments are based upon personal observations from having served as a public defender for four years in Gooding, Jerome, Lincoln and Camas Counties as well as a prosecutor in Ada and Jerome counties and now almost thirty-two years in the judiciary, twenty-two as a magistrate and district court judge and now ten years on the Supreme Court.

At the outset I want you to know that I fully support the Criminal Justice Commission's vision of key areas of study:

- The structure and organization of how Idaho will deliver its system of public defense
- How the system will be held accountable
- The standards and funding for training, and
- How best to provide on-going and stable funding to support Idaho's system of indigent defense.

Next, I would like to describe what a public defender's job entails. Our judicial system is a three-legged stool which depends on advocates for two sides – a prosecutor and a criminal defense attorney going to an impartial third party – the judge – who applies law to a set of contested facts. All three-legged stools are only as stable and useful for their intended purpose as the three legs. In Idaho's system of justice today, defense for the indigent is the weakest leg in the system. I am not in any way impugning the competence of the individual defenders but rather the system. Frankly, our system for the defense of indigents, as required by Idaho's constitution and laws, is broken.

As we look at our system of justice it is only right that the two advocates on either side of a factual dispute are roughly equal in terms of talent, resources, and time. The job of a public defender is not as envisioned by some to "get the guilty off through a technicality." The job of a public defender is an advocate to make sure that the government's case is grounded in fact and law. Throughout my years as a public defender, over 95% of my cases were concluded with entries of a plea of guilty. I estimate that figure is true today in all criminal cases. There seems to be little or no difference between the conduct of private and public criminal defense attorneys in terms of the final resolution of their cases. So prior to this plea of guilty, what will a public defender be doing?

First, a public defender contrary to any other lawyer practicing law has no control over who their client will be. These attorneys are doing a tremendous service to the community in their public defense work.

A public defender is notified of an appointment after an arrest has been made. The first step is usually at a hearing called an initial appearance where the defender finds out the allegation and first meets their client. Usually the public defender has minutes to obtain background information about the client's ability to secure a bond or other information.

Next, the public defender contacts the prosecutor for purposes of discovery and/or discussions concerning the case itself. This phase of the case can take minutes to months. Felony cases are serious allegations involving drug-related or property crimes and will take some time. A murder case, of course, or other crimes of violence may take a significant period of time to investigate, review and strategize for trial.

The defense attorney will interview their client, contact witnesses, and obtain all the information that law enforcement has gathered. Additional conferences are set with witnesses, client and family as well as the prosecuting attorney. There is also a determination based on the information, what violations, if any, can be proven beyond a reasonable doubt. This process of checking law and facts is what some refer to as plea negotiations. The end result is a plea of guilty or a trial if the matter is not dismissed. Once this phase is concluded the defense attorney's next responsibility is sentencing.

The sentencing phase is a significant part of a public defender's work. Most of the individuals who are on the public defender's caseload are individuals who have suffered lives significantly different than ours. Oftentimes, there is grinding poverty; sexual, physical or emotional abuse; alcohol and/or some sort of substance abuse or addiction; mental illness, lack of education, and as a result they have lived very chaotic lives. As a public defender I often times stood in wonder

at how some of my clients were still alive or that they functioned at all in modern society.

Most public defenders have an intimate knowledge of the resources in a community that are available to try to rehabilitate or place individuals prior to ultimate sanctions of jail or prison time. Most criminal defense attorneys will indicate to you that these facilities and alternatives are non-existent in many counties or lacking even in our largest cities and counties. I think your work on the public defender system will have a significant impact on the justice reinvestment initiative and save taxpayers money. An appropriately trained public defender can better see what placements are best based upon evidence based risk factors thereby saving taxpayers unneeded waste for services or incarceration.

The most significant factor in any sentence is the defendant's prior criminal record. Without that accurate prior criminal record it is very hard for an effective sentence to be determined.

Does the case end at sentencing? The short answer is "no" for felonies and "yes" for misdemeanors. In either case there is an issue of appeal and if it is in fact a misdemeanor the public defender of the county involved will be in charge of that appeal after consultation with their client. As concerns a felony there are not only significant issues of appeal, but also pleas of leniency pursuant to Criminal Rule 35, as well as uniform post- conviction relief issues.

For those of you not familiar, post-conviction relief is a statutory vehicle enacted whereby a defendant can file a civil suit alleging four basic grounds to have their conviction reviewed by the criminal court that imposed the sentence. The most common ground for the granting of a post-conviction relief petition is the incompetency of defense counsel. So a public defender not only must work with their client in making certain decisions throughout the case, but they must also be cognizant that they can be sued for incompetency of counsel at the end of their representation. As an aside, as a public defender, I often felt that I was battling not only the prosecuting attorney and law enforcement, but also my client in terms of their analysis of the case and what they thought should be the outcome, and also the attorney who was going to sue me at the end of the case in a post-conviction relief proceeding.

This gives you an idea of the responsibilities of a public defender in a criminal case. Public defenders also represent individuals in child protective act proceedings, juvenile corrective act proceedings, mental competency and commitment proceedings, extradition, and civil and criminal contempt proceedings. All of the basic responsibilities I mentioned for a criminal case apply to these proceedings.

I need to comment that child protection and juvenile justice cases present especially important examples of the need to insure attorneys who handle these cases are well trained; not only in the law, but that they know how to adequately represent these vulnerable children. Our judges tell us that in some counties, the newest attorneys are often assigned these cases, yet the complexity of the law and the vulnerability of the children represented require seasoned, well trained and capable attorneys. These laws can only be implemented as intended if qualified, trained lawyers are available.

WHAT IS IDAHO'S HISTORY OF RIGHT TO COUNSEL

Even before Idaho had been admitted to the union, our territorial legislators enacted statutes relating to the right of counsel. The 1874 Criminal Practice Act, § 3, states "when the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had."

If the defendant wished to have an attorney, the magistrate had to adjourn the examination and send a peace officer to take a message to the attorney within the township or city as the defendant may name.

Section 267 of the same act then describes what happens when the defendant is brought before the district court. "If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel."

This concept of counsel at court proceedings was carried into the constitutional convention and made a part of the Idaho Constitution. Article I, §13, states in part:

> "Section 13. Guarantees in criminal actions and due process of laws – in all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf and to appear and defend in person and with counsel. . . . "

The right to counsel in a criminal case has continued uninterrupted in one statute or another until today.

The policy embodied in these statutes predated by half of century the United States Supreme Court's pronouncement of the same Federal rule in *Johnson v. Zerbst*. In *Johnson,* the U.S. Supreme Court said a defendant in a federal prosecution has the right to counsel in a criminal case even if they couldn't afford

the same. In *Betts v. Bradley*, the United States Supreme Court refused, however, to extend the federal rule to the states by the Fourteenth Amendment, and Idaho was cited as one of eighteen states affording counsel to an indigent accused of a crime. The fact states had enacted their own provisions showed that federal protection was not needed.

Idaho's statute was enacted seventy-six years before the United States Supreme Court overruled *Betts v. Bradley*, and declared in *Gideon v. Wainwright in* 1963:

> "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but it is in ours."
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> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Throughout the nation there are symposiums, speeches and articles celebrating the 50TH anniversary of the *Gideon* decision.

However, forty years earlier than *Gideon v. Wainright,* in 1923 the Idaho Supreme Court stated in *State v. Pontroy*:

> It is the public policy of this state, disclosed by constitutional guarantees as well as by numerous provisions of the statutes, to accord to every person accused of a crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In a case of indigent persons accused of crime, the court must assign counsel to the defense at public expense."

As can be seen by this very plain statement, the right to be represented by an attorney at state expense is one of Idaho's basic tenents of criminal law. Not only is it a basic tenent that defendants have the right to be represented by an attorney, they must also be given the right to a fair and impartial trial and be given every reasonable opportunity to prepare his defense to vindicate their innocence upon trial. These words of "fair and impartial trial" and "reasonable opportunity to prepare for his defense" have been the laws of this state since before statehood and certainly since 1923.

Historically those protections have been explored by federal and state law and have been expanded to juvenile proceedings and post arrest interrogation, line ups, other identification proceedings, preliminary hearings, arraignments, plea negotiations, sentencing proceedings, rights of appeal, and probation violation proceedings. Additionally, since the 1960's courts throughout the nation have further defined what a fair and impartial trial is and what is needed in modern advocacy to prepare and present a fair and impartial trial. Additionally, every criminal defendant in Idaho by statute and constitutional history must be given a reasonable opportunity to prepare his defense.

As we go forward ask yourselves are we in fact protecting and enhancing these statutory and constitutional responsibilities? We should be in fact trying to uphold these ideals that were handed to us about 140 years ago.

THE IDAHO COURTS' RESPONSIBILITY

Pursuant to Title 3 of the Idaho Code specifically Idaho Code § 3-101, the Idaho Supreme Court has exclusive power in the admission and policing of attorneys in the State of Idaho. Additionally, the Idaho Supreme Court must approve all rules defining the power of the Idaho State Bar pursuant to Idaho Code § 3-408 touching on rules of professional conduct for attorneys. As such, the Idaho Supreme Court has a significant interest in how the public defenders of the State of Idaho are carrying out their duties to defend Idaho citizens.

However, the Court also understands the power of the legislature to set public policy of how best the State of Idaho can meet its constitutional and statutory duties to provide for the criminal defense of indigents. As such, the Idaho courts stand ready to help this committee in any way possible.

For instance our existing and certainly our new technology systems will track and manage cases assigned to public defenders and will allow you and the counties to hold the system accountable as well as track expenses and other costs.

Speaking of costs, I would urge the committee to consider other recommendations to provide a fair method of public defender reimbursement. Considerable work has been completed in the area of a defendant's financial obligations and their impact on the system, society and recidivism. We can acquaint the interim committee with this data and offer recommendations.

We would be pleased to present these recommendations and others to you at subsequent committee meetings. For instance a panel of administrative district judges will meet on October 17 to answer questions from the front lines and provide their experienced perspective on these issues.

Your third branch of government will be active in making sure the interim committee is given factual information as well as any help necessary so you can craft a public policy that carries out Idaho's long tradition of constitutional and statutory representation of indigent persons.

I believe strongly that Idaho must aggressively improve the system that exists today. Any change which takes place should have as benchmarks the following broad principles.

First, I think the legislature and Governor's enacting of House Bills 148 and 149 to clarify who is entitled to an attorney at public expense is an important first step.

Secondly, since 1923 Idahoans have had the right for every "reasonable opportunity" to prepare a defense. This starts with time – time to interview, investigate and prepare legal arguments. All of Idaho public defense attorneys do not have that time. Appropriate caseload numbers exist from state and national organizations. These should be closely examined by the interim committee and made enforceable.

Every reasonable opportunity for a fair and impartial trial should include competent attorneys who are trained and have an experience level commensurate with the case or crime. This necessitates a well-funded, systematic state-approved training program. Remember the large sums of state and county dollars used for training for other members of the criminal justice system.

Part of the funding issue needs to include an analysis of lowest bidder or fixed fee contracts. The conflict of economic interest is inherent in this approach and must be eradicated.

Idaho has already defined the parameters of our task to "make sure that every person accused of crime, not only is given a fair and impartial trial but every reasonable opportunity to prepare his defense and vindicate his innocence upon trial." It has been the duty of this state before statehood and continues today. It is our duty to protect these fundamental ideals for the future.

Thank you for your time here today.