

January 27, 2023

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VIA E-MAIL

Marcie Ryba
Executive Director
Department of Indigent Defense Services
896 W. Nye Lane, Suite 202
Carson City, NV 89703

Re: Workshop for the Possible Repeal of Regulations of the Nevada State Board on Indigent Defense Services

Dear Ms. Ryba:

As you know, undersigned counsel represent the certified Plaintiff class in *Davis v. Nevada*, in which our clients challenged the State and Governor's failure to provide constitutionally sufficient representation to indigent criminal defendants in certain of Nevada's rural counties. We write regarding the Department of Indigent Defense Services' ("DIDS" or "the Department") January 13, 2023 Notice of Workshop for the Possible Repeal of Regulations of the Nevada State Board on Indigent Defense Services ("Workshop").

We understand that the Workshop was scheduled in response to the Governor's Executive Order 2023-003 ("the EO"), which requires state agencies to recommend at least 10 existing regulations for repeal (Section 2), and cease promulgation of new regulations (Section 4) unless certain exceptions are met (Section 5). Compliance with Sections 2 and 4 of the EO would set back DIDS' efforts, on behalf of the State and the Governor, to comply with the Consent Judgment in *Davis v. Nevada* ("Consent Judgment" or "Judgment"). However, we believe that DIDS may continue to issue new regulations despite the EO because the DIDS's regulations fall within the EO's exceptions.

The Judgment in *Davis v. Nevada* Requires Maintenance of DIDS' Existing Regulations and the Promulgation of New Regulations.

Complying with Sections 2 and 4 of the EO would interfere with the State and Governor's judicially enforceable obligations as set forth in the Judgment. Many of the State and Governor's obligations under the Judgment are executed by DIDS and the Executive Director through the promulgation of regulations. Since its creation in 2019, DIDS has promulgated regulations that are narrowly tailored to accomplish its statutory charge and to comply with the terms of the Judgment. For example, as required by the Judgment, the DIDS Board adopted regulations establishing a formula to determine the maximum amount that a county may be required to pay for indigent defense services (*see* NAC R042-20 § 16), establishing requirements for continuing education and experience of attorneys providing indigent defense (*see* NAC R042-20 §§ 30-38), and establishing guidelines to be used to determine the maximum number of cases for

an attorney providing indigent defense services (*see* NAC R042-20 § 42). However, as the latest Independent Monitor’s Report highlights, many of these regulations do not go far enough to meet the Judgment’s requirements and require either amendments or additional clarifying regulations. *See generally* Sixth Report of the Monitor, *Davis v. State*, Case No. 170C002271B (November 11, 2022) [*hereinafter* IMR Six].

Accordingly, DIDS cannot comply with Sections 2 and 4 of the EO without breaching the State and Governor’s judicially enforceable obligations under the Judgment. The independent monitor, who is tasked with documenting the State and Governor’s progress towards fulfillment of the Judgment’s terms, has issued six reports. All six independent reports reflect that there are outstanding Judgment terms that the State and Governor have not yet satisfied. The State and Governor have not raised any objections to the accuracy or conclusions of these six reports. Unless and until the terms of the Judgment are satisfied, the Judgment will remain in effect and the court will retain jurisdiction over the case. Compliance with Sections 2 and 4 of the EO will only prolong the court’s monitoring and potentially lead to an enforcement action.

We therefore urge you, on behalf of DIDS, to request a waiver from the EO in its entirety so as to avoid repealing any existing regulations or face any obstacle to promulgating new regulations.

DIDS May Continue to Promulgate New Regulations Because the EO’s Own Exceptions To the Ban Apply.

In addition to maintaining DIDS’s existing regulations, the State and Governor’s outstanding obligations under the Judgment require new DIDS regulations. For example, the Judgment requires that indigent defense providers accurately report attorney and staff hours spent on each public defense case as well as their private workload. *See Davis v. Nevada* Judgment, Section IX. However, the Independent Monitor’s Sixth Report explains that the current regulations are not accomplishing this requirement and recommended that DIDS provide further regulatory clarification in order to meet compliance. *See* IMR Six at 26. This form of systematic clarification is most successfully achieved through the enactment of additional regulations. Regardless of whether or not the Governor issues DIDS a waiver from the EO in its entirety, the EO’s Section 4 ban on new regulations does not apply to DIDS: all future DIDS regulations will fall under at least one of the Section 5 exceptions.

Specifically, we believe that three of these exceptions are relevant to future DIDS regulations: “affect public safety and security,” “affect pending judicial deadlines,” or are “necessary to comply with federal law.” Section 5(b), (e), and (f).

Affect Public Safety and Security

Public defense systems promote public safety. The absence of quality public defense hampers the State’s ability to deliver justice. Inadequate public defense systems can result in innocent indigent people being convicted of crimes they did not commit and a failure to ensure accountability for people who have committed crimes. Moreover, the federal and state constitutional guarantees to meaningful counsel do not turn on innocence or guilt: every accused person is entitled to a criminal process that comports with our constitutional rights against unreasonable searches and seizures, against excessive bail, to confront one’s accusers, to have prosecutors disclose exculpatory evidence before trial, and to punishment that is not

cruel and unusual. Functioning public defense systems are necessary to uphold these cherished rights. When the government can routinely trample these rights, all of us are less safe and less secure.

Affect Pending Judicial Deadlines

The Judgment in *Davis v. Nevada* requires that the State and Governor, through DIDS, enact regulations that create an adequate system of indigent defense in Nevada. The Judge cannot dismiss the case until the State and Governor demonstrate that DIDS has promulgated regulations that meet all of the requirements set out in the Judgment. Repeal of any regulations promulgated in response to the Judgment, or failure to continue promulgating additional regulations, would violate the requirements of the Judgment and its mandated progress.

Necessary to Comply with Federal Law

To ensure that Nevada adequately protects the constitutional rights of indigent defendants, specifically the Sixth Amendment obligation to provide effective representation (the adequacy of which was challenged in *Davis v. Nevada*), DIDS must keep in place the current regulatory protections and continue passing regulations that improve indigent defense throughout the state.

Accordingly, we believe DIDS may continue promulgating regulations, as the EO’s own exceptions permit.

We plan to attend the February 2, 2023 Workshop and we respectfully request time to speak so that we can explain our position to all relevant stakeholders. We look forward to continuing to work with DIDS to ensure that Nevada meets its constitutional obligations to indigent criminal defendants throughout the state. We are always available should you have any questions about our position on these matters.

Sincerely,

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