POWERPOINT SCRIPT: NEVADA ADVISORY COMMISSSION ON THE ADMINISTRATION OF JUSTICE
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SLIDE 1 (Title): Good morning. My name is David Carroll and I am the Executive Director of the Sixth Amendment Center – a non-partisan, non-profit organization assisting states meet their constitutional obligation to provide effective lawyers to indigent men and women accused in criminal proceedings. We have worked with the Supreme Court's Indigent Defense Commission for many years under a grant from the U.S. Department of Justice.

SLIDE 2: I want to cover five topics today. First will be a brief overview of the Sixth Amendment. This will transition into a discussion of Nevada's unique history and vision with regard to the right to counsel. The main part of the presentation will be the work of the Supreme Court Indigent defense commission focusing on identified systemic deficiencies and accomplished remedies.

SLIDE 3: Unfortunately, there are some reforms that cannot occur without legislative action. So I will also talk about a consensus bill draft that the commission is proposing. Finally, I will briefly discuss what has been happening in your neighboring states focusing on legislative achievements and on-going litigation to give context to the proposed changes. So let's jump right in.

SLIDE 4: In 1963, the U.S. Supreme Court in *Gideon v. Wainwright* determined that the 14th amendment requires states to provide lawyers to poor defendants under the Sixth Amendment. The Court famously announced: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." But what has always fascinated me is the next line in the *Gideon* decision….

SLIDE 5: The Court stated: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials." Is that true? From the "very beginning" of our country? The answer is "yes" - courts were appointing counsel since even before the Sixth Amendment was ratified. This is because the right to counsel goes to the very core of what it means to be American.

SLIDE 6: You see, for the signers of the Declaration of Independence, liberty is the universal notion that every person should determine their own path to happiness, free from undue governmental control. Patrick Henry preferred death to living without it.

SLIDE 7: In fact, liberty is so central to the idea of American democracy that the framers of our Constitution created a Bill of Rights to protect personal liberty from the tyranny of big government. All people, they argued, should be free to express unpopular opinions or choose their own religion or take up arms to protect their

home and family without fear of retaliation from the state.

SLIDE 8: Preeminent in the Bill of Rights is the idea that no one's liberty can ever be taken away without the process being fair – we call this "due process." A jury made up of everyday citizens, protection against self-incrimination, and the right to have a lawyer advocating on one's behalf are all American ideals of justice enshrined to protect personal liberty against governmental tyranny.

SLIDE 9: John Adams had risked his reputation for these very ideals by defending the British soldiers involved in the Boston Massacre. Adams stated years later that a defense lawyer ought to be the last thing a person should be without in a free country.

Why did Adams and other patriots believe so fervently in the primacy of the right to counsel? Because the European people that arrived on American shores were, in many instances, those who had been subject to religious persecution in European courts without the presumption of innocence and without the ability to have a lawyer. Simply put, the new colonists were not going to set up justice systems that would railroad defendants who were ignorant of the law.

I mention all of this because if you think the right to counsel starts in 1963, it is too easy to write off indigent defense as simply a civil right of the liberal-leaning Warren Court. But that is simply not the case. In fact, the state we have to thank for reminding us of the "liberty v. tyranny" framework of the right to counsel is none other than …

SLIDE 10: Nevada! That's right - nearly 100 years before *Gideon,* Nevada was the first state in the Union to require the right to counsel in all cases (including misdemeanors) *and* the payment of lawyers for services.

SLIDE 11: This story starts in Lander County… In the fall of 1873, a thirty-year-old harness-maker was arrested at Battle Mountain. He was wearing a uniquely identifiable coat that was commissioned by the Manhattan Silver Mining Company before it was stolen during one of a series of stagecoach heists. His name was Shepherd L. Wixom. Let me be clear - Wixom was no saint. He had already been charged with horse stealing once and spent time in the Nevada State Prison for helping an accused murderer to escape from the Lander County jail. He had the stolen coat. He fit the general description. He was an ex-felon. He was guilty.

SLIDE 12: In January 1874, Wixom finally got his day in court. He was arraigned in front of the Honorable DeWitt C. McKenney, who set the trial for a few days later. Besides his not guilty plea, Wixom only made one statement: "Defendant objects to the time of trial and to the legality of his being tried without counsel." Judge McKenney would have appointed a lawyer, as was his custom in other counties, but with no lawyers in the Lander County courtroom he proceeded with

the trial. Wixom was found guilty.

SLIDE 13: With Wixom in the state penitentiary, the story turns to the Nevada assembly. Thomas Wren was the Austin city prosecutor from 1864 to 1866. Subsequently, Wren was elected to the Nevada Assembly as the representative from Eureka. He would later serve as the Nevada's lone U.S. Congressman from 1877 to 1879, but in 1875 he was passionately and persuasively arguing in the Nevada Assembly.

SLIDE 14: (As a state assemblyman, Wren introduced?) Assembly Bill 122 in 1875, which stated:

Section1. An attorney appointed by a Court to defend a person indicted for any offense, is entitled to receive from the County treasury the following fees: For a case of murder, such fee as the Court may fix, not to exceed fifty dollars; for felony, such fee as the Court may fix, not to exceed fifty dollars; for misdemeanor, such fee as the Court may fix, not to exceed fifty dollars.

SLIDE 15: Wixom was eventually able to make arrangements to sell what little property he owned and hire an attorney. Unfortunately for him the only legal action available to him was to petition the Supreme Court of Nevada for a writ of certiorari. The Court granted the writ and considered what the right to counsel meant in Nevada 140 years ago.

In a sad twist of legal irony, had Wixom been able to retain private counsel within the appellate filing deadline, it is likely his conviction would have been overturned on direct appeal and a new trial ordered. Through dicta in Wixom's case, the Court took pains to say that, in forcing the defendant to go to trial without a lawyer, "the district judge may have erred, and may have abused his discretion . . .. His action may have afforded good grounds for granting the defendant a new trial, or for reversing the judgment on appeal . . .." Wixom, however, had never filed an appeal.

SLIDE 16: The Court did not stop there. Justice William H. Beatty, writing on behalf of the unanimous three-person bench, foreshadowed the view of the Nevada Supreme Court in cases to come. Referring to Wren's Assembly Bill 122, the Court concluded that "a statute (Laws of 1875, 142) passed since the trial of this petitioner, has made provision for compensation of attorneys appointed to defend in such cases. Probably since this statute, if not before, a failure to assign professional counsel for a poor defendant would be deemed a fatal error on appeal . . .." It was too late for Wixom, but Wren's 1875 bill and the 1877 Nevada Supreme Court decision assured that, from that day forward, the failure to appoint counsel to the poor in a criminal case was a valid reason to overturn convictions on direct appeal.

SLIDE 17: To the extent that Wren's bill could have been construed as merely

giving judges the discretion to pay appointed counsel, but without requiring them to do so, the Nevada Supreme Court eliminated any ambiguity two years later in the 1879 case of *Washoe County v. Humboldt County*. The case involved, among other things, the payment of counsel in the controversial death penalty case of J.W. Rover. The Nevada Supreme Court, citing Wren's 1875 law, concluded that it was their duty "to determine the real intention of the legislature." Noting the financial hardship some attorneys endured when representing the indigent accused, the Nevada Supreme Court was "of the opinion that it was not the intention of the legislature to invest the courts with any such discretionary power." Instead, "it was the intention of the legislature to provide for the payment of a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court."

SLIDE 18: Nevada's commitment to equal justice that began in the 1870s reached its zenith in 1971. In the wake of the *Gideon* decision, the National Conference of Commissioners on Uniform State Laws, funded by the U.S. Department of Justice, published a Model Public Defender Act that it recommended all state governments adopt. Following that recommendation, in 1971 the Nevada Legislature created the State Public Defender as an executive branch agency charged with administering the constitutional mandate to provide competent lawyers to the poor in all counties other than Clark and Washoe.

The Act created an independent seven-member commission appointed by a diversity of factions to ensure that no single branch of government could exert undue interference on the work of the agency dedicated to representing poor people. The commission was charged with overseeing the State Public Defender system, hiring and firing the chief defender, and setting uniform policies for the delivery of indigent defense services. If created today, the State Public Defender Commission of 1971 would meet virtually every national standard related to the independence of the defense function.

However, the commitment to anti-tyranny began to fade over time. In 1975, only four years after creating the State Public Defender Commission, the Nevada Legislature did away with it and voted instead to make the State Public Defender a direct appointment by the Governor. Chief public defenders who are direct political appointees often take into account what they must do to please the Governor, rather than doing what is solely in the best interest of the defendants as ethics require, or they risk losing their jobs.

Say, for example, that a Governor calls for all executive branch departments to take a 10% cut in their budgets. The problem is that public defenders are constitutionally required to defend all people appointed to them from the court. Unlike other aspects of government, the defense practitioners do not control their own workload. Therefore a 10% budget cut is impossible to implement if it is not met by a 10% cut in workload –- at least it is impossible if one is concerned about providing ethical representation. But, despite the ethical

considerations, the public defender that is a direct gubernatorial appointee is likely to cut 10% rather than risk being replaced by someone who will do what the Governor says.

SLIDE 19: Indeed, independence of the defense function is not just good public policy – it is the law. In the 1979 case of *Ferri v. Ackerman,* the U.S. Supreme Court determined that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation."

SLIDE 20: Two years later, the Court held in *Polk County v. Dodson* that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court concluded that a "public defender is not amenable to administrative direction in the same sense as other state employees."

SLIDE 21: This principle was re-affirmed in *Strickland v. Washington*, where the Court stated that "independence of counsel" is "constitutionally protected," and that "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."

SLIDE 22: In 1989, the legislature further compromised the ability of the State Public Defender to render effective services by demoting the position from a gubernatorial cabinet-level position to one of several intra-agency positions within the Department of Human Services. This move resulted in the State Public Defender having to argue for adequate budgetary resources amongst several other Human Service agencies. From there, the director of Human Services would have to argue for all of their needs against the needs of all the other executive branch departments.

Without an independent voice to advocate for appropriate resources, the state's commitment to the rural counties deteriorated further. As originally conceived, the state paid for 80% of all public defender costs in the rural counties and the counties funded the other 20%. The state's financial commitment slowly eroded to the point where counties, at first, had to pay the majority of the costs and, eventually, 80% of the entire cost. Counties quickly learned that, by simply opting out of the state system, they could spend less money to provide the services *and* exercise local power over their public defense systems.

Unfortunately for poor defendants, this movement out of the State Public Defender system was done with no guidance whatsoever by the state. There were no standards as to how the counties must set up their systems. There were no standards to say what training or experience attorneys must have to take indigent defense cases or what on-going training was required for them to

continue to take cases. In most instances, the county governments established systems in which an attorney was contracted to provide representation in an unlimited number of cases for a single flat fee – these contracts predictably went to the lowest bidders. The attorneys were not reimbursed for overhead or out-of-pocket case expenses such as mileage, experts, investigators, etc. The more work an attorney did on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible.

The impact of this devolution was keenly felt during a survey undertaken by the Nevada Supreme Court Indigent Defense Commission in 2008. Since no state agency was responsible for the representation given to poor defendants in rural Nevada, the commission had to ask each county to self-report information such as indigent defense expenditures and number of cases. Some counties could not or would not provide even this basic information to Nevada's highest Court.

SLIDE 23: But from the counties that did report this information, an ugly picture emerged. Douglas County reported that it spent $383,683 in 2007 on primary defender services (or, $191,845 each for two separate attorneys) and $46,661 on conflict counsel, with an additional $23,036 spent on case-related services. Though that may sound like a lot of money, the county reported that in the same year they had 202 felony cases including one murder case, 3,249 misdemeanors, and 341 juvenile delinquency cases. So, on average, there was only $119.56 available on each of these cases to pay the attorney a fee, and to pay the attorney's overhead, and to pay for all of the necessary out-of-pocket expenses in the case. One hundred and forty years ago the Nevada Legislature set attorney compensation at a rate not to exceed $50 dollars per case. $50 in 1874 is estimated to be about $12,200 in 2007 dollars. Douglas County public defenders in 2007 earned less than 1% of the compensation originally envisioned by the legislature.

SLIDE 24: Douglas County is not alone. The *Las Vegas Review Journal* investigated the indigent defense system in Lyon County, and they found even more problematic conditions. When a contract defender there was appointed to the bench, his pending cases needed to be transferred to another attorney. A 27-year-old attorney who had only passed the bar exam a few weeks prior inherited the flat fee contract. He began his tenure as a public defense attorney by receiving 600 open cases on his first day, 200 of which were felonies, including some murder cases. Under national standards, this caseload should have been handled by more than three experienced full-time attorneys. And if that wasn't bad enough, all case-related expenses had to be paid out of that same flat fee.

SLIDE 25: The State Supreme Court's Indigent Defense Commission set about trying to fix as many of these deficiencies as possible. Here is how the process works. An issue is raised and debated among the commission members composed of criminal justice stakeholders, county managers, etc. If research or

data collection is needed it is done. More debate and discussion occurs until a recommendation is made. Then the Court holds a hearing to consider the recommendation. If the Court finds the recommendation meritorious, the Court issues an administrative order adopting said recommendation.

Through this process, the Court has banned flat fee contracts, removed the judiciary from the oversight of defender services, set a uniform standard for indigency, set attorney performance qualifications, and studied workload controls. The Commission's work has been recognized nationally by _____.

SLIDE 26: Unfortunately, the Commission cannot fix what is truly needed in the rural counties. What is needed is a functioning and independent state public defender. The legislature needs to reclaim its equal justice roots. In 2015, the Court supported a Bill Draft to do just that. The BDR, set to be run again in 2017, creates a 13-member commission. The Governor appoints these members based on recommendations by diverse authorities.

SLIDE 27: In the BDR, the Commission would have authority to promulgate standards that must be approved by the Court. All Commission standards would still go through the Nevada Supreme Court, and Clark and Washoe would still have to follow them. However, because their systems are deemed to be effective they would maintain the funding and administration autonomy they currently possess. Additionally, the Commission has the ability to decide the best way to provide representation in the rural counties. County costs would be capped at 2016 levels and any new monies to meet standards would come from the state.

SLIDE 28: It is important that Nevada gets this right. A number of Western states have been sued by the ACLU for providing sub-par public defense services, including Washington, Idaho, Utah, and California. That list does not include Montana, where the ACLU tabled a lawsuit while the state works to create a fully integrated statewide public defender system.

SLIDE 29: Perhaps more importantly, the U.S. Department of Justice filed a Statement of Interest in the Washington case. In Idaho, they filed an Amicus brief supporting the ACLU. In these cases, the DOJ declares that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant's representation met the aims of *Gideon* and its prodigy. If state or local governments create structural impediments that make the appointment of counsel "superficial" to the point of "non-representation," a court can step in and presume, prospectively, that the representation is ineffective. The types of government interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): "a severe lack of resources," "unreasonably high caseloads," "critical understaffing of public defender offices," and/or anything else making the "traditional markers of representation" go unmet (i.e., "timely and confidential consultation with

clients," "appropriate investigations," and non-adversarial representation, among others). The Supreme Court Task Force found all of these deficiencies in rural Nevada.

SLIDE 30: In both Idaho and Utah these lawsuits are ongoing despite recent legislative changes. Utah SB 155 –passed on a near unanimous vote and signed by the governor earlier this year - created the new Utah Indigent Defense Commission (UIDC), made up of members appointed from diverse appointing authorities. The principal duty of the UIDC is to adopt guiding principles for the oversight and assessment of public criminal defense services.

SB 155 also includes the first ever state funding of trial-level public defense services in Utah. UIDC is statutorily required to develop policies and procedures for how best to disseminate these new monies. However, it is important to note that all local governments are bound by UIDC standards whether they seek state funding or not.

Having studied indigent defense in rural Utah, I can tell you that the problems being addressed by the Utah Commission and at the heart of the class action lawsuit are the same as what we found in rural Nevada.

SLIDE 31: The same can be said of Idaho. In March of this year, the Idaho legislature on a near unanimous vote enacted HB 504 – a bill with the expressed Legislative purpose of "improving the delivery of trial-level indigent defense services by providing funding to counties and creating standards with which counties must comply." The bill authorizes a State Public Defender Commission to promulgate and enforce uniform indigent defense standards.

Additionally, a companion $5.4 million appropriations bill was passed, authorizing the commission to disseminate grants to counties to offset the cost of compliance with indigent defense standards. All Idaho counties must comply with the Commission's standards, regardless of whether they apply to the commission for funding assistance. The hammer to compel compliance with standards is significant. If the commission determines that a county "willfully and materially" fails to comply with commission standards, the commission is authorized to step in and remedy the specific deficiencies, including taking over all services, and charge the county for the cost. And, if the cost is not paid within 60 days, "the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county," and the intercepted funds will go to reimburse the commission. These "intercept and transfer provisions" operate by force of law.

Today, Utah, Idaho, Montana, Oregon, Wyoming, Colorado and New Mexico all have statewide integrated public defender systems and/or a statewide indigent defense commission. Public defense advocates need your help.

SLIDE 32: In conclusion, I encourage you all to read the full account of the Wixom case in the 6AC report “Reclaiming Justice.” Though no one can go back in history and say what a competent lawyer could have done in the case, there is a lot of circumstantial evidence – including Judge McKenney writing on behalf of a pardon for Wixom – that suggests Wixom was framed. A Civil War Veteran who continued in the Army even after suffering severe injuries, Wixom is buried in California.

SLIDE 33: Thank you.