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Summary: On June 8, 2017, Nevada Governor Brian Sandoval signed into law Senate Bill 377 establishing the Nevada Right to Counsel Commission (NRTCC). Section 11 of the bill requires the NRTCC to, among others, study and make recommendations for a statewide system for the provision of legal representation to indigent persons in counties with populations of 100,000 or less. The Sixth Amendment Center (6AC) submits this scope of work to evaluate right to counsel services in rural Nevada, provide on-site technical assistance to the Nevada Right to Counsel Commission, and provide post-report technical assistance to the legislative and executive branch on findings and recommendations in advance of the 2019 legislative sessions.

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The Constitutional Right to Counsel: The Sixth Amendment to the U.S. Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

While the Sixth Amendment encompasses several rights and privileges held by individuals, the right to counsel is paramount. As the Supreme Court has noted, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[1]

The Fourteenth Amendment gives our federal courts express authority to tell states what our federal constitution requires the states to do to provide due process and equal protection to all people. It says, in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[1] United States v. Cronic, 466 U.S. 648, 654 (1984).

The U.S. Supreme Court held in *Gideon v. Wainwright*[2] that states have a constitutional obligation under the Fourteenth Amendment to provide Sixth Amendment lawyers to the indigent accused. Early on, *Gideon* was presumed to apply only to felonies. The Supreme Court has since expressly clarified that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time in misdemeanors where jail time is actually imposed and in misdemeanors with suspended sentences.[3]

Indigent Defense Services in Nevada: By statute, Clark County (Las Vegas) and Washoe County (Reno) must each have a county-funded office of the public defender, because the county population is 100,000 or more. The other fourteen rural counties and one independent city (Carson City) may contract with the State Public Defender[4] and share costs with the state, although only Carson City and Storey County currently do so.

The remaining counties may provide services through one of two methods: a) employ government staff attorneys; and/or b) compensate private attorneys to provide representation.

Government employees are either full-time or part-time employees. Full-time government attorneys are generally barred from carrying private cases[5] but in return receive benefits consistent with other government attorneys (i.e., health insurance, retirement, malpractice insurance) and are generally housed in government office space. Part-time government-staff attorneys are employed for a specific number of hours per week, month or year, and may or may not received government benefits or office space. Part-time government staff attorneys are typically allowed to take private cases during their non-public hours. Currently, only Elko County uses staff government attorneys.

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[2] 372 U.S. 335 (1963).

[3] Alabama v. Shelton, 535 U.S. 654 (2002); Argersinger v. Hamlin, 407 U.S. 25 (1972). Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as severe. Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation, among other things.

[4] The State Public Defender Act of 1971 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 executive of the system, and setting uniform policies for the delivery of indigent defense services in Nevada's rural counties. 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 gubernatorial appointment (four-year term). 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.

As originally conceived in 1971, the State Public Defender was funded through a combination of state and county funding, with the state paying for 80% of all public defender costs in the rural counties and the counties paying the remaining 20%. Over time, the state reduced its financial commitment to the point where today participating counties pay 80% of the entire cost of the system. As only one of a number of agencies within the Department of Human Services, the State Public Defender must now justify its office budget among all human services divisions and then have the Director of Human Services argue that budget amongst all other cabinet departments.

[5] Excluding the occasional case for a relative or friend.

Private attorneys can be paid one of two ways: a) under contract; or, b) at hourly rates.

A. *Contracts*: Indigent defense contracts can be constructed in multiple ways, including:

- A set fee per case event (e.g., a lawyer earns one fee for completing an initial hearing, and a separate fee for other proceedings such as an "arraignment," "preliminary hearing," "trial," or, "direct appeal," etc.);
- A set fee per defendant (e.g., a lawyer earns a set fee to represent a single defendant against all charges regardless of the point in the case that the charges are disposed);
- A set fee per "case" (This is similar to the above example except that a lawyer earns a set fee to represent a single defendant against charges presented on a single prosecution charging instrument regardless of the point at which the "case" is disposed); or
- A set flat fee per week, month or year regardless of number of case events, defendants or cases represented.

Under each of these four models, contract fees may or may not include the cost of trial-level expenses (e.g., experts or investigators).

B. *Hourly Rates*: Separate hourly rates may be set by case type (one rate for felony representation, and different rates for misdemeanor, delinquency, direct appeal, etc.) These hourly rates may or may not differ depending on whether the lawyer is working in-court or out-of-court. Hourly rates may or may not be set to include overhead operating costs of administering a law office (office rent, malpractice insurance) in addition to a reasonable fee to compensate the lawyer. Total compensation earned under any of these hourly rate models may or may not be capped at a determined limit (regardless of hours worked). And, these potential compensation caps may or may not be waivable upon judicial review.

Each of the other eleven Nevada counties provides indigent defense services with private counsel although the exact compensation method is unclear for each. However, the Nevada Supreme Court has issued administrative orders that establish some parameters for indigent defense services. Administrative Order ADKT-411 on January 2008 determined, among other things: a) performance standards for attorneys in trial-level adult criminal, juvenile delinquency, and appellate representation must be met; and, b) the local judiciary must refrain from exerting undue influence over the oversight and administration of indigent defense.

Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate its Sixth and Fourteenth Amendment responsibilities to its counties and/or cities, if a state does delegate the responsibility to its local governments, the state must guarantee that local governments are not only

capable of providing adequate representation, but that they are in fact doing so. The State of Nevada, however, has no state governmental body tasked with the responsibility to ensure that people facing jail time are afforded effective representation.

Evaluation Scope of Work: Of course, the lack of uniform standards and state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not necessarily mean that all right to counsel services are constitutionally inadequate. Institutionally, the State of Nevada simply does not know whether its services meet the federal requirements.

Nevada began to rectify its lack of oversight of Sixth Amendment services in the 2017 legislative session. June 8, 2017, Nevada Governor Brian Sandoval signed into law Senate Bill 377 establishing the Nevada Right to Counsel Commission (NRTCC). Section 11 of the bill requires the NRTCC to, among others, study and make recommendations for a statewide system for the provision of legal representation to indigent persons in counties with populations of 100,000 or less. The Nevada Supreme Court requested the Sixth Amendment Center (6AC) to submit a scope of work for the evaluation.

The current study proposal sets out to answer the question of whether the absence of state oversight and standards results in constitutionally inadequate services. The study will survey all rural counties and the independent city to determine basic information about how services are delivered (delivery model, expenditure, caseload, etc.). Additionally, five counties will be chosen for additional on-site research. The 6AC prefers for the NRTCC to select the specific five counties to be reviewed so that the 6AC will not be accused of cherry-picking either the very best or the very worst jurisdictions.

The site visits will employ three primary approaches to assess the quality of services:

- *Data collection*: Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents, from statistical information to policies and procedures. Relevant hard copy and electronic information, including copies of indigent defense contracts, policies, and procedures, was obtained at the local level and analyzed.

- *Court observations*: Evaluating how right to counsel services work in any jurisdiction requires an understanding of the interaction between at least three critical phenomena: (a) the procedures an individual defendant experiences as her case advances from arrest through disposition; (b) the process the defense attorney experiences while representing that individual at the various stages of the case; and (c) the substantive laws and procedural rules that govern the justice systems in which indigent representation is provided. In each sample county, courtroom observations will be conducted to clarify these processes.

- *Interviews*: No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, interviews will be conducted with a broad cross-section of stakeholder groups during each site visit. In addition to speaking with indigent defense attorneys and office supervisors, interviews will be conducted with trial court judges and magistrates, county officials, prosecutors, court clerks, and law enforcement. State-level agency staff members were also interviewed.

The Sixth Amendment Center independently and objectively evaluates indigent defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The use of standards as a basis for evaluation of government services is familiar to most governmental officials. After all, for many decades policymakers have ordered minimum safety standards in all proposals to build a brand new courthouse, provide a fleet of city buses, or construct a new state highway overpass. Our Constitution demands that the threat of taking an individual's liberty is given the same level of concern and care.

To help policymakers who may not be versed in the standards imposed by Sixth Amendment constitutional law, the American Bar Association (ABA) promulgated the *Ten Principles of A Public Defense Delivery System (Ten Principles).* As the ABA explains, these principles represent "fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."[6] The *Ten Principles* aid in answering questions like: "Are attorneys appointed early enough in the process to have sufficient time to conduct necessary investigations?" or "Is the defense service provider free to zealously defend the client without concern for retaliation (i.e. termination of employment, reduction in pay, reduction in personnel, or reduction in defense resources)?" As such, the *Principles* are not a set of best practices to be aspired to, but rather they represent the minimum floor of effective representation.

This is made clear through two principal U.S. Supreme Court cases, decided on the same day, that describe the tests employed to determine the constitutional effectiveness of right to counsel services. *United States v. Cronic*[7] and *Strickland v. Washington*[8] together describe a continuum of representation. *Strickland* is backward-looking, setting out the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case, and it is used after a case is final to decide whether the lawyer provided effective assistance of counsel. *Cronic* is forward-looking and states that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. Only after the system within which public attorneys work is found to

[6] AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://bit.ly/RZejPm.
[7] 466 U.S. 648 (1984).
[8] 466 U.S. 668 (1984).

be structurally sound, as defined and prospectively determine by a *Cronic* and *Powell* analysis, can *Strickland's* two-prong test be used to retrospectively measure the effectiveness of specific attorneys who work within those structurally sound indigent defense systems.

Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys with sufficient time to provide competent representation under independent supervision. These factors align with many of the ABA *Ten Principles*:

- Presence of counsel at critical stages (*Principle #*3): The first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused at the "critical stages" of a case. Arraignments,[9] plea negotiations,[10] and sentencing hearings,[11] for example, are all critical stages of a case. If counsel is not present at every one of these critical stages, an actual denial of counsel occurs.

- Attorney qualifications, training, and resources (*Principles* #6 and #9): Next, the U.S. Supreme Court explains in *Cronic* that there are systemic deficiencies that make any lawyer – even the best attorney – perform in a non-adversarial way. As opposed to the "actual" denial of counsel, the Court calls this a "constructive" denial of counsel.[12] The overarching principle in *Cronic* is that the process must be a "fair trial."[13] *Cronic* notes that the "fair trial" standard does not necessitate one-for-one parity between the prosecution and the defense. Rather, the adversarial process requires states to ensure that both functions have the resources they need at a level their respective roles demand. As the Court notes: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[14]

  Cronic's necessity of a fair fight requires the defense function to put the prosecution's case to the "crucible of meaningful adversarial testing."[15] If a defense attorney is either incapable of challenging the state's case or barred

[9] Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961).
[10] Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).
[11] *Lafler*,132 S. Ct. at 1386; Wiggins v. Smith, 539 U.S. 510, 538 (2003); Glover v. United States, 531 U.S. 198, 203-04 (2001); Mempa v. Rhay, 389 U.S. 128, 134, 137 (1967).
[12] *Strickland,* 466 U.S. at 683 ("The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused." (citing *Cronic*, 466 U.S. at 648)).
[13] *Cronic,* 466 U.S. at 658.
[14] *Id.*.at 657 (quoting United States ex rel. Williams v. Twomey*,* 510 F.2d 634, 640 (7th Cir. 1975)).
[15] *Id.* at 656-57 ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

from doing so because of a structural impediment, a constructive denial of counsel occurs.

In *Cronic*, the Court points to the deficient representation received by the defendants known as the "Scottsboro Boys" and detailed in the U.S. Supreme Court case of *Powell v. Alabama*[16] as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys' case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.[17] The *Powell* Court concluded that defendants require the "guiding hand"[18] of counsel – i.e., attorneys must be qualified and trained to help the defendants advocate for their stated interests.

- Sufficient time (*Principle* #5): Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day.[19] *Powell* notes that the lack of "sufficient time" to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel, commenting that impeding counsel's time "is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."[20] Insufficient time is, therefore, a marker of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly.

- Independence of the defense function (*Principle* #1): Perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from governmental interference, specifically from the judge presiding over the case. As noted in *Strickland*, "independence of counsel" is "constitutionally protected," and "[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

[16] 287 U.S. 45 (1932). In 1931, nine young men of color stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the "Scottsboro Boys."
[17] A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.
[18] *Powell*, 287 U.S. at 68-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").
[19] Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest – only thirteen years old – was instead sentenced to life in prison.
[20] 287 U.S. at 56-59.

to conduct the defense."[21] In specific relation to judicial interference, the *Powell* Court stated: "

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[22]

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer's representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that a judge's in-court observations of a defense attorney cannot comprise the totality of supervision.

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case of *Ferri v. Ackerman*,[23] the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation." Two years later, the Court observed in *Polk County v. Dodson*[24] that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."[25] Commenting 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 notes in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."[26] The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.

[21] Strickland v. Washington, 466 U.S. 668, 686 (1984).
[22] *Powell,* 287 U.S. at 61.
[23] 444 U.S. 193, 204 (1979).
[24] 454 U.S. 312 (1981).
[25] *Id.* at 321-22.
[26] *Id.*

The Sixth Amendment Center – Competency, Capability, and References: The 6AC is a Massachusetts non-profit, tax-exempt organization seeking to ensure that no person accused of crime goes to jail without first having the aid of a lawyer with the time, ability, and resources to present an effective defense as required under the United States Constitution. We do so in part by measuring public defense systems against Sixth Amendment case law and established standards of justice, and we assist state and local policymakers in their work to establish and implement public defense systems that meet constitutional requirements while promoting public safety and fiscal responsibility.

The 6AC team for the Nevada project will consist of David Carroll, Phyllis Mann, and Michael Tartaglia. Resumes for all team members can be found at Appendix A.

- David Carroll, 6AC Executive Director, is a nationally recognized expert on the standards and methods for the delivery of right to counsel services, with more than twenty years of providing technical assistance to policymakers at the federal, state, and local levels. He has led numerous research and evaluation projects, authored several papers and reports, and testified on right to counsel issues before a number of state legislatures and the U.S. Congress. His work has brought him to all but two of the nation's 50 states. Mr. Carroll will be the lead consultant on the project.

- Phyllis Mann, 6AC Senior Counsel, has more than twenty years of experience in criminal defense and its surrounding concerns, after earning her J.D. from Southern Methodist University. Since retiring from her private practice in the state and federal courts of Louisiana, Mann has focused her research, writing, and consulting on how our country can improve the quality and effectiveness of representation for people charged with crimes who cannot afford a private attorney. She has worked with Sixth Amendment Center staff for many years in evaluating indigent defense systems in and across jurisdictions from the east coast to the west, prior to joining our staff in 2015.

- Michael Tartaglia joined the 6AC staff following a one-year fellowship with 6AC from Boston University School of Law, where he received his J.D. *cum laude* in 2015. Prior to law school, he was a paralegal at the ACLU National Prison Project, working on class action cases regarding prison conditions and advocating for more evidence-based prison management policies. While at BU School of Law, Tartaglia interned with Greater Boston Legal Services' Housing Unit and the Public Defender Service for the District of Columbia. He was also a defender in BU's Criminal Law Clinic, Senior Notes Editor on Boston University *Law Review*, and the president of the school's ACLU student group.

References: References regarding the 6AC's work are available from the following individuals, among others:

- Judge Stephen Roth, Utah Court of Appeals
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  In 2012, the Utah Judicial Council – the state courts' highest policymaking body – created the Study Committee on the Representation of Indigent Criminal Defendants ("Committee") to examine the status of the provision of indigent defense services. After a lengthy vetting process, the Committee asked the 6AC to help. Judge Roth chaired the Committee.

  On behalf of the Committee, the 6AC conducted a statewide evaluation of the provision of right to counsel services at the trial level. Released in October 2015, the Sixth Amendment Center's report, *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services*, found that Utah's trial courts do not uniformly provide counsel at all critical stages of criminal cases as required by the U.S. Supreme Court, with many defendants – particularly those facing misdemeanor charges in justice courts – never speaking to an attorney.

  In March 2016, the Utah legislature enacted comprehensive statutory reform, creating the Utah Indigent Defense Commission and designating the first-ever state funding for trial-level indigent defense services.

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  Before 2013, Michigan was one of only seven states in the country that required their counties to carry the full financial burden of providing trial level representation (other than in capital cases). Today it has an independent statewide commission with authority to enforce mandatory standards for the provision of indigent defense in every county and with state funding to assist in doing so.

  The 6AC was instrumental in helping Michigan policymakers achieve this victory, by providing technical assistance to the Michigan Governor's Advisory Commission on Indigent Defense under a grant from the Michigan Bar Association. That commission issued a report defining the state's indigent defense system as an "uncoordinated, 83-county patchwork quilt," with each county "dependent on its own interpretation of what is adequate" given limited

local funding. The 6AC provided more technical assistance to a subsequent legislative advisory committee. In 2013, Michigan enacted a comprehensive legislative package transforming the way right to counsel services are provided. The newly created Michigan Indigent Defense Commission (MIDC) has the power to develop and oversee the "implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state."[27]

Judge Boyd served on the Governor's Advisory Commission and currently serves on the MIDC.

[27] MICH. COMP. LAWS § 780.989 (2015).