

**MINUTES OF THE 2017-2018 INTERIM
NEVADA RIGHT TO COUNSEL COMMISSION**

January 26, 2018

The meeting of the Nevada Right to Counsel Commission was called to order by Justice Michael Cherry at 9:06 a.m. at the Legislative Building, 401 South Carson Street, Room 4100, Carson City, Nevada, and via videoconference at the Grant Sawyer Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada.

Exhibit A is the Agenda, and Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT (CARSON CITY):

Justice Michael Cherry, Nevada Supreme Court
Assemblywoman Teresa Benitez-Thompson, Assembly District No. 27
Robert Crowell, Representative of the Nevada Association of Counties
Joni Eastley, Representative of the Nevada Association of Counties
Laura Fitzsimmons, Representative of the State Bar of Nevada
Tom Grady, Representative of the Nevada Association of Counties
Justice A. William (Bill) Maupin (Retired), Nevada Supreme Court
John Slaughter, Representative of the Board of County Commissioners of Washoe County
Jerri Tipton, Representative of the Nevada Association of Counties

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Senator Tick Segerblom, Senatorial District No. 3
Erika Ballou, Representative of the State Bar of Nevada
Drew Christensen, Representative of the Board of County Commissioners of Clark County
Phil Kohn, Representative of the Board of County Commissioners of Clark County
Anne Traum, Representative of the State Bar of Nevada

STAFF MEMBERS:

Brenda Erdoes, Legislative Counsel, Legal Division, Legislative Counsel Bureau
Risa Lang, Chief Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau
Joi Davis, Senior Program Analyst, Fiscal Analysis Division, Legislative Counsel Bureau
Angela Hartzler, Secretary, Legal Division, Legislative Counsel Bureau
Jordan Haas, Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

John McCormick, Assistant Court Administrator, Administrative Office of the Courts
Karin Kreizenbeck, Nevada State Public Defender
David Carroll, Executive Director, Sixth Amendment Center

Justice Michael Cherry (Nevada Supreme Court):

Because this is the first meeting of the Nevada Right to Counsel Commission, I am acting as Chair until we take a vote for the selection of the Chair and Vice Chair. I am an Associate Chief Justice of the Nevada Supreme Court.

Let me introduce some of the folks who are here. Our secretaries are Angela Hartzler and Jordan Haas. We also have Risa Lang, who is the Chief Deputy Legislative Counsel. Joi Davis is a Budget Analyst, and I'll have a nice story about her later. We're only here because Ms. Davis understood about indigent defense. We also have Brenda Erdoes, a legend in her own name, who is head of the Legal Division of the Legislative Counsel Bureau.

In the audience is Jamie Gradick. She is my right hand, and she's the rural coordinator for the Administrative Office of the Courts. Wherever I go, she goes. She helped me with the Indigent Defense Commission.

I will now open public comment. Seeing none, I will close public comment.

As you are all aware, this Commission was formed as a result of the passage of Senate Bill (S.B.) 377 of the 2017 Legislative Session (Exhibit C).

The creation of this Commission was very important to me, because I was the chair since 2007 of the Indigent Defense Commission, which is formed by the means of ADKT 0411, which is an administrative docket. I want to thank my good friend Senior Justice Bill Maupin, who was Chief Justice at the time, who had the insight to create the Indigent Defense Commission and also to appoint me as chair. I will be forever indebted to him. We served as public defenders in the early 1970s, which means we know a lot about indigent defense. I want to thank Senior Justice Maupin for everything he's done.

I would now like to allow each member of the Commission to introduce himself or herself. Please feel free to explain your interest in the Commission, your background and what you hope to accomplish as a member of the Commission. I will go first.

I am Michael Cherry, Associate Chief Justice. I just finished being Chief Justice. I was Chief Justice in 2012 and 2017. I had the pleasure of trying to get S.B. 377 through the Legislature. To tell you the truth, it was dead, and we thought, "Forget it." It died in 2015. We thought it had died again, then Joi Davis and Senator Joyce Woodhouse called me to their office on a Saturday during the legislative session. John McCormick

was with me, and Ben Graham and Jamie Gradick. We were able to work something out. Because of that, I'm indebted to Ms. Davis just as I am to Senior Justice Maupin for being able to chair this Commission at this time. We've got a lot of work to do, and we've got to figure out how we're going to do it. We've got some good presentations today.

My background in indigent defense and why I'm so interested in it is because I graduated from Washington University Law School in St. Louis. I moved to Las Vegas, and this is my 48th year as a Nevadan. I got my dream job as a public defender. I was there for 7 years. I worked my way up to assistant public defender. I loved it. I was able to work with people like Senior Justice Maupin and many other premier defense attorneys. I learned a lot about indigent defense as a public defender. As a private attorney, I was a contract attorney. I was a retained criminal defense attorney. I did that for years and really got to see a different type of criminal representation. I just feel that my background is very sufficient to be able to help everybody with indigent defense in this state. After private practice in 1997, I was appointed as the first special public defender. I only did capital murder cases and murder cases with six other attorneys, two great investigators who were mitigation specialists and three clerical staff. We did a really good job of representing those. Some people ended up on death row, some people ended up acquitted and some people ended up just in prison for life. Then, I was on a district court bench for 8 years in Clark County, and of course I saw everything there as far as indigent defense. I have been lucky enough to be a member of the Supreme Court since 2007. I get to review what the district judges are doing as far as indigent defense.

There are two reasons why indigent defense became so important to Senior Justice Maupin and to me. Someday, Laura Fitzsimmons will tell you all about a guy named Roberto Miranda, who was on death row for 14 years. He was not guilty of anything. When he finally got out, it cost Clark County \$5,000,000. Then, the *Las Vegas Review-Journal* did an exposé on contract attorneys. It wasn't working out well in Clark County. It also didn't work out too well in Washoe. They had problems in the rurals with contract attorneys and court appointments. Senior Justice Maupin said, "Mike, let's do something about it," and we were able to establish the Indigent Defense Commission and we were able to make some guidelines and performance standards. The Indigent Defense Commission is still working on caseload standards. I don't know whether we'll continue that or turn it over.

Let me start with Senator Segerblom. Why are you interested in indigent defense?

Senator Tick Segerblom (Senatorial District No. 3):

When we had the hearing on the bill, we heard that the American Civil Liberties Union (ACLU) was looking at suing some other states, which have been sued for some of their rural defense programs like we have. So, I think we're trying to avoid a major lawsuit and a major cost to the State. It would be unusual for Nevada to actually be proactive

on something, but that's our goal. Hopefully, we can accomplish that. I do want to commend Senator Woodhouse. You're right, we passed it through my committee and then the Senate Finance Committee, and I just assumed it was dead as a doornail. She revived it and called you in and said, "Let's give you some money and do it." We can't thank her enough.

Justice Cherry:

Next is my good friend, Senior Justice Bill Maupin.

Justice A. William (Bill) Maupin (Retired) (Nevada Supreme Court):

I had the privilege of serving on the Nevada Supreme Court from 1997 to 2009, but my primary interest in this really derives from my time in the Public Defender's Office with Justice Cherry, who was one of my mentors there. Actually, we tried a couple of cases together. The thing that always struck me was that we had a cadre of dedicated, younger lawyers, but it seemed like on-the-job training. It's very important to make sure that people who are taken into the criminal justice system are treated fairly and have equal opportunity to a just result. It's very important that we, as a part of the government, ensure that issues that exist, issues that existed in the past and issues that we anticipate in the future will be addressed so that we satisfy the performance standards we enacted several years ago, and that the defense of indigents in this state is topflight.

Justice Cherry:

Next, we have somebody from the law school, a good friend of mine, Anne Traum, who was appointed by the Nevada State Bar to be on this Commission.

Anne Traum (Representative of the State Bar of Nevada):

My interest comes from a couple different perspectives. One is that I was a federal public defender for many years here in Las Vegas at the Federal Public Defender's Office. In that role, I represented people who were charged in federal court, but also a lot of habeas petitioners who were serving time in the state system. So, I became quite familiar with how things go down in that system and the constitutional impact of those issues. At the law school, I teach criminal procedure in federal courts and about the civil aspects and habeas aspects of it, and about crimes. I also practice with students doing appellate work, sometimes in civil rights and immigration in the criminal arenas. I've also just spent a fair amount of time on access to counsel, generally in the civil domain, as well as in the criminal domain, and working on pro bono projects here in the state. Also, I spent a year at the Department of Justice in their Access to Justice Office, which was focused on access to counsel in the criminal defense arena. So, I've had that national perspective in seeing how those lawsuits unfold and the issues for access to counsel.

Justice Cherry:

Next is Laura Fitzsimmons, who was also appointed by the Nevada State Bar.

Laura Fitzsimmons (Representative of the State Bar of Nevada):

I'm very, very interested and glad to be on this Commission. I came to Nevada in 1981 as a Supreme Court Law Clerk, and the first case I saw in the old building was this insane murder case where the guy's lawyer just stood up and said, "I haven't had a chance to read anything." Anyhow, the guy was convicted. That was a real eye opener, coming from California. I was a state public defender, and I was a contract public defender working in most of the rural northern counties. I moved to Las Vegas and continued doing habeas work. I did several cases, including the Miranda case, where the issue was ineffective assistance of counsel. You can see it if you're an attorney appearing in court. Hopefully it's not you and it's not a self-realization, but you can just feel it. It's systemic and continues to be, certainly in my opinion, in the rural counties. My husband is a retired public defender and both of our children are public defenders.

Justice Cherry:

Thank you. Next is Erika Ballou, who is a third appointment by the Nevada State Bar.

Erika Ballou (Representative of the State Bar of Nevada):

I am a Clark County public defender. I have been in the Public Defender's Office for almost 13 years. Prior to that, I was in the Federal Public Defender's Office here in Las Vegas. Also, I went to law school because I wanted to be a public defender. In both offices, I've been surrounded by passionate people who want to make sure that everyone gets the representation they deserve, and they'd want us to represent them even if they had money. I just want to make sure we're able to do the jobs that we would like to do. I mainly just want to work on caseloads and performance standards and things like that, to make sure we're able to do the job that most people in my office are super passionate about doing.

Justice Cherry:

The next three people were appointed by the Nevada Association of Counties (NACO). I have to say, but for NACO, my Indigent Defense Commission would have been a terrible failure. I think Dagny Stapleton is in the audience, and Jeff. To everybody who's involved in NACO, and these folks who are from the rural counties, thank you, thank you, thank you. Our first one is Jerri Tipton, who was appointed by NACO.

Jerri Tipton (Representative of the Nevada Association of Counties):

I'm a County Commissioner in Mineral County, Nevada. I am starting the last year of my third term, so I will be termed out this year. Some of you may not know that Mineral County is about 4,000 square miles. We have about 4,000 residents. Three percent of my land is private. So, on that three percent, half of that has no taxable infrastructure. It is a challenge for us to address anything in that county, much less indigent defense. Many years ago, we were with the public defenders. My understanding is that, before I became a commissioner, we would have people in the Hawthorne Hilton for months before they ever saw a lawyer. That's not the way we need to do business. So, for me, it's a financial standpoint. We have a contract. We do contract law work. We need to deal with this. We need to fix this, and that's why I'm here. I think this is an opportunity to make something that will work.

Justice Cherry:

Next is Tom Grady. He's also appointed by NACO. He is a former assemblyman.

Tom Grady (Representative of the Nevada Association of Counties):

I started my career in local government as the mayor of Yerington. I served about 10 years there. Then, I was the executive director of the Nevada League of Cities for quite some time. I was an assemblyman from District 38 for 12 years, terming out in 2014. I was very pleased when NACO gave me a call and asked me if I would allow my name to be submitted. I think this is a problem that we have worked on since I started my political career. Hopefully, we can bring it to a successful conclusion this year. I will say that I've tried to represent the rurals, namely in all my time in public office, because people don't realize the traveling that is necessary in the rurals. Like all the counties, there's hardship when it comes to finances, so maybe through this Commission we can help out a little bit. That is my goal here.

Justice Cherry:

Our next member, Joni Eastley, was very active with the Indigent Defense Commission. I consider her a good friend.

Joni Eastley (Representative of the Nevada Association of Counties):

I appreciate that, Justice Cherry. My involvement with indigent defense began in 2007 when our late District Court Judge John Davis contacted me after ADKT 0411 was issued. He made an appointment to talk to me about it and was very concerned about the caseload standards that may be proposed, which would be a one-size-fits-all solution that really doesn't fit the rurals for many different reasons. I can only echo some of the things my former colleague Jerri Tipton said. I served on the Nye County Commission for 12 years until I termed out and was then hired by the county as the

Assistant County Manager, and I continued to be involved in indigent defense issues all that time. My interest then is the same as it is now: fair and effective representation to indigent defendants. Nye County left the State Public Defender's Office for that very reason, because we believed that indigent clients were not receiving fair and effective representation. They now contract with five public defenders whom they pay \$150,000 a year, which is an enormous amount of money for a county that is 18,000 square miles in size with only 2 percent from which we derive tax revenues. So, I hope to find a good balance there, something that is fair to the frontier counties and still provides fair and effective representation for indigent clients.

Justice Cherry:

Assemblywoman Benitez-Thompson, will you tell us why you're interested on being on this Commission?

Assemblywoman Teresa Benitez-Thompson (Assembly District No. 27):

The role that I am filling is the appointment by the Speaker, serving as a member who has expertise in finance and state government, and that would be serving two terms on Ways and Means. I think it's ensuring that we've got some continuity, so that as this conversation rolls into the next legislative session, with the one bill draft request (BDR) that's allotted to the Commission, there's a member in our House who's been present and can help our members understand the goal and intent of conversations that happen.

Justice Cherry:

Thank you, Assemblywoman Benitez-Thompson, for serving. Next is our mayor of Carson City, Robert Crowell.

Robert Crowell (Representative of the Nevada Association of Counties):

I am the mayor of Carson City. Carson City is my hometown, but I was born in Tonopah, Nevada, and I'm very proud of it. Commissioner Eastley and Commissioner Tipton, it's very good to see you guys here. I'm a retired partner from the Kaempfer Crowell Law Firm. I've been practicing law for over 42 years. I've been the past president of the State Bar, thanks to Commissioner Fitzsimmons. I was on the Colorado River Commission with Senator Segerblom. I'm very interested in the funding issues that go along with indigent defense. From my perspective, and I think I can probably speak for all of us here, the right to counsel is a fundamental core of our democracy, and I'd like to see balance happen between the prosecution and defense all the way around. Obviously, like I said, money is an issue. Frankly, I thought that S.B. 377 when it first came out was a pretty good bill.

Justice Cherry:

Next up is John Slaughter. Thank you for what you do as far as our two public defenders' offices in Washoe County, and also our contract attorneys headed by Robert Bell.

John Slaughter (Representative of the Board of County Commissioners of Washoe County):

I'm very honored to be part of this Commission. In thinking about why I'm here and what I hope to add, it's really just that perspective, not as an elected official of a county, but as the appointed administrator of our second-largest county. So, I hope that I can provide some of that insight on some of the challenges that we have in balancing all of the interesting challenges. I meet once a month with new employees in Washoe County, and I always talk about the different services that we provide as a county. I always begin with talking about that basic right of public defense that we provide and how important that is as a service we provide in Washoe County.

Justice Cherry:

Our next member is Drew Christensen, and I'm going to ask him to explain to everybody what exactly his position is and why we created it and how we created it, and of course that will show your interest in indigent defense. This is Drew Christensen, former public defender, former district attorney, and now heading up the Office of Appointed Counsel in Clark County.

Drew Christensen (Representative of the Board of County Commissioners of Clark County):

It's an honor to be here. I'm a long-time Nevadan. I started my career at the Nevada test site. I received my undergraduate degree in electrical engineering and worked for several years at the test site. I had an urge to go to law school. I started my legal career in the 1980s as a law clerk in the Eighth Judicial District. I went to the District Attorney's Office. I've been in private practice. I spent a number of years in the Public Defender's Office working for Phil Kohn. But in response to the Nevada Supreme Court's ADKT 0411 in January of 2008, the county manager came to me and asked if I'd be willing to start up an Office of Appointed Counsel program. So, I've been the director of the Office of Appointed Counsel since January of 2008. It oversees our conflict model, where those charged with a crime who can't afford counsel, if they are not able to be represented by our institutional office, we put together a program where the private bar can be contracted with the county and then a variety of different levels of experience based on the type of case. I've been a member of the Indigent Defense Commission since that timeframe in January of 2008. At the time, I helped the Commission work on the model plan. I worked for almost 9 months on the significance of Clark County's model plan for indigent defense. What I hope to bring to the table over the last decade

of doing this is some of the successes and concerns we've had over the years with a model that hopefully mirrors ADKT 0411. I've enjoyed the work. I've been able to work with many members on the Commission with the Indigent Defense Commission.

Justice Cherry:

Would you go a little further and talk about how the contracts work in Clark County for the contract attorneys?

Commissioner Christensen:

In Clark County, we've kind of put a model together based on the type of case. First, let me step back. We wanted to have the independence of the judiciary when we decided who would be contracted with Clark County to represent the individuals, so we put together a local committee, not of specific individuals but of organizations that we felt were concerned with the indigent defense happening in Clark County. So, we took members from the Public Defender's Office, Special Public Defender's Office, Federal Public Defender's Office, the Latino Bar and Nevada's Attorneys for Criminal Justice and Barbara Buckley's legal aid center. We asked the State Bar and the National Bar and these organizations to nominate people to help us select candidates for these contracts. We've had this committee together for 10 years. It's changed over the years, but the organizations are still part of it. We meet twice a year to evaluate the current membership of the contracts we have, as well as look at new members who may like to receive a contract with Clark County. We break our contracts into two different types: those that are based on a monthly concept, where we pay them a monthly stipend to represent a certain type of case, and an hourly component where we pay the statutory \$100 per hour if the case could result in a life sentence. So, to make a long story short, if the charge you're facing is a non-life sentence, we call you a track attorney, and we assign you to a particular department. For those of you in the system for a while, the track attorney is the model we've used, but we've tweaked it a little bit over the years because there was always the concern with the flat-fee concept, that if we pay X amount of dollars to a lawyer, there was really no incentive to potentially go to trial or to investigate the case. Obviously, that per diem per month is a lot easier if all your cases resolve quickly, versus them starting to drag on. So, we tweaked our model plan to provide incentives for those types of individuals, even on the non-life cases, which are the bulk of the cases in the system: attempted murders, robberies, burglaries, etc. These are fairly significant charges. The county will look at the particular case, and if we feel that it's complex enough, we can convert it to hourly so it's not merely a flat-fee contract. If the individual wants to go to trial and the attorney thinks that's in their best interest, we will pay hourly for their trial time. We also pay hourly for appellate work. We currently have about 160 lawyers contracted with Clark County at a variety of levels. We have those that contract at our capital murder level. We have those that contract with our more significant life sentences. We kind of break our life sentences into two different levels of experience. With non-capital murder, sexual assault and lewdness, we feel those offenses need a lot more experience and expertise to handle. So, this committee

that we use evaluates the applicants and makes determinations as to whether we feel it's appropriate for them to have that particular contract. Not to diminish the charge, but both large trafficking in narcotics and kidnapping in Nevada are life sentences, but we utilize those as the next layer down as far as experience. So, you can see that we look at all the different genres of appointment types and hopefully try to match an attorney's experience and expertise in that area with that appointment type. We also have a habeas counsel and we have appellate counsel. In the last several years, we have misdemeanor contracts because of the volume of domestic violence and DUIs (driving under the influence). The Eighth Judicial District isolated those types of cases into specific courtrooms, so we are always responding to the needs of the court and the criminal justice system.

Justice Cherry:

Thank you, that was a great explanation. Our final member of the Commission is one of my heroes for indigent defense. When I started in the public defender's office in 1970, there were 9 of us. When I left as assistant public defender in 1977, there were 25 public defenders. Today, Phil Kohn supervises over 100 public defenders in a population of 2,200,000 in Clark County. He practiced law in Northern Nevada, so he's got a taste of that. He was on the murder team when he was Deputy Public Defender and Chief Deputy Public Defender. The he was a Special Public Defender, and now he's the Clark County Public Defender.

Phil Kohn (Representative of the Board of County Commissioners of Clark County):

As the Chair has indicated, I'm the public defender for Clark County. We have about 120 lawyers at this point. I was appointed in 2004. That's important because that's a year after the case of Roberto Miranda, which two members of the Commission have referred to, was resolved. Mr. Miranda was convicted of capital murder in about 1984. The federal courts found a number of things wrong with our representation of Mr. Miranda, not the least of which was a lack of training. The county paid out a \$5,500,000 judgement in that case. My number one concern in being on this Commission is that there's never another Roberto Miranda in this State. For one, we don't have someone spending 14 years on death row who didn't do it, and two, that we don't pay out another \$5,500,000 judgement. As a number of members have pointed out, indigent defense is really expensive. It is. Our budget is close to \$25,000,000 in Clark County. But paying out one of these will break any county that ends up on the wrong side of a Roberto Miranda case. As Senior Justice Maupin pointed out, when he started in our office, and when I started in our office in 1992, the practice was taking a brand new lawyer out of law school who had passed the bar examination, putting them in a courtroom with a caseload and saying, "Good luck." Senior Justice Maupin and Justice Cherry, and Franny Forsman in the audience, I think every one of you saw this. What we've done in Clark County over the last 14 years is develop a training program that is approximately 10 to 12 weeks, which I say because it starts early in November and we have an awful

lot of holidays at the end of the year. We just finished our last training class a week ago today. We put people through a program that is meant to bridge the gap between law school or coming from another jurisdiction to Clark County. After that, we have a mentoring program that lasts between 12 and 18 months in our office. I'm not asking for a show of hands, but I don't think there are many counties in Nevada that have a training program. If we don't look towards training and towards making our indigent defenders better, we are going to pay out more Mirandas and we're going to have innocent people convicted. That's my interest in being on this Commission. Having practiced in Douglas County for 7 years, and I can't tell you how much I enjoyed that time, and to a smaller degree in Carson County, I'm certainly mindful of the constraints for the smaller counties. But I have some experience with establishing a training program. There are people who work in our office who love doing it. I hope that we can address this issue statewide and make all indigent defense in the State of Nevada something we can be proud of and something that will avoid wrongful convictions.

Justice Cherry:

I will now open agenda item IV, the selection of the Chair and Vice Chair for this Commission. As an ex-officio and nonvoting member of this Commission, the Legislative Counsel Bureau (LCB) requested that I start this meeting. I'm now going to open up the meeting to anyone who would like to nominate themselves or another member to serve as Chair.

Senator Segerblom:

I nominate Justice Cherry to be the Chair. Given his history and involvement, he's perfect.

SENATOR SEGERBLOM NOMINATED JUSTICE CHERRY AS CHAIR.

COMMISSIONER EASTLEY SECONDED THE MOTION.

Seeing no further nominations, I will call for a vote. Remember that I'm a nonvoting member, but I checked with the LCB and they said I could serve as Chair. They looked at the statutes, and it's my pleasure if I am voted on.

THE MOTION PASSED UNANIMOUSLY.

Thank you very much. I appreciate the fact that I'll get to serve as Chair of this legislative Commission. I'm very excited, and I've never been able to do this before.

I will now accept nominations for Vice Chair.

Commissioner Tipton:

I'd like to nominate Commissioner Eastley.

Chair Cherry:

Commissioner Eastley, are you willing to serve?

Commissioner Eastley:

Yes, but I'm certainly open to other nominations.

Chair Cherry:

Are there any other nominations?

Commissioner Ballou:

I would like to nominate Commissioner Christensen.

Commissioner Kohn:

I would like to nominate Senator Segerblom.

COMMISSIONER EASTLEY WITHDREW HER NAME FROM
CONSIDERATION.

Chair Cherry:

So that leaves Senator Segerblom and Commissioner Christensen. Is there any discussion on either nominee?

Commissioner Ballou:

I'd like to explain why I nominated Commissioner Christensen. Just because of the experience that Commissioner Christensen has had with all of the setting up of the Office of Appointed Counsel, and I thought that would be helpful on this Commission.

Chair Cherry:

Seeing no further discussion, I will now call for a roll call vote.

COMMISSIONER BALLOU VOTED FOR COMMISSIONER CHRISTENSEN.

Commissioner Christensen:

Is it inappropriate to vote for myself?

Chair Cherry:

Let your conscience be your guide.

Commissioner Christensen:

I'll go ahead and vote for myself. I do think I have the experience to at least help the Commission with some of the issues we've dealt with over the last decade.

COMMISSIONER CHRISTENSEN VOTED FOR HIMSELF.

Senator Segerblom:

I'm going to withdraw. We wanted to make sure we had someone from Southern Nevada, but since Commissioner Christensen is here and offering to do it, then that'd be great.

SENATOR SEGERBLOM WITHDREW HIS NAME FROM CONSIDERATION.

Chair Cherry:

A lot of camaraderie here today. I will now call for a vote to select Commissioner Christensen as the Vice Chair.

THE MOTION PASSED UNANIMOUSLY.

Congratulations, Vice Chair Christensen, you are my right-hand person on this Commission.

Vice Chair Christensen:

Thank you, Chair Cherry. I look forward to working with you.

Chair Cherry:

Next on the agenda, I've asked John McCormick, who is the Deputy Director of the Administrative Office of the Courts, the Assistant Court Administrator of the State of Nevada. He's a good friend. He was the Rural Coordinator before Jamie took the position. A man who is beloved by the rurals, by the way, which I really appreciate, and he's really been a great help to me on the Indigent Defense Commission. He never says no. We had the conference of chief justices coming to Henderson, Nevada this weekend. Of course, he's got a lot of work to do because he's in charge of the marshals and the security and everything else. He was going to fly down today to Las Vegas, and I said, "Can you go Thursday?" and he said, "Of course, Justice." Thank you, John. We will now hear your presentation on the historical background of indigent defense in Nevada.

John McCormick (Assistant Court Administrator, Administrative Office of the Courts):

A lot of the background history has already been covered. The Indigent Defense Commission was created in April of 2007 (Exhibit D). I only pre-date the Indigent Defense Commission at the Supreme Court by about 8 months. It was created under the chairmanship of Justice Cherry after the exposés in the media and the concerns that were raised regarding indigent defense. The Commission filed its first report with the Supreme Court in November of 2007. In that first report, the Indigent Defense Commission made a number of recommendations to the Court, which was operating under its authority to regulate legal practice in Nevada. They recommended that judges be removed from selection of counsel for indigent defendants, which is a national best practice. They recommended that all rural counties use the State Public Defender's Office at that time. They also asked each jurisdiction to file a plan for the appointment of counsel. The first order also asked for Clark County and Washoe County to do a weighted-caseload study to examine public defender caseloads in those jurisdictions. That first order also included language as to how to determine indigence for someone who is eligible being represented by public counsel. This also was derived with the help of David Carroll, who at that time was working for the National Legal Aid and Defender Association before he founded the Sixth Amendment Center. This again was based on national best practice as far as making that determination on whether or not an individual could afford their own counsel. Interestingly enough, this standard is a statutory standard now in juvenile cases, as far as the appointment of public counsel.

That was added in S.B. 106 of the [2013] Session. It was an important issue for Judge Bill Voy then, and it still is now.

In March of 2007, particularly because of concerns related to the recommendation that all the counties use the State Public Defender's Office, the Court had another hearing to reconsider some of the aspects of that initial order that was filed. That order required new members to be added to the Indigent Defense Commission. At that time is when the first District Attorney's Office representatives were added to the Commission. Prior to that, there had been no prosecutorial representation on the Commission. Also, the initial performance standards were ordered to be reconsidered. Another rural subcommittee was formed to reexamine issues in rural Nevada. As I go forward, I'll talk about the first, second and third rural subcommittees. In March of 2007, the second rural subcommittee came into being to examine issues related to the rurals. Subsequent to that order, there was a lot of work done to revise the performance standards. At that time, Franny Forsman and Former Justice, then-Deputy District Attorney, Nancy Becker from Clark County did a tremendous amount of work on revising those performance standards. The rural subcommittee reconvened, chaired by Senior Judge Dan Papez from White Pine County and then-federal public defender, now-retired Deputy Federal Public Defender, John Lambrose. Washoe County and Clark County went ahead and moved on with their plans for delivery of counsel. As Vice Chair Christensen has mentioned, that's what the genesis of his office was. They also worked on their weighted-caseload study.

In July of 2008, while that was going on, the revised performance standards were presented to the Court. Then, the Court ordered those standards to be considered by the Rural Subcommittee. The final performance standards were approved in October of 2008, and they were to be implemented in April of 2009. I'll talk a little bit more about what's in the standards later. Also at this time, training on the standards for judges, public defenders, district attorneys and contract counsel was discussed and ultimately implemented subsequent to that. The performance standards promulgated by the Indigent Defense Commission are guidelines and they do not overrule the United States Supreme Court decision *Strickland v. Washington* as far as setting a floor for the adequacy of representation. The performance standards include standards for how counsel is to represent a defendant in capital, felony, misdemeanor and juvenile cases. Also, the standards note that they can be adjusted as necessary based upon each individual case in order to ensure that appropriate representation is occurring.

In January of 2009, at which point we'd been doing this for 2 years, the Rural Subcommittee presented its final report, and Washoe County and Clark County updated the Court on the progress in their weighted-caseload studies. The second rural report made some recommendations, and a number of these have been made again through subsequent subcommittees or other methods. The first recommendation is that the State of Nevada should completely fund indigent defense. This is based upon an idea that was hit on in a "white paper" that was included in this, and subsequently has come up in other venues, including a case which has been provided. I think it's *Tucker v.*

Idaho that considers this matter. The Sixth Amendment obligation to provide counsel through *Gideon v. Wainwright* is a responsibility of the state, and while the state may delegate some of that responsibility to the counties, the ultimate responsibility still lies with the state. So, that's an idea that came up at this time and has continued to be in play as we move forward with the Commission and the associated bills, etc., that while delegation is possible, it's ultimately the state's responsibility to ensure adequate representation.

The second rural subcommittee report was to create an independent oversight board, and that's been recommended a number of times. Senate Bill 377 in its initial form and its first reprint after it came out of Senator Segerblom's Senate Judiciary Committee did create that independent board to oversee indigent defense, set standards and review the system, but again, this was the first time it was recommended by the Indigent Defense Commission. Also, there was what some folks refer to as the Lake Tahoe Compromise. We had a big meeting in May of 2008 where the rural judges, particularly Senior Judge Richard Wagner, worked with a lot of folks and we came up with some compromise language as far as the appointment of counsel in rural jurisdictions and the level of judicial involvement, just because of the infrastructure issues. Judges continue to make appointments. However, a list of appointed counsel was developed and they appointed from that list, rather than making an appointment based on other factors. I see Commissioner Kohn smiling, because I think he was at that meeting.

Also, the Rural Subcommittee's second report recommended that the State Public Defender's Office be funded totally by the State and become independent from the executive branch (Exhibit D). At this time, the State Public Defender's Office still is part of the Department of Health and Human Services. Initially, when the State Public Defender's Office was started around 1970, the funding formula was that the State paid 80 percent of the costs to the State Public Defender's Office, and the counties picked up 20 percent. Today, that's flipped and the counties pay 80 percent of the cost of that office and the State pays 20 percent. Part of that flip in the funding formula is what has led a number of counties, as has been indicated, to strike out on their own and either retain contract public defense counsel or create a County Public Defender's Office. So, the recommendation here was that the State Public Defender's Office be fully funded by the State. Again, the State Public Defender's Office was recommended not to be part of the Department of Health and Human Services. I touched on the white paper earlier and the subsequent Idaho case. In 2009, the best number we could come up with for the delivery of indigent defense services was approximately \$46,000,000. This is one of the struggles the Indigent Defense Commission has had during its entire life, getting complete and adequate data whether or not it's funding or caseloads—particularly for contract counsel. There are some statutory requirements as far as reports being made to the county commission or the Legislature. We found that a lot of those reports maybe weren't made in their entirety, particularly by counties. This is where I'll give a shout out to the National Association of Counties. The counties have really improved and they have really stepped up their oversight in making sure counsel is filing reports, etc. Again, that's been one of the struggles we've had, getting complete and accurate data

in a number of areas on this. Another order in March of 2009 was a fairly tame order and just denied the request for a deferral of performance standards and implementation and called for a hearing on the Public Defender's Office's training on those performance standards. As Commissioner Kohn has indicated, the training, as part of the process of everyone working together on the Indigent Defense Commission across the board, has improved significantly for public defenders and contract public counsel, etc.

In another order, and this one's kind of a boring order, the court denied the request for an extension of time on the weighted-caseload study. So, then we ended up with the weighted-caseload study, and this was developed by the Spangenberg Group, which is a national research group that has expertise in this. The report found that the public defender's offices in Washoe County and Clark County would be unable to comply with the requirements of ADKT 0411 at that time. This was a fairly contentious hearing. I remember the administrative hearing we had in October of 2009 at the Regional Justice Center, and many of the folks on this Commission were there for 4 or 5 hours late into the night for that one. There was a lot of discussion regarding those caseloads and the weighted-caseload study. Ultimately, subsequent to that hearing, the Supreme Court ordered the Indigent Defense Commission to reconvene and reexamine the issue of caseload limits in light of the report. There was an impetus here, particularly for the urban counties in question, for county management and the public defenders and the county commissioners to all come together to work to improve the staffing of not only the public defender's offices, but also the district attorney's offices for parity in representation.

As we're moving forward, and now we're making it to February of 2011, basically a year has gone by with meetings and continued work on caseload standards, etc. A subcommittee was created to develop a data dictionary and worksheets for indigent defense data collection, because as I have indicated, that's always been a problem for the Indigent Defense Commission, getting that complete and accurate data. That subcommittee worked together and came up with definitions and the dictionary, and then the Court asked that subcommittee to come up with a way to collect that data. Then, an extension was later granted. But right now, it's a disparate system in terms of how data's collected. Obviously, the urban public defender and Special Public Defender's Office of contract counsel collected their data, and it's solid data, from my perspective. But in the rurals, it's all over the board. We have district courts now collecting indigent defense data using this dictionary, etc., through the Administrative Office of the Court's Research and Statistics Unit. But because of the way it's being collected in the rurals, I think we're really missing, particularly at the limited-jurisdiction level, some data, as well as a lack of confidence in the numbers being put in. The Supreme Court has never ordered that the courts collect this data, so it's been a voluntary thing by the courts. So, that's one of the reasons we have limited confidence in that. But our Research and Statistics Unit has really worked to improve that data and supply that data to the Indigent Defense Commission.

As we move forward into 2012, the Commission continued to explore additional issues in indigent defense. Ultimately in 2013, and I'm sure Mr. Carroll will cover this further when he presents, the Sixth Amendment Center issued a report that the Court asked them to do, entitled "Reclaiming Justice," which reviewed the history of indigent defense in Nevada. So, Mr. Carroll will be able to cover the pre-ADKT 0411 aspect of that. From that report, there again was the recommendation that a state-funded public defense commission be created to oversee indigent defense in the rural counties. From this report, we started working on legislation that ultimately resulted in S.B. 377 during the 2017 Session.

In 2013, the Court asked the Commission to create a third rural subcommittee report subsequent to the "Reclaiming Justice" report to reexamine the indigent defense situation in rural Nevada (Exhibit D). The third rural subcommittee report made five recommendations in October of 2014. The first one, that the State fully fund the provision of indigent defense service in Nevada's rural counties, was again based on that same idea that ultimately the Sixth Amendment guarantee of counsel is a state responsibility. Then, it made a second recommendation indicating that the subcommittee thought it unlikely that the State would be able to fully fund that, but that the counties should use the State Public Defender's Office, create a County Public Defender's Office or continue using a contract method. However, the subcommittee at that time identified that flat-fee contracts receiving a set amount of money for however many cases came that contract counsel's way were not an appropriate method. They indicated that there needed to be provisions in those defense contracts that allow for extraordinary fees, experts and investigators so that counsel was not disincentivized from pursuing cases or taking cases to trial as necessitated. One of the contentions with flat-fee contracts, and this has been looked at nationally, is always that it encourages pleas and it encourages contract defenders not to take the appropriate cases to trial and not to zealously advocate in those instances. The third recommendation from the third rural subcommittee recommended that death penalty cases in the rurals be handled by the State Public Defender at the State's expense. Death penalty cases are subject to Supreme Court Rule 250 as far as quality of representation cost often, and you'll see in rural Nevada that there are very rarely death penalty prosecutions because of the concerns of hitting the counties so much. The idea here was to have the state fund it so decision making, as far as whether or not to pursue life or death, was not necessarily contingent on county finances. The third Rural Subcommittee recommended again that the independent oversight board be created. It also recommended that the Indigent Defense Commission provide legislative support to the State Public Defender and the counties to rebalance the cost of indigent defense away from the counties.

So, for another order in July of 2015, the Court did not take any action on recommendation one, so the Court did not voice an opinion on full state funding. The court did ban flat-fee contracts that do not allow for extraordinary fees and other expenses. The interpretation of this order is in question right now as far as exactly what that ban entails, and that was discussed at the last Indigent Defense Commission, which was last week. It again recommended that the State Public Defender take over

rural death penalty cases at state expense. However, the budget is not there for that, so they continued the status quo. Again, the Court recommended that an independent oversight commission be formed, and it also asked the Indigent Defense Commission to support the legislation to rebalance the cost. The Indigent Defense Commission has continued to meet since then and has discussed a number of issues and has provided a forum to bring everybody together, including reforms in the urban jurisdictions, potential legislation the Commission discussed, S.B. 377, and the Clark County murder team project has been a topic of discussion as of late. Also at this time, the Indigent Defense Commission has always been ongoing, but the Supreme Court also was focusing on other Commission areas with staff support, including guardianship and juvenile justice. So, it's been maintained. However, the focus areas move around a little bit as necessary.

At this point, I think we can pinpoint a few outcomes from the Indigent Defense Commission. One of the primary, obviously, being the creation of the conflict counsel, the Office of Appointed Counsel in Clark County and its contract-based counterpart in Washoe County headed by Robert Bell. Also, the plans for delivery of counsel in urban jurisdictions, the performance standards, the data dictionary, the three rural reports and the increased understanding of data and caseloads. I'm not saying we're all the way there or have complete data, but I think people are getting a better idea. We're also looking, as Chair Cherry said, at caseload standards moving forward. Our research team has looked at standards from similar states. Texas, particularly, recently did a reform as far as indigent defense standards, and with the size of that state, there may be some applicability to Nevada. Also, continued collaboration between NACO and their member counties, public defender's offices, district attorneys and the courts—we had a lot of turnover on this Commission, obviously, having gone on 10 years, but everybody here, despite maybe disagreements over how we arrived there, has really had a commitment to improving the delivery of indigent defense services. Again, the counties are put in a difficult position. This is just me opining on the need to provide the service, and maybe not necessarily having the resources they'd like and having too many competing interests at the county level.

The future of the Indigent Defense Commission is, as Chair Cherry indicated, kind of up in the air, depending on what this Commission decides to do moving forward. Some possible actions include reexamination of the plans for the provision of counsel, perhaps extending that into the rurals a little bit, development of rural caseload standards, working with the Nevada Right to Counsel Commission, supporting legislative initiatives to improve the delivery of indigent defense services, and improving the collection of indigent defense data, which I think is a question this Commission may want to look at.

Since its inception in 2007, the Indigent Defense Commission has been involved with, in some way, shape or form, the legislation on this slide (Exhibit D). Assembly Bill (A. B.) 45 from the 2009 Session would have proposed that the State fund the State Public Defender's Office to fully provide indigent defense services.

At that point, it was figured at about \$486,000,000. It had a hearing in Ways and Means at the time, but it did not move. In 2011, NACO, with one of their bill drafts, advanced an idea of letting the counties create a special tax fund to fund indigent defense. It would have been funded by administrative assessments, which the Supreme Court and the judicial branch had been opposed to for the last several years, so there was a little tension there. If you want to know about administrative assessments, you can come to the Committee to Study the Advisability and Feasibility of Treating Certain Traffic and Related Violations as Civil Infractions, because we'll talk about administrative assessments to death there. But again, that bill didn't move. In 2013, the same bill came back, minus the administrative assessment. In 2015, the Commission had drafted the Indigent Defense Commission Act of 2015, but it did not ultimately find a sponsor and was not introduced. Then in 2017, S.B. 377, which was ultimately amended to create this Commission, was introduced, and its first reprint was passed by the Senate Judiciary Committee and then re-referred to the Senate Finance Committee. Then it was amended again, and that's where we are as far as this Commission.

Briefly, for the current funding status, during Fiscal Year 2017, approximately \$68,000,000 was spent in the state on indigent defense, and the total for the 15 rural counties is \$6,700,000 of that. In talking with NACO, we figured that the counties currently carry about 97 percent of the cost of providing those indigent defense services in the State of Nevada. The State Public Defender's Office, which after long years of arguably being underfunded or creating too high of a county share, plus trying to supervise attorneys all over the state from Carson City with limited resources, etc., is now down to two counties, that being Carson City and Storey County. In this most recent budget, the counties paid 76 percent of the cost share for the State Public Defender's Office to service those two counties, and the State picks up 24 percent of that. Again, just based on the International Monetary Fund's projected inflation rates, the total amount for the provision of indigent defense is going to continue to escalate. In Fiscal Year 2019, the next legislative session, using that formula, services are estimated to top \$72,000,000, with the rural share being over \$7,000,000. So, that's an overview of the last 10 years of the Indigent Defense Commission as promulgated by ADKT 0411.

Vice Chair Christensen:

I can't recall if one of the bills that came out of the Legislature a few years ago, originally from the Indigent Defense Commission—but I think it's important to note, just when we're talking about this for future meetings that—recall that we did that capital funding project a few years ago, where the Legislature came in and went around the state to ask the cost of capital—I think that's a component that should be considered within our discussions of funding, that I know there was that bill or law that was passed that went state-wide about the cost of capital expense, not only from the district attorney's perspective, the court's perspective, the defense, the prison perspective—do you recall that?

Mr. McCormick:

Yeah. It became a study on the costs of the death penalty, of capital punishment, within the State of Nevada. Was it out of 2013 or 2015?

Vice Chair Christensen:

Was it 2013 with Ohrenschall? Okay. I just bring that up, because when we were talking about costs, at least for purposes of Clark and Washoe, mostly Clark, that's a huge component of our budget. At least, with the defense of the capital cases that we carry in this community.

Mr. McCormick:

If I'm remembering correctly, it was about \$2,000,000 more in the life of the case over a comparative life only.

Senior Justice Maupin:

It's a vague recollection, but before I left the Court, there was an ongoing discussion between the Commission and the rural judges about the approval of the bills for indigent representation, and there was, at least by one of the rural judges, a vehement defense of the notion that the judges had to project the counties' financial situation with regard to decisions made by the lawyers involved in defending cases. Forgive me for not knowing this, but what is the current status of the approval of bills of rural counties, in terms of whether judges are still involved in that process?

Mr. McCormick:

Rural judges are still involved in the approval of those bills for experts, etc., in the rural counties. However, it's become much more of a system where, as long as it's reasonable, they approve it. Those have been my conversations with district court judges from across the state. In so long as the bill is not, as they perceive, extraordinary or out of line with the kind of case, they generally, for lack of a better term, rubberstamp it. That was part of that 2007 compromise. The situation, anecdotally, has gotten better in terms of judges understanding the need for those extraordinary fees.

Commissioner Kohn:

Not at the last meeting we had last week, but at our previous meeting, that did come up. I think the problem is that we don't know how many bills are being submitted that are not being approved. We had a judge from one of the rural counties who thought that paying for trials was not appropriate, that the contracts they pay are more than sufficient to remunerate the lawyers who do their work. I have no idea if that is true or not, but I think one of the biggest problems we've had, Senior Justice Maupin, is a lack of

numbers, and that is certainly something I would like to see us delve into. How many fees are sought by lawyers? Do they feel comfortable in seeking those fees, or are they likely to lose their contract because they've asked for too much money? When we talked about the cost of the death penalty, there are any number of cases that I personally handle doing death work where we exceeded \$100,000 in expert costs. I don't know how frequent that is in other communities, but I think the biggest problem we have is that we don't know the answer to your question, and I'm hoping that this Commission will delve into that and try to determine what fees are requested, not only what fees are granted.

Senior Justice Maupin:

If you were to read the phrase, "Well, the judges seem to understand better and seem to be going along with these requests," based on my experience, the Ninth Circuit would turn us into a cartoon. It would be interesting to know how many are refused, but to me, and this is just my opinion, there is no excuse for having the district court judge sitting on a case reviewing and approving bills, because they have a different view of what is needed in a case and what it's worth than the lawyers involved. It undermines the independence of the representation of the defendant. Again, that's my opinion, but there's another, more practical issue. Judges hear interim motions, they hear the trial, they hear the post-trial motions, and those bills all have work product in them, and the judge has no business knowing what that is.

Commissioner Fitzsimmons:

Following up on Senior Justice Maupin's statements, are the judges involved in any way in the rural counties in the selection of counsel?

Mr. McCormick:

Currently in the rurals, the judges are, to an extent, involved in the selection of counsel, as far as determining the list of potential appointees for conflict. The county commissions generally are the ones that select the contract counsel, and in the rural counties that have created a public defender's office, that's a county office, so the counties are hiring those public defenders.

Commissioner Traum:

I'm curious about the relationship with the state public defenders. It seems from what you've said that it was very expensive and the counties mostly have rejected it and gone their own way. My questions are, when the state does handle a case, and obviously the state seems to be stepping in if there's a death penalty case, but if the state does handle a case, does that mean there are lawyers from Carson coming into the county to handle the case, and does it also mean that, in those cases, the judges have no role at all in approving fees?

Chair Cherry:

We're fortunate to have Karin Kreizenbeck in the audience here. I'll ask her to come forward. I think that, as part of Mr. McCormick's presentation, we need Ms. Kreizenbeck to give us a little history. For those of you who did not serve on the Indigent Defense Commission, I've worked with Ms. Kreizenbeck and the previous State Public Defender. Ms. Kreizenbeck, why don't you lay out exactly what your office is doing at this time, and if you could answer Commissioner Traum's question about how it works as far as indigent defense in the rurals, as far as the State Public Defender is concerned.

Karin Kreizenbeck (Nevada State Public Defender):

As stated, the Nevada State Public Defender's Office currently serves Carson City and Storey County. We basically operate as a county public defender for those two counties. We have an office in Carson City that has eight attorneys, two investigators and three secretarial staff. We also have two attorneys who operate as appellate attorneys. I'm appointed by the Governor, so he appoints the State Public Defender, and then I hire staff to support the office. The judges have no direct impact and no direct say as to who I hire. Certainly, since we practice in front of them, I ask their input and take it very seriously, but they could not tell me who to hire or how to conduct business in the office, other than that their opinion is important because we practice in front of them on a routine basis.

Chair Cherry:

If the State Public Defender were to represent all the counties that do not have a public defender's office, what other counties would you be looking at? I know Douglas County and Elko County have public defender's offices.

Mr. McCormick:

I think I know the current status as far as which counties use what methodology. Currently, the two urban counties are statutorily required to have their own public defender's offices. As far as the rurals, Churchill County, Lyon County, Douglas County, Nye County, Mineral County, Esmerelda County, Lincoln County, Eureka County and White Pine County all have contracts. Elko County, Pershing County and Humboldt County have created public defender's offices in the rurals.

Chair Cherry:

So, the urban counties, Washoe and Clark, have public defender's offices. What were the others?

Mr. McCormick:

Elko, Humboldt and Pershing are the three rural counties that have created an institutionalized public defender's office. Pershing and Humboldt have a good relationship, and their public defender's offices sometimes act as conflict counsel for each other under an agreement.

Chair Cherry:

So, if this Commission talks about expanding the jurisdiction of the State Public Defender, and of course having to pay that to relieve the counties that do not have public defender's office so that we'd have a State Public Defender that's really—I'm sure David Carroll is going to comment on this, but how many counties then would the State Public Defender cover besides Lyon and Carson?

Mr. McCormick:

It would be Storey County and Carson City. Then, counting those two counties and the two urbans, then the three rurals, that's seven, so then the State Public Defender's Office would have to expand up to 10 more.

Chair Cherry:

So, that's where we stand on indigent defense in this State right now, as of 2018. So, it's Storey County and Carson City only?

Ms. Kreizenbeck:

Correct.

Chair Cherry:

So everybody now understands that the State Public Defender is like a county public defender for two counties, right?

Ms. Kreizenbeck:

Correct.

Chair Cherry:

I see no other questions from the Commission for Ms. Kreizenbeck or Mr. McCormick.

THE CHAIR CALLED FOR A BRIEF RECESS.

Our next speaker is David Carroll of the Sixth Amendment Center. When Senior Justice Maupin appointed me to be chair of the Indigent Defense Commission for ADKT 0411, Gary Peck was one of my members, and he said, "You know what, there's this guy who's with the National Legal Aid and Defender Association. He really knows a lot about indigent defense. Maybe if you get in touch with him, he'll help you out." I was fortunate enough to get in touch with Mr. Carroll, and he was really a stalwart consultant for the Indigent Defense Commission. Then, he started an organization called the Sixth Amendment Center. He's here to provide testimony. He's conducted work for the Indigent Defense Commission of the Nevada Supreme Court and has assisted other states that were looking into their own criminal defense systems. He's going to provide us with a historical background of the right to counsel in Nevada, and then he'll discuss work that he proposes to do to assist this Commission. Mr. Carroll, thank you for coming to Carson City, and thank you for all the work you did for the Indigent Defense Commission. You're such an expert in this field it's incredible, on the Sixth Amendment and the right to counsel and indigent defense. What you've done throughout the United States to promote commissions like this is just incredible, as far as I'm concerned.

David Carroll (Executive Director, Sixth Amendment Center):

I am David Carroll, Executive Director of the Sixth Amendment Center. We're a non-partisan, non-profit organization that provides technical assistance to governments across the country. We're based in Boston. I've been doing this work in one form or another for over 20 years. In that time, I have had the great pleasure and privilege of traveling all across this country. I've now been to 48 of the 50 states studying these issues. Over my career, I have testified before the U.S. Congress. I've recently testified before Chief Justice Roberts's Commission on the Federal System. I've testified in numerous state supreme courts and legislatures all across the country. This morning's presentation is intended to place the critical work that you've all been asked to do in its proper historical context.

In 1963, the U.S. Supreme Court determined in *Gideon v. Wainwright* that the 14th Amendment requires states to provide Sixth Amendment lawyers to poor people charged with felonies, announcing, "The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours" (Exhibit E). Subsequent cases have clarified that the right to an attorney extends to any criminal or delinquency case that may result in incarceration. Indeed, lawyers have to be provided to any critical stage of such cases. I put these cases up not to just go through every single line here, but to show that the Sixth Amendment case law is continually evolving, so the burdens that are placed on rural counties continually change and have to be updated (Exhibit E).

So if the right to an attorney for those who cannot afford one starts in 1963, why was a 30-year-old harness maker accused of a series of stagecoach robberies, named Shep Wixom, questioning the fairness of his being tried without counsel in Lander County some 90 years prior to the *Gideon* decision? Wixom was arrested in Battle Mountain.

He 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 fit the general description. He was most assuredly guilty. To begin to understand what was happening in the 1870s in Lander County, one turns again to the *Gideon* decision. The Court stated, "From the very beginning, our state and national constitutions have laid great emphasis on the procedural and substantive safeguards designed to ensure fair trials." Is that true, from the very beginning of our country? The answer is yes. Courts have been appointing counsel since before the Sixth Amendment was ratified or even before we had established our independence. The presentation shows the very first right to counsel statute in our country, the 1660 in Rhode Island (Exhibit E). The right to counsel goes to the very core of what it means to be an American. The Europeans that had 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. That's right, in England, the law was that a person accused of treason or a serious crime was to be denied the assistance of counsel in defending himself against his accusers.

After the Revolution, the inalienable right to be at liberty free from undue governmental interference led the framers of our Constitution to create 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. 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, protections 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 overreach. 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."

Even before the Bill of Rights was ratified, Congress passed the Punishment of Crimes Act of 1790. Section 29 authorizes and requires federal courts to appoint counsel to anyone charged with a capital offense wanting a lawyer. And why is that important? Up until the latter half of the nineteenth century, the vast majority of crimes in this country classified as felonies were potentially punishable by death. Since most states after the founding of the Constitution were created from U.S. territories, the right to counsel preceded statehood in most areas of the country. Moreover, criminal proceedings were actually quite rare in the 1800s. Trial judges would ride a circuit around the state, hearing cases in one town on one day and the next town when they could get there. Any cases that required the judge's attention would simply have to wait until he could get to the next town. There were also relatively few attorneys, and those few often rode circuits with judges. So, when criminal cases came up, it was frequently fairly convenient to appoint an attorney rather than to have the defendant try to defend his own interests.

In January of 1874, Shep Wixom finally got his day in court. He was arraigned in front of the Honorable DeWitt C. McKenney, who had set trial for a few days later. Judge McKenney would have appointed a lawyer, as was his custom in other counties, but with no lawyers appearing in Lander County that day, he just went ahead with the trial. Wixom was found guilty. But what happened next is what thrust Nevada to the very forefront of the right to counsel in America. First, Thomas Wren, a former Austin city prosecutor and Nevada Assemblyman from Eureka, entered Assembly Bill 122 of 1875, requiring counties to pay attorneys a fee of \$50 whenever they were appointed to represent an indigent defendant. As that was happening, Wixom eventually was able to make arrangements to sell what little property he owned to hire an attorney. Unfortunately for him, the only legal action available to him was to petition the Nevada Supreme Court. The Court granted the writ and considered what the right to counsel meant in Nevada 140 years ago. Through dicta in the Wixom 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. 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 a direct appeal. In a sad twist of legal irony, had Wixom been able to retain counsel within the appellate filing deadline, it is very likely his conviction would have been overturned on direct appeal and a new trial ordered.

But the Court did not stop there. Justice William 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, "A statute passed since the trial of this petitioner has made provision for compensation of attorneys appointed to defend 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 in Nevada, the failure to appoint counsel to the poor in a criminal case was a valid reason to overturn convictions on direct appeals.

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 2 years later in 1879. The case involved, among other things, the payment of counsel in the controversial death penalty case. It is a case called *Washoe County v. Humboldt County* about who was going to pay the fees. 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 courts with any such discretionary power. Instead, it was the intention of the Legislature to provide for the payment of a fee, not exceeding \$50, to every attorney who defended a prisoner charged with a crime. In other words, Nevada was the very first state in the country to require that counsel be appointed to the indigent accused in all types of cases, including misdemeanor cases, which didn't come about in most states until 1972, and the first to require the payment of the attorneys for

those services rendered. Nevada is absolutely the first state. This is all chronicled in the report we did for the Nevada Supreme Court called "Reclaiming Justice" (Exhibit F).

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, which is a group funded by the U.S. Department of Justice, published what became known as the Model Public Defender Act that it recommended all states 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 all those 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 influence on the work of the agency.

If created today, that 1971 act would meet virtually every national standard related to the independence of the defense function, namely those promulgated by the American Bar Association (ABA) known as the "Ten Principles of a Public Defense Delivery System." However, Nevada's commitment to anti-tyranny began to fade from that point forward. In 1975, only 4 years after creating the Commission, the Legislature did away with it and voted instead to make the State Public Defender a direct gubernatorial appointee. 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 percent cut in their budgets. The problem is that public defenders are constitutionally required to defend all the people they are appointed to. Unlike other aspects of government, the defense practitioners do not control their own workload. Therefore, a 10 percent budget cut is impossible to be implemented if it is not met with a 10 percent cut in workload. At least, it is impossible if one cares about providing ethical representation. But despite the ethical considerations, my experience has been that public defenders who are direct gubernatorial appointees are likely to cut the 10 percent rather than risk being replaced by someone who will do what the governor asks.

Indeed, independence of the defense function is not just good public policy, it is the law. In the 1979 case before the U.S. Supreme Court called *Ferri v. Ackerman*, the Court determined that independence of appointed counsel to act as an adversary is an indispensable element of effective representation. 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 alone, the Court concluded that a public defender is not amenable to administrative direction in the same sense as all other state employees. The principle was re-affirmed in *Strickland v. Washington*, where Justice Sandra Day O'Connor, writing for the Court, stated that independence of counsel is constitutionally protected, and that governments violate the

right to effective assistance when they interfere in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.

In 1989, the Nevada Legislature further compromised the independence 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 all the other Department of Human Services agencies. From there, the Director of the Department of Human Services would have to argue all of their needs against the needs of all the other executive branch departments. As Mr. McCormick told you, without an independent voice to advocate for appropriate resources, the State's commitment to the rural counties deteriorated. As originally conceived, the State paid for about 80 percent of public defender costs in all rural counties, and the counties funded the other 20 percent. The State's financial commitment slowly eroded to the point where the State started providing 20 percent and the counties had to pick up 80 percent. Counties quickly learned that, simply by opting out of the State system, they could spend less money to provide the services and, importantly from what we've heard from the rurals, exercise local power over their public defense systems rather than being dictated to by Carson City. 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. In most instances, the county governments established systems in which the attorney contracted to provide representation in an unlimited number of cases for a single flat fee, and these contracts almost predictably always went to the lowest bidder.

My first visit to Nevada came 20 years ago in 1998. I worked at that time for a group called the Spangenberg Group, and we were asked by the Supreme Court Committee on the Elimination of Racial, Gender and Economic Bias in the Criminal Justice System to look at indigent defense services in Nevada. The two basic conclusions of that U.S. Department of Justice and ABA report were that indigent defendants throughout the State of Nevada were not afforded equal justice, and that the State indigent defense system was in crisis at that time. But because there were major systemic deficiencies in the two urban counties as well as the rural counties, and because your population centers are obviously in those two counties, groups went to work on fixing those problems first. By that time, I had switched over to the National Legal Aid and Defender Association, and we were retained by Clark County to do a study of their public defense system. To its credit, Clark County responded to that report with significant increases in resources and staff, to the point where the Clark County Public Defender's Office is now, in my opinion, seen as one of the national models in this country and is recruiting from all the top law schools in the country. Clark County also created a coordinated and independent conflict panel to handle the conflicts, in addition to what we know of as the Special Public Defender. I should mention here too that, although Washoe County was not formally studied, the original Spangenberg report from 1999 criticized their conflict system. As we've heard today, Washoe County picked up their responsibility, working to

create an alternate public defender in a coordinated contract system for the rest of the conflicts.

In thinking about where we're going forward, I want to take a moment just to go back to that history from the 1870s, because I kept thinking when I was doing this report, just who was this Shep Wixom that was accused of these stagecoach robberies? It is, of course, impossible to go back in history and see what a competent attorney would have been able to accomplish for Mr. Wixom, but some evidence suggests that a well-qualified lawyer could have made a difference. What was Wixom's criminal history, for instance? Wixom was arrested and jailed on suspicion of stealing a horse. He was eventually totally acquitted for that. But while he was in the Lander County jail, it is true that he befriended a woman named Hattie Funk, who was accused of murdering her husband. When he left jail, he did help Hattie temporarily escape. Although she too was acquitted of the charges against her, and evidence suggests that it was self-defense against an abusive husband, Wixom was found guilty of abetting that escape and sent to the Nevada State Penitentiary. However, he soon received a full and complete pardon from the Governor. And what about Wixom's character? Wixom's short stay in the Nevada State Penitentiary coincided with a large-scale escape plan by 29 other prisoners in September of 1871. The prisoners overtook the guards, broke into the armory and stole weapons. In what's been described as an "epic gun battle," 20 prisoners made their escape. But some time later, after Wixom was pardoned but before his arrest on the stagecoach robberies, Wixom became aware that one of the escapees, a person named Chris Blair, was living in Ogden, Utah. Wixom told law enforcement where Blair could be found. Blair was captured and returned to the Nevada State Prison. In the hands of a competent lawyer, such actions could be used to either demonstrate that Wixom was of good character, or perhaps show motive for why true outlaws like Blair may have wanted to set Wixom up as the fall guy for the stagecoach robberies.

Shep Wixom is buried in Tuttle Gulch Cemetery in California. Thanks to the electronic information age in which we now live, a photograph of Wixom's headstone is publicly available. The headstone indicates that Wixom was a Union Civil War veteran. He enlisted in Detroit in February of 1863. At the age of 20, he was a private in Company H of the Michigan 9th Cavalry Regiment. Wixom's regiment fought numerous battles against the Confederate Army as they wound their way through Ohio, Kentucky, and on into Tennessee and Georgia. He was one of the few people who stayed with General Sherman on his famous march to the sea that many historians credit with breaking the backbone of the Confederacy. Two months before Robert E. Lee would surrender in April of 1865, Shep Wixom was wounded in one of the final battles of the Civil War. Rather than abandon the cause, Wixom transferred to the 17th Regiment Veteran's Reserves, which was known at the time colloquially as the "invalid corps." Despite their massive injuries, the men of the Reserve Corps aided the front lines with communication and supplies to the extent possible. Wixom remained in the invalid corps until November of 1865. With a competent attorney, Wixom's military career could also have been used during his trial to show good moral character and to counter the public

perception that he was a notorious highwayman. This may have gone a long way with Wixom's jury, given Nevada's reputation as the battle-born state that achieved statehood in part to help Lincoln win the war effort.

With that, I'll close on this note from the U.S. Supreme Court case called *Cronic* to really underscore what you're all doing here. Of 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. That's what you're all doing here.

Chair Cherry:

Mr. Carroll, could you comment on the situation that we face right now with the State Public Defender? Any suggestions? We've got Assemblywoman Benitez-Thompson, Senator Segerblom and Former Assemblyman Grady here. We've got county people here that are picking up the tab. What would you say to Assemblywoman Krasner and Senator Segerblom about the State Public Defender's Office? It's representing 2 counties out of 17.

Mr. Carroll:

I think there are two main points on that. First of all, this understanding of *Gideon* is not just a Sixth Amendment case. It's also a Fourteenth Amendment case. So, what we know from the Court is that it's the state's obligation to provide Sixth Amendment lawyers. They have never ruled on whether the state can pass that obligation onto the counties, but what we do know is that, if a state chooses to pass it on to their counties, the state still holds the obligation to ensure that the counties are able to do it and are in fact providing effective representation. Nevada simply has no infrastructure or ability at this time to do that. There's no way to go out and look at what's going on in the counties and assess them against others on the Sixth Amendment to say they're doing it well or they're not. The State Public Defender could play that role without a doubt.

I think one of the mistakes that happened with the State Public Defender is this idea that the model of having a staffed public defender in every office was the best model. National standards, including the ABA's "Ten Principles," say that if there's enough of a caseload, you should have both a public defender and a private attorney model. I suspect, because I haven't been out to the rurals, that there's not enough of a caseload in many of them to sustain a public defender's office. I think the State Public Defender, if it was going to take over the responsibilities, probably needs to have a dual system where, if there is enough of a caseload that could support having a staffed public defender's office, they should do so. That might include region-wide in certain areas, being able to say a public defender can handle these two or three counties. But where there aren't enough cases or the expanse between counties is so large, I think there always is going to need to be a private counsel system, much like we've heard Vice Chair Christensen running in Las Vegas. So, I think that's a key component of saying, "Just how do the systems function out there as best they can?" But if the State Public

Defender had the independence it needed and the resources and ability to play that oversight role, I think it's very easy to move to the type of system that's going to get you out of some of the massive litigation that's going on around the country on these issues.

Commissioner Fitzsimmons:

I worked in the State Public Defender's Office here in the 1980s when it did cover substantially the entire state other than the urban areas, and we did have regional offices. I was the appellate deputy after a period of time. You always look back at glory days, but it was a fabulous office. That's when the State Public Defender was Tom Perkins. He's a judge now in Douglas County. There was a horrible death penalty case in Winnemucca and we all went out there. It seemed to work very well, and that's when he was a direct appointee of the Governor and was not competing with starving babies in rural counties. When you're put in with the Department of Human Services, and I hate to say it, but you're sitting there saying, "The crooks need some of this money." It's just really hard. I just want to speak out. I understand there are members from the rural counties who had very disappointing experiences with this availability and the resources of the State Public Defender. It was not always the case when they had adequate funding.

Commissioner Traum:

You talked a little bit about some of the markers of the infrastructure for the State Public Defender's Office if they were to take on that role. I was wondering if you could check through those. Obviously, independence and funding are two of them. I'm just wondering if there are some states that have this urban and rural mix, maybe not quite the breadth of geography that we have, but I imagine there are, in terms of how a system like that integrates training and selection. So, just a list of check marks that you would normally put on that list of infrastructure.

Mr. Carroll:

You've set me up for my next presentation, so we can jump right in. I do have a background in what other states are doing, and I'm happy to answer those. Maybe we should just go through this first, because you don't necessarily have to reinvent the wheel. There are options out there on some of this. So, I recently did the type of report that I'm going to suggest that you all should undertake in Utah (Exhibit G). I want to talk about what I found there and the problems they had in their rural counties, because I think there are a lot of similarities. But I'll also go through those parameters of the Sixth Amendment that you need to be meeting on that as well.

All right to counsel services in Utah are delivered and funded through local contracts with individual lawyers and law firms, or with private, non-profit, public defender's offices (Exhibit H). There is a misdemeanor court in Grantsville, Utah in Tooele County. Like many of Nevada's counties, Tooele is geographically large, about the size of

Connecticut and Rhode Island combined, but sparsely populated, with about 50,000 people. So, I think there are similarities there between what we've heard this morning from some of the rurals. In January 2014, I observed a young woman, whom I will call Mary Smith, appear for a status hearing in this misdemeanor court. She had pled guilty to issuing a bad check, which in that state is a Class C misdemeanor, sometime prior and had been sentenced to attend Alcoholics Anonymous (AA) classes and to pay fines and restitution. As she stood before the Court that day, the judge applauded her for attending AA classes, but noted that she had yet to put any money toward her fines and restitution. "Are you prepared to pay anything today?" the judge asked her. The woman replied, "Judge, I am here to turn myself in. I am ready to have this whole thing over with." Somewhat incredulously, the judge asked her point blank if she was seeking to go to jail. Acknowledging that she had no money and no job, she stated, "I see no prospect of paying, so I want to go to jail." The judge said, "Ms. Smith, I am worried about your sense of hopelessness." "I am okay with it," she said. "I don't want to keep coming here, acting like I can pay when I can't pay. I am trying to take responsibility." The judge said, "While I appreciate that, I am a little concerned. You seem depressed." She said, "Well, I just want to have this behind me." The judge said, "If I put you in jail, you understand that they are going to do a urine screen. What are they going to find, Ms. Smith?" The defendant said, "Probably THC (tetrahydrocannabinol), pot and definitely alcohol." "Well, your drug use is probably why you're depressed, and jail's probably the best place for you," said the judge, and called the bailiff over and took her into jail.

In an interview upon conclusion of that docket, I had the chance to interview the judge and sit down with him. I said, "Judge, I've got to ask you about this case. When Ms. Smith was originally arraigned and the plea was taken, did she have a chance to have a lawyer?" He said, "No, without jail on the table, she didn't need a lawyer, and she was only getting fines and fees. So, no, she didn't have a lawyer. Therefore, I confirmed when Ms. Smith appeared in court that day that she was not under a suspended jail sentence." When I asked by what authority the judge put her in jail, he stopped and paused, got a weird look on his face and scratched his head and said "Mr. Carroll, you ask really tough questions." I said "Well, do you think the defendant knowingly and intelligently decided to go to jail today without counsel to advise her?" The judge said, "Absolutely. We like to see people taking responsibilities for their answers like that." He believed this, despite the assumption that she was depressed and her admission in open court that she was on drugs.

Our subsequent report showed that approximately 62 percent of all people passing through Utah's misdemeanor courts do so without ever speaking to an attorney. That's about 43,000 defendants annually. All misdemeanors in Utah carry a potential jail term, which means the right to counsel is triggered. Why was this happening? Well, earlier when I said that these people were going to jail without talking to a lawyer, I bet you thought I meant talking to a defense lawyer. But that wasn't the case. You see, the judge in Mary's story also was not a lawyer, and there was no prosecutor in the courtroom either. Now, it is true that in Utah, and I heard this from the appellate courts on down, a defendant has a right to a de novo appeal. For those of you who aren't

lawyers, that's basically a do over. We're just going to redo this in the higher court and you're not going to be biased based on anything below. But of course, as we said of 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. How many people think an indigent defendant, a poor woman of moderate background on drugs, knows what a de novo appeal is? Without an attorney, they can't have that right and do what needs to be done.

Now, let me explain what else was going on in that courtroom. In Utah, because no state monies were used to fund indigent defense services, the counties paid for everything. It was therefore common practice in rural counties for the prosecutor to contract directly with defense lawyers. The lawyer contracted to handle the Grantsville courtroom was paid \$600 a month to handle every case in that courtroom. With about 25 cases per month, that amounted to about \$24 per case. And, of course, any trial-related expenses had to come out of that defense lawyer's pay. The lawyer in question told me that he couldn't afford those rates to cover initial hearings and status checks. Indeed, this lawyer decided to take contracts in two other counties, in Box Elder County and Juab County. Now again, we are talking about counties slightly smaller in size than all of New Jersey, so the drive time just to staff courts each week ate up a significant amount of his days. Through all his contracts and what private work he could fit in, he earned \$37,000 per year. This amounts to \$18 an hour. The attorney also needs to pay his overhead costs out of that, things like his insurance, his telecommunications bill, his Bar dues, etc. To give you a comparison about how low that is, the Mississippi Supreme Court determined in a case challenging that state's assigned counsel rates that indigent defense attorneys are entitled to a reasonable hourly fees, in addition to overhead expenses, and took testimony that the Mississippi State Bar Association knew that the average overhead rate in that state was \$34 per hour. So basically, it was double what they were paying these attorneys in Utah. And did I mention that that case in Mississippi is now 27 years old? We're talking about people in the 1990s in the Mississippi delta needing to be paid \$34 per hour just to cover costs.

Our principal finding in Utah was that the state needed to pick up its Fourteenth Amendment and start ensuring that these counties were able to do it and that they needed to meet the basic parameters of the Sixth Amendment. Now, what are those parameters? I told you I'd get to it in this presentation. As the Supreme Court said in *U.S. v. Cronin*, "The right to 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. If the process loses its character as a confessional between adversaries, the constitutional guarantee is violated." The Court would further clarify, "While a criminal trial is not a game in which participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Now, clearly Utah was failing this requirement. The good news is that the Utah right to counsel system is rapidly changing, and we will get to those changes in a little bit. But for right now, I want you to understand the nadir of what a non-functioning system could

look like as we delve into the parameters you must meet, as indeed all state and county systems must meet.

Now, this graph in the report basically says there are two cases that were tried and heard on the same date in the US Supreme Court, *U.S. v. Cronin* and *Strickland v. Washington* (Exhibit G). They're supposed to be seen as a continuum. Basically, *Cronin* asks, "Can the system itself afford the accused a fair fight?" Then and only then, if it passes that threshold, can you move to *Strickland*. Having determined that no systemic deficiencies prevented a fair fight, you can then look back and see if the attorney provided ineffective representation. But you have to get through *Cronin* first. *Cronin* basically says there are certain circumstances where the structure is so deficient that any lawyer would fail to provide effective representation. Then they turned to the case of the Scottsboro Boys in a case called *Powell v. Alabama* as demonstrative of the type of systemic deficiencies that prevent *Strickland* from being appropriately applied in looking backwards.

In that case, the judge hand-picked the attorneys, who did not have sufficient time to adequately defend the accused, and the attorneys were not qualified without the proper training to handle the complexity of the issues in that case. That is basically in a nutshell what every system must do. It must have independence from the judiciary. The attorneys must have sufficient time to prepare, and insufficiency of time can be due to too many cases, trying to cover too many courtrooms or other things. The lawyers have to be qualified, they have to be trained and they must be supervised to make sure they can handle the complexity of the cases. When governments structure indigent defense systems in ways that interfere with all of this, that is the basic threshold at which you will be considered presumptively ineffective. So, it works in the inverse of *Strickland*. I don't want to get too technical for people who aren't lawyers.

Basically, what we do when we do these type of studies is we go around and apply those *Cronin* criteria in looking at the county systems and trying to determine if they're meeting them or not. Now, I can tell you when we were in Utah, one of the great pleasures was that we found places that were doing good things, and they could be used as models for the rest of that state. So, there are places now in Utah where they created an indigent defense commission much like yours in 1971. The state is funding a lot of the services in that state now, but they're doing it through different models. So, one of the interesting things is that in our report, we said, "Provo is doing an excellent job on that, and there are a lot of rural counties around Provo that could easily be reached by this office. Wouldn't it be great if maybe this office could start doing some of the work in some of those counties?" Those counties agreed and started contracting with that local public defender's office to serve them as well. This benefited both Provo and those other counties. The state said, "This is so good we want to help you," and contributed a lot of that funding.

So, this is why you really need to get out and see what's going on in all of your counties, because we don't know. We've been studying this through the Indigent Defense

Commission for 10 years now, and we just don't know. We've heard testimony from lots of defenders and judges saying, "We think we're doing a good job. Please come out and look at us and determine if we're doing a good job or not." That's what I propose you all have us do. It's what we do, and we do it all across the country, going out and doing a cross section of some of the rural counties and really spending time out there talking with people. When we do these studies, we do 360-degree interviews. We talk to the judges, we talk to law enforcement, we talk to prosecutors, we talk to defense counsel and we talk to the court clerks. We try to understand what the constraints are that all of them are facing when trying to provide effective representation. We do courtroom observations, as we demonstrated in Utah. We sit in your courts and we look at what's going on. Just so you know, we're not sitting in on trials. That'll tell you something about the attorney themselves. We look at these early hearings, where you see a lot of things happening fast. Are attorneys just meeting clients before they're offering plea advice? Things like that. We look at what they're doing. We try to see if attorneys are qualified. What training have they had? What background do they have? We also do a lot of data crunching. As you can see, no one in Utah knew that 62 percent of all misdemeanors went through the court without ever talking to an attorney. You can only do that by getting into the data in the local areas and really working with the court clerks and trying to put all that together. So, I'll pause and see if there are questions about the parameters, but also general questions about what I've seen elsewhere or how I think you all could benefit from having this type of study out in your rural counties.

Chair Cherry:

Commissioner Traum, does that help you with your question?

Commissioner Traum:

It does. We know that institutional defenders do better generally, especially on training, so that's one of the things I'm wondering if, in Utah or elsewhere, you've seen some kind of integration or cooperation between people who are on contracts and the institutional defenders, or some system where training is really integrated somehow with that panel of lawyers or whoever is providing the services.

Mr. Carroll:

One thing that I think I've recognized in Nevada is that, because there are good public defender's offices in Clark County and Washoe County and because you have a federal defender's office that's been actively involved in your reforms, people think of public defender's offices as that model, and that is a good model. But I can tell you that I've been to public defender's offices in other places that are just as terrible as some of the things you saw in Utah. We're about to release a report in Detroit, which is just one of the most efficient systems I've ever viewed in my life. They have a public defender system. I don't want to be caught saying public defender's offices are the only model. It is true that good benefits come if there are enough cases, things like specialization. If

you have a large office, you can have a serious sex crimes unit so people aren't having to relearn all the different aspects of those things to get up to speed, as you would if you caught one of those cases somewhere else as a private lawyer. It's true that you can have, as Commissioner Kohn mentioned, these 10 to 12-week training, continual supervision and other things doing that, but I come from a state where the majority of indigent defense services are a private system. They have just as good training, if not better, where they have classes that undergo several weeks of training and you have to be monitored and mentored and supervised, and it's an entirely private system. I don't want to get out there and say that it's one model or the other. What's important is that whatever model is chosen, it's independent. It has qualified attorneys, it has a way to ensure they stay qualified, that they're continually trained, continually supervised, that they have sufficient time to do what they're being asked to do. In Detroit, that's one of the problems. There are so many parts they have to staff that there's no time to actually do any work on the cases as well.

I don't know what the answer is for Nevada. It's been one of those issues, as I've worked with the Supreme Court taskforce, I've been wanting to get out to the rural counties and see it for myself. I feel like I've made friends with a lot of the judges and a lot of the county executives in some of these places. I'd like to go out and sit and see what it's like. For example, hearing that Mineral County is 4,000 square miles and only 3 percent of it is private. I didn't know that, and that's the type of thing that greatly impacts the resources you can put into those cases. When we do the 360-degree interviews, it's not just criminal justice stakeholders, it's the county management, and the people who are making the fiscal decisions to do that. I don't know what your answer is, except that I do think something like this Commission should be permanent, it should be overseeing something similar to what the State Public Defender has traditionally been thought of, but I think it's probably going to need some combination of private and public systems to be able to match what's going on out in the counties. But I can't say at this point.

Senior Justice Maupin:

If you go back to this *Cronic-Strickland* continuum, you indicated that the first threshold issue that has to be resolved in any particular case is whether there's a systemic problem affecting the ability of the lawyer to provide a defense that satisfies the Sixth Amendment. It seems to me that it should be reversed, because you should look at the individual case first, because if you look at the systemic issue first, you have a much broader set of issues that create more expense. Challenging the jury pool, for example, has always been, at least in Clark County, problematic. A lot of people in the old days used to think that people who owned dogs that had dog tags were not an appropriate demographic segment from which to pull jurors. Having said that, if you end up having to attack the system first as a threshold matter, as a trial lawyer, you might have some reservations about that, because the first thing you've got to do is attack what your own office is doing, which usually puts the public defender completely out of joint, because that person is having to deal with the political system. You have to argue that whatever bureaucracy for payment exists has a problem, and then of course you have to attack

possibly the political subdivision that is funding you. Maybe I'm missing something, but it seems to me that to resort to something that sensitive and political, particularly when you have—I've been a politician. Judges run for office here. When someone challenges whether you are right or not, you end up with almost a personal issue that now bleeds into an analysis of what's happening with the system, so these systemic attacks have built-in issues with regard to an objective analysis, because at every step of the examination of the systemic problem, you run into someone that you're making wrong. So, maybe I'm missing something, but can you discuss that a little bit?

Mr. Carroll:

There are several parts there to unpack. When I first started thinking about this, I had the fortune to hear Sandra Day O'Connor speak at a *Strickland* symposium. Defense attorney after defense attorney stood up there and basically yelled at her for *Strickland*, saying, "The threshold is way too high, we can't possibly—it's terrible law. Why did you do this?" She finally got a little frustrated and said, "The problem isn't *Strickland*. The problem is that the states aren't fulfilling all their other Sixth Amendment parameters that they need to be doing." That got me thinking about really looking at that, and in *Strickland*, there's a presumption that they have done all the things they need to do structurally. When we talk about this, we're not talking about an individual lawyer's strategy about attacking this. We're talking about what the parameters are of what the Court says is a functioning system. Now, what's true is that, in the past probably 5 years, 6 or 7 state supreme courts have all ruled that you have a pretrial right to attack the system under *Cronic* and under these parameters. It's a growing body of case law from the states. It's true that it's been developed through systemic class action lawsuits like the type your state is facing from the ACLU. But it is developing this whole realm. It hasn't gotten to a point where I think it can work from an individual lawyer's attack for all the reasons that you mentioned, Senior Justice Maupin, but it doesn't alleviate the point that these are what the Supreme Court has set as the markers of a functioning system that must be met in each case.

Senior Justice Maupin:

That's a very good explanation, but it seems to me that, in practice, the lawyer does have the ability to forego the *Cronic* analysis and go straight to the *Strickland* analysis.

Mr. Carroll:

And that's what most attorneys do, in that they file a *Strickland* appeal and they approach it that way. But it is developing that you can attack this stuff pretrial under *Cronic*.

Commissioner Fitzsimmons:

Having been out there, I still go out to the rural counties, but not in the court system. I just want to suggest that they're going to know if you're coming. It's what Senior Justice Maupin was talking about. The judges are going to be on their best behavior and whatever attorney is representing. Everybody's going to be on their absolute, best behavior. I'm sure you've figured out ways to deal with this. This isn't the first time you've dealt with that. Do you talk to the defendants? It's hard, I know. At what point do you talk to them? But is that also included in your scope of services?

Mr. Carroll:

It's not, so let me address the first part of what you're talking about. In every study that we've done, we've notified the court where we're going to be and what day we're going to be in their courtroom. When I get there, I pass a business card out to the bailiff to make sure the judge remembers that I'm going to be there. I typically try to schedule an interview with the judge after that docket so I can talk about what we've immediately seen. When people are working in deficient systems, they're not consciously thinking, "We're trying to do wrong by the defendant." They believe they're doing right. This judge in the Utah story was delighted that someone from the East Coast would make their way out to Grantsville to care what he thought about what was going on in those courtrooms. Let me put it this way. In my travels over the 20 years, I think probably 95 percent of everybody I've met in the criminal justice system and in county government are good people trying to do good things. They take on this work because they want to give back to their community. They're trying to do it right, they just don't necessarily either have the knowledge they need to do it right, or more likely, it's just the way the system evolved. You learn the system you're thrown into. So, you can't hide systemic problems. You can polish it a little.

Commissioner Fitzsimmons:

One thing you said specifically before this interaction was that you're going to go in and you're going to observe and get a sense of whether or not defense counsel interviewed their client or they're just doing it that morning. I'm following up on what Senior Justice Maupin said. If I knew you were coming out, I would just think, "Well, I want to do the best I can do, so this weekend I'm going to go and I'm going to talk to all my clients," probably for the first time in 4 or 5 months, because usually I probably wait until that morning. So, I agree generally, you don't know what you don't know, and that's the people you're interviewing.

You talked twice about private systems. You said in your state there's a private system that is excellent, and you talked about sometimes a mix of public and private. I don't know enough to know what that private system you're talking about is. Do you mean just one lawyer with an office on a contract, or do you mean a system set up that's basically a law office that contracts in different areas?

Mr. Carroll:

There are a multitude of various functioning private attorney systems in this country. In my state, it is individual lawyers who are paid hourly by a state commission, but they have to undergo training. There's supervision over them. They have contracts with private attorneys to play the role of supervisor. So, in the western part of our state, the rural part of our state, it's nothing like the rural parts of your state, but it is a way that they can have supervision and oversight and monitoring of those people and be able to do that. Now, our system pays very well. In Massachusetts, we have 6,000,000 people, I believe. We spend \$230,000,000 a year on indigent defense. So, it's a very robust, well-developed system. They have excellent training. They have just some of the best holistic approaches to juvenile representation. But you go just to the north and west in Oregon and it's an entirely private system too. Except that the private system there could be individual lawyers, a consortium of lawyers, law firms or non-profit public defense systems. They use a multitude of ways to do it to be able to cover their area. So, the urban areas do have these non-profit public defense systems contracting with the state, but most of that state is either law firms or individual lawyers doing it.

Commissioner Fitzsimmons:

So, Vice Chair Christensen's system would be deemed a private system under your description?

Mr. Carroll:

Yes.

Commissioner Fitzsimmons:

Okay, thanks.

Senator Segerblom:

I had a question, but I'm not sure if it's something the witness has expertise in. In the last couple sessions of the Legislature, we have enabled the doctors to do videoconferencing of diagnoses and other things to help the rurals because they don't have access to specialists. Is it possible we could have an office in Carson City that videoconferences a lot of these things in the small towns so they wouldn't have to—you could have an immediate attorney available and cut a lot of the problems that distance causes.

Mr. Carroll:

I think it's something that needs to seriously be looked at in this country. I will tell you what the knock on it is, and I think it's a legitimate one. The lawyer needs to be with the

defendant. So, if the defendant is in jail and the action is going on in the court somewhere else, that lawyer, if he's with the defendant, is not seeing all the interactions that are going on in court. What side bar conversations are occurring? What's happening after the camera shuts off? Are the prosecutor and the judge talking? Those types of things. So, on most videoconferencing, it's not quite standard yet, but they want an attorney both in the courtroom and with the defendant, so it's not really helping your issue. I think there's room for videoconferencing for things much more about doing attorney-client conferences, interviews and updating, things like that. I've seen a lot of really secure systems that work, where there really is a private space in the jail to be able to do that. So, I think there's some room for some of that to come into play, but there are serious ethical issues with it in a way that it doesn't fit the medical model that you mentioned. But I think it's worth talking to people about it and trying to figure out if there's some new model we can come up with that will work that can use technology in that way.

Senior Justice Maupin:

Since I took senior status, I've been handling criminal calendars. I did a week in Las Vegas and I spent several months in the second district doing this. If we go back to 2007 and 2008 when it first came to us that we should form the Indigent Defense Commission out of the Supreme Court, the biggest problem was sitting in an open setting in a courtroom with a whole bunch of other defendants chained together and all this noise going on and people coming in and out, and they sit there and negotiate pleas right there in the courtroom. I'm sorry, but that's not an optimal situation for getting a full and robust, as you call it, interaction between a lawyer and the client. This was the thing that first stimulated this practice. It's one of the first things, and I think you'll agree with me, Chair Cherry, that caused us to start getting into this, in addition to other issues. In the fall of 2007, now 10 years later, exactly the same issues are coming up. I talked to the public defender, and there was a situation where this defendant was completely off the wall. He was not being seen in the jail. He wanted a new lawyer. He wanted to represent himself, all of that business. So, I said, "You need to go over to the can and meet with him before you make a decision of this magnitude." His supervisor says, "Well, we don't go over there." I said, "What are you talking about?" He said, "Well, these lawyers have families too. They have to go home." Now, as an owner of at least two major private law firms, I don't believe in that anyway. Young lawyers are supposed to stay there all night. But you see what I'm saying. I'm looking at a system where it appears, after all this work and all these analytics and all these statistics, that in the most fundamental confrontation between a lawyer and his or her client, nothing has changed. So, I'm not kvetching with you, I'm just saying that this is a challenge that this Commission probably needs to look at to see just what has happened in the interim. Certainly, they've thrown more money and resources in Clark County and Washoe County, but if the actual behavior on the ground hasn't changed, then it is an institutional problem of some seriousness.

Commissioner Ballou:

I just have some things to say on what Senior Justice Maupin just said. I am a regular attorney in the Clark County Public Defender's Office, so I know exactly what you're talking about with the early offers and talking to our clients in court about offers, and that has some things to do both with the way the district attorney's office offers us negotiations and a lot of times with the way that we're allowed to interact with our clients at the jail. So, one of the things that happens is that most of the attorneys in my office are in court all morning and don't get back until the afternoon. We can't start talking to our clients on the phone or visiting them or doing anything until 12:30 p.m., then we're only allowed to see them until 3:30 p.m., and then the next time would be at 7 pm. So, that does have an impact on the way we're allowed to do our jobs. I've tried to call at different times. The way that the jail operates and the way that they don't allow continuous visits or just visits when it's convenient for the attorney. There are only specific times and things like that. Another thing that I've always thought was just bizarre is the way that the phone system worked from the jail in Clark County to the attorney's office. You have to specifically be sitting at your desk in order to accept a collect call. When I've worked in other places, you didn't have to do that. You could say on your voicemail, "We accept collect calls from the detention center," and that would just allow them to go through. So, if you get a call, it will just tell you, "You had a call from the jail," and then you don't know who it was and you can't return the call from that client and things like that. So, it's the phone systems, the way the jail works, and also the way the district attorney's office makes offers to us. Earlier this week, I specifically negotiated a case at calendar call because the district attorney gave me a different offer that particular morning. I spoke to the client in court. He decided to take it. He did want me to call him back, and I did, but I wasn't given the offer until the morning we were supposed to be announcing that we were ready for trial, so there are some things that are outside of our ability to control that have bearing on that. So, those might be some things that we need to look at, how the jails allow us to interact with our clients and how the district attorney's office does their work as well.

Chair Cherry:

Those were very good points that you raised. I remember those days myself, when people would walk in and say, "Mr. Smith, I'm your attorney." Are you really? Seeing no further questions for Mr. Carroll, thank you for your presentation.

Our next agenda item is a discussion of the benefits and the need to have somebody like Mr. Carroll from the Sixth Amendment Center as our consultant. My suggestion is that we leave the contract to the LCB and Mr. Carroll, the people who know what they're doing, Ms. Davis, Ms. Lang and Ms. Erdoes, to work out a contract with him. Is that acceptable to everybody? You see he's a real pro. There's no doubt, on indigent defense in this country, there's nobody that I know better, and he's the one who was able to get the things done that have been successful. So, I'd ask for a motion that we

allow the LCB to engage in contractual negotiations with Mr. Carroll and reach a final contract.

Commissioner Fitzsimmons:

I totally agree. I'm thrilled and grateful to the Sixth Amendment Center for even being willing to undertake this. We have a deadline of September 1. I did not see, but I didn't spend a lot of time looking at it, is there a deadline for the completion of your scope of work (Exhibit H)? Do you believe that would be sufficient for us then to take what you have done and turn it into whatever we need to do? I understand you'd probably be working with our concurrence or comments or anything, with the findings and the recommendations. I'm concerned about our single legislative opportunity for the next session. When would you have this work done?

Mr. Carroll:

We are prepared to meet the statutory requirements. I've been in touch with Ms. Lang, Ms. Erdoes and Mr. McCormick on all of this. We need to start immediately to be able to hit that deadline, but we can deliver a report in advance. What we do, by the way, is we don't believe in "gotcha" politics. If we go out and you tell me, "The five counties I want you to look at are x, y and z," when we do the first one, at the next meeting we'll come back and say, "Hey, this is what we're starting to find. Let's see if it happens in the next one or whatever. So, by the time you need to make recommendations under the statute, you'll be able to have our information and report of what we recommend to you all.

Commissioner Fitzsimmons:

So, you're going to let us know if you're seeing problems or whatever, but the way you view this, because I haven't done something like this before, you're looking at a couple meetings before September 1 where we actually roll up our sleeves and adopt or modify or reject whatever you're suggesting?

Chair Cherry:

Well, I hope we can meet monthly. In fact, I have a date for our next meeting in February, which will give Mr. Carroll a month's chance to get started on this. Some of the stuff initially has been done because of the Indigent Defense Commission. If you look at section 11(2) as to what the responsibilities are as far as the report's concerned, the nice thing is the Legislature—Senator Segerblom, thank you very much for putting in section D, which says, "Any other recommendation in accordance with the findings of the Commission," along with these other findings that have to be made. So, I think we've got a good head start today. It's only January, and I would like to have a meeting in February, and that gives you almost a month to get us an initial thing before we meet again. I'm working with Ms. Lang on how many meetings we can actually have because of travel expenses and budget, but I'd like to say that the LCB has the right to enter into

the contract with Mr. Carroll. Let them worry about it. I don't think we need to review it. They know what they need to do. Ms. Davis is an expert in this, and so is Ms. Lang. Of course, Ms. Erdoes is the foremost person on this stuff, and I'd let them work it out. It's just going to be easier.

COMMISSIONER FITZSIMMONS MOVED TO ALLOW THE LEGISLATIVE COUNSEL BUREAU TO DRAFT AND ENTER INTO A CONTRACT WITH DAVID CARROLL OF THE SIXTH AMENDMENT CENTER.

COMMISSIONER BALLOU SECONDED THE MOTION.

Commissioner Eastley:

I have a question. I had a chance to quickly review the scope of work, and I just have a comment specifically about the scope of work, which I want to say that I agree with (Exhibit H). I understand that your recommendation is for five site visits. So that you are not accused of cherry-picking either the best or worst jurisdictions in which to perform these site visits, you're recommending the following counties: Elko, Humboldt, Lander, Lyon and Nye. I just want to say, based on my previous experience with the Indigent Defense Commission, I absolutely support these and I would hope that the LCB would take seriously those recommendations for these specific counties.

Mr. Carroll:

In working with the LCB, we had to figure out, "Can we get this done?" So, we had to jump ahead and say, "Okay, if we were pulling the random sample, what would it look like?" Those were the five that came out. We will survey and talk to people in all the rural counties, but these will be the deep dives of really going down. So, we pulled those just to be able to say whether we can meet these commitments or not, but if people wanted to change those counties out for other counties or something like that, we'd be happy to go wherever we're directed.

THE MOTION PASSED UNANIMOUSLY.

Chair Cherry:

Ms. Lang suggested that we approve those five counties at this time. Does anybody have a problem with those five counties that Commissioner Eastley just said?

COMMISSIONER EASTLEY MOVED TO APPROVE THE SELECTION OF ELKO COUNTY, HUMBOLDT COUNTY, LANDER COUNTY, LYON COUNTY AND NYE COUNTY IN THE CONTRACT WITH DAVID CARROLL OF THE SIXTH AMENDMENT CENTER.

COMMISSIONER TIPTON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Cherry:

It looks like February 20 will be a good date for our next meeting. I'd like to have the next meeting as soon as possible, and February 20 is good. I'd like to have it a little later, but the justices of the Supreme Court go to the family law conference in Bishop, California, and that would mean that I couldn't appear. I'd like to still be here for the next meeting.

Senator Segerblom:

When we initially made our statements and thanked everybody, I didn't mention John Lambrose, who really is, from my perspective, the one who pushed this thing along. So, thank you Mr. Lambrose. Without him, we wouldn't be here. Also, we are lucky to have the two best attorneys in the State with Ms. Erdoes and Ms. Lang. Anything we need to have done, they can do it.

Chair Cherry:

I will now open public comment. Seeing no public comment, I will now adjourn this meeting at 12:07 p.m.

RESPECTFULLY SUBMITTED:

Jordan Haas, Secretary

APPROVED BY:

Justice Michael Cherry, Chair

Date: _____

DRAFT

| Exhibit | Witness/Agency | Description |
|----------------|---|---|
| Exhibit A | | Agenda |
| Exhibit B | | Attendance Roster |
| Exhibit C | | Agenda Item III: Senate Bill 377 from the 2017 Session |
| Exhibit D | John McCormick, Administrative Office of the Courts | Agenda Item V: Background on Indigent Defense in Nevada |
| Exhibit E | David Carroll, Executive Director, Sixth Amendment Center | Agenda Item VI: Understanding Nevada's Right to Counsel History |
| Exhibit F | David Carroll, Executive Director, Sixth Amendment Center | Agenda Item VI: Reclaiming Justice, 2013 Report |
| Exhibit G | David Carroll, Executive Director, Sixth Amendment Center | Agenda Item VI: The Right to Counsel in Utah, 2015 Report |
| Exhibit H | David Carroll, Executive Director, Sixth Amendment Center | Agenda Item VI: Research Plan |