THE RIGHT TO COUNSEL IN UTAH

AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES

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The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide competent counsel to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case. (www.sixthamendment.org)

The 6AC works in partnership with the Defender Initiative of the Seattle University School of Law (SUSL). The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education. (http://www.law.seattleu.edu/centers-and-institutes/korematsu-center/the-defender-initiative)

DISCLAIMER

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The report solely reflects the opinions of the authors and does not necessarily reflect the views of the Utah Judicial Council Study Committee on the Representation of Indigent Criminal Defendants, the U.S. Department of Justice, the Bureau of Justice Assistance, or the National Training and Technical Assistance Center.

EXECUTIVE SUMMARY

Under Supreme Court case law, the provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment. Utah is one of just two states requiring local governments to fund and administer all indigent defense services. Though it is not believed to be unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so. The state of Utah, however, has no institutional statewide presence, and a limited statewide capacity, to ensure that its constitutional obligations under the Sixth and Fourteenth Amendments are being met at the local level.

The result is that more people accused of misdemeanors are processed through Utah's justice courts without a lawyer than are represented by counsel – upwards of 62 percent of defendants statewide, according to the state Administrative Office of Courts' data. In fact, the data suggests that in most misdemeanor justice courts, the number of misdemeanor defendants proceeding without representation is closer to 75 percent. To the degree that many of these defendants are entitled to a lawyer, the U.S. Supreme Court calls this an "actual denial of counsel."

Right to counsel issues in Utah's felony courts are different in kind than those of the misdemeanor courts. There, most indigent defendants are indeed provided with a lawyer. However, depending on the local jurisdiction, that lawyer may work under financial conflicts of interest, or may be beholden to a prosecutor to secure future work, or may be appointed too late in the process or be juggling too many cases to be effective. The U.S. Supreme Court calls this a "constructive" denial of counsel.

These conclusions were reached after an 18-month study of public defense services in ten sample counties (Cache, Davis, Salt Lake, San Juan, Sanpete, Tooele, Uintah, Utah, Washington and Weber). The sample counties encompass 90 percent of the state's population and represent all eight felony-level trial court districts. The Utah Judicial Council Study Committee on the Representation of Indigent Criminal Defendants ("Study Committee") authorized the report funded through the U.S. Department of Justice, Bureau of Justice Assistance. Chapter 1 (pages 3 to 18) sets out the study methodology and assessment criteria adopted by the Study Committee.

Chapter 2 (pages 19 to 38) details the actual denial of counsel in Utah's justice courts. Courtroom observations confirm that a majority of misdemeanor defendants in Utah's justice courts plead without a lawyer for two main reasons:

A. A misapplication of Sixth Amendment case law related to: i) the early appointment of counsel; ii) the right to counsel in misdemeanor cases, especially those with suspended sentences; and, iii) valid waivers of counsel.

B. Prosecutors directly entering into plea agreements with uncounselled defendants, or, in the absence of prosecutors at arraignment, judges advising defendants and negotiating pleas.

Specifically:

- Despite U.S. Supreme Court case law defining an "arraignment" as a critical stage requiring the appointment of counsel to those of limited financial means, in every justice court observed, with the exception of Salt Lake City and County justice courts, defendants were arraigned and subsequently sentenced (another critical stage) to jail time or suspended sentences without any defense attorney present.
- Although Supreme Court case law requires the appointment of counsel in cases where a loss of personal liberty is at stake no matter how remote the possibility, Utah's justice courts frequently deny counsel to defendants solely because the immediate threat of jail is lifted and a suspended sentence is imposed as a condition of probation. In every justice court observed, defendants without counsel were given suspended sentences and probationary terms that, if revoked, would result in a loss of liberty, and defendants appeared for probation revocation hearings on charges for which they had not originally been represented by counsel.
- While Supreme Court case law determining that a defendant may waive the right to counsel only if the court determines that the decision is being made "knowingly, voluntarily and intelligently," Utah justice courts were observed regularly allowing defendants to waive counsel without individualized inquiries into their decision to go without counsel.
- Supreme Court case law defines the plea negotiation as a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant's right to counsel has been knowingly, voluntarily, and intelligently waived. Yet it is the practice of many justice courts to have prosecutors meet with unrepresented defendants to attempt to resolve the case prior to the defendant appearing before the judge. In others, the opportunity to meet with the prosecution is offered as though it is a chance to consult with an attorney who is looking out for the defendant's interests.
- In many justice courts, there are no prosecutors present and there are also no defense attorneys present. This leaves justice court judges responsible for all sides of the adjudicative process. Having judges judging, negotiating pleas, and advising defendants all at once creates a criminal process that is, in a word, non-adversarial.

Utah's appellate system is not set up to rectify any actual denial of counsel that occurs in justice courts. Utah's justice courts are not courts of record so there is no official record from which cases can be appealed. Instead, defendants have a right to a "do over" in district court, known as a *de novo* review. But without counsel to advise them of this procedure, poor defendants simply do not know how to get a higher court to take a second look. In 2013, there were 79,730 total misdemeanors and misdemeanor DUI cases heard in all justice courts statewide. Only 711 of such cases were reviewed *de novo* in all district courts combined (an appellate rate of 0.89%). Further still, a *de novo* review can never change the underlying systemic flaws that resulted in the denial of the right to counsel in the first place.

"Constructive denial of counsel" in Utah's felony district courts is more complicated to assess and explain. This is because a public defense lawyer is indeed present in the courtroom with the indigent accused, but systemic deficiencies prevent that lawyer from effectively advocating for the stated interests of each and every defendant assigned. Accordingly, the analysis of constructive denial of counsel is divided into three chapters explaining:

- How a lack of structural accountability and independence encourages constructive denials of counsel, Chapter 3 (pages 39 to 62);
- How systemic financial conflicts of interest encourages constructive denials of counsel, Chapter 4 (pages 63 to 76); and,
- How systemic structures interfere with the sufficiency of time needed to effectively defend indigent defense cases, Chapter 5 (pages 77 to 88).

At the outset of this project, no statewide government entity could detail how public defense services are provided in each and every district and justice court or give the names of all of the lawyers who represent the accused. Approximately one-third (46 of 139) of private attorneys providing public defense in Utah hold more than three indigent defense contracts (these can be with district or justice courts within a county, or in other counties). As a result, unbeknownst to policymakers, the bulk of the indigent defense workload outside of the two largest counties is handled by a small number of private attorneys. This is important because Utah cannot determine for itself the effectiveness of its right to counsel services if it does not first know who handles public defense cases from one county to the next.

The absence of state oversight is perhaps most apparent in the realm of managing public defense workload. Although local governments may believe the number of cases assigned to a particular lawyer in a particular courtroom in their county is not excessive on its own, there is currently no mechanism for government to know if the additional work that attorney is doing elsewhere (in a neighboring county, or in a juvenile court,

or a justice court, or on behalf of their retained clients) pushes the attorney's workload to the point that the lawyer begins triaging the duty owed to each and every person appointed to them to defend. For example:

- One of three contract defenders in Cache County District Court also provides public defense services in the Hyrum Justice Court and the North Logan/Hyde Park Justice Court. On first pass, the lawyer's combined felony caseload (134) and misdemeanor caseload (84) do not appear too egregious. However, he also handled 270 delinquency cases and appeared at 432 dependency cases in 2013.

Thirty-five percent of Utah's private defense contractors have excessive caseloads. In the absence of Utah-specific workload standards that take into account local criminal practices and procedures, geography, court locations, and other variances, it is difficult to determine whether the remaining 65 percent of indigent defense attorneys' workloads are, in fact, reasonable.

The primary cause of attorneys having insufficient time to advocate for the stated interests of defendants is due to the prevalence of "flat fee contracting." Outside of the institutional defender offices in Utah and Salt Lake counties, lawyers are paid a single fixed fee to provide services in an undefined number of cases, such that the defense providers have negative financial incentives to dispose of cases quickly, rather than effectively. The conflicts of interest such flat fee contracts create are compounded in some jurisdictions, because they reduce a lawyer's take home pay if he seeks trial-related expenses (e.g., investigators, or experts).

To give context to the way flat fee contracts create financial conflicts of interest and lead to excessive caseloads, consider the following:

- One rural justice court pays its misdemeanor attorney a flat $600 per month to handle the representation of everyone determined to be indigent. In 2013, this attorney was appointed to 246 justice court cases – an average of 20.5 assignments per month. This means he is compensated at approximately $30 per case regardless of if the case goes to trial or is disposed immediately. Because there is no independent supervision of this attorney, the attorney also handles representation in the county district court and conflict representation in the county juvenile court. In total, this attorney handled 423 cases on behalf of indigent defendants in 2013, including 101 felonies.

Altogether, the attorney is paid $37,200 annually (his public caseload does not allow him to engage in private work). That means, on average, he is compensated just $87.94 for each and every case, regardless of the complexity of his felony and delinquency cases. To put it another way, if the attorney works 40 hours every single week of the

year (or 2,080 hours annually), the attorney is paid $17.88 per hour. Though $18 per hour may sound like a lot of money to the average person trying to scrape by in hard economic times in rural Utah, it is not a lot of money given the parameters of what is required of a practicing attorney.

The maintenance costs to operate a law practice in Utah – commonly referred to as "overhead expenses" – are many (e.g., office rent, telecommunications, utilities, accounting, bar dues, business travel, and professional liability insurance). As a means of comparison, the Mississippi Supreme Court determined, in a case challenging that state's assigned counsel compensation rate, that indigent defense attorneys are entitled to a reasonable hourly fee in addition to overhead expenses. Although that case is now nearly 25 years old, the Mississippi Court heard testimony from the Mississippi State Bar Association that the average overhead rate in that state was $34.86 per hour at that time (or nearly twice the 2014 hourly rate paid to this attorney in rural Utah without taking into account overhead costs).

Flat fee contracting is exacerbated in Utah by the fact that in the more rural parts of the states, county attorneys are involved to varying degrees in the selection of defense counsel, the negotiation of defense attorney compensation, and the oversight of defense counsel performance. Having county attorneys involved in right to counsel decisions means that the defender's courtroom adversary is the one ultimately responsible for whether the defender gets the next appointment or contract. Such involvement is an undue infringement on the constitutional obligation to ensure independence of the defense function and is rarely seen anywhere else in the country.

To be clear, the degree to which constructive denial of counsel impacts district court services varies a great deal from jurisdiction to jurisdiction in Utah. For example, Utah County and Salt Lake County have many structural safeguards to prevent constructive denial of counsel. Yet, the systemic safeguards in both counties do not extend to the secondary systems for providing representation in conflict cases. The Constitution requires the same minimum level of effectiveness for each and every indigent accused, regardless of whether a person is deemed co-defendant #1 or #2.

Despite the fact that actual and constructive denials of counsel occur in Utah courts, it is wrong to conclude that Utah's criminal justice system and its stakeholders hold ill intent toward the indigent accused. Indeed, the very opposite appears true. In every jurisdiction visited, conscientious people were striving to do well by both victims of crime and the accused. It is simply the case that even the most well-meaning local stakeholders will, at times, fail to meet the dictates of right to counsel case law without appropriate guidance and supervision. This report is about the failure of the state of Utah and not a condemnation of the local people working to fill the gap left by the state.

Chapter 6 (pages 89 to 98) offers two broad recommendations to criminal justice stakeholders and policymakers to remedy the identified systemic deficiencies.

1. Insulate the provision of right to counsel services from political, judicial, and prosecutorial interference through the establishment of a statewide independent oversight commission, authorized to enact right to counsel standards and to actively monitor and enforce ongoing compliance with those standards for, at a minimum: workload, attorney performance, attorney qualifications, training, supervision, contracting, and ensuring independence of the defense function.

Thirty-three states (66 percent of all states) currently have some form of a statewide indigent defense commission. A statewide indigent defense commission does not require services to be administered and funded at the state level. Rather, commissions set standards and monitor compliance against those standards.

2. Prohibit contracts that create financial incentives for attorneys to fail to provide effective representation.

Utah should follow the lead of other states that have banned these practices, including: Michigan, Idaho, South Dakota, Nevada and Washington.

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