The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services
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PREPARED BY
The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding.

PREPARED FOR
The Nevada Right to Counsel Commission (NRTCC) was established by legislative action on June 8, 2017 to conduct a study of issues relating to the provision of indigent defense services and to make recommendations to the legislature to improve the provision of those services ensuring effective assistance of counsel is provided as required by the United States Constitution and the Nevada Constitution.
In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” Since Gideon, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.”

Gideon also established that the provision of the Sixth Amendment right to effective assistance of counsel is an obligation of the states – not local government – under the due process clause of the Fourteenth Amendment. Nevada has left it to each of the cities and the rural counties to determine how to provide the right to counsel in the courts located within their geographic boundaries. The State of Nevada only funds the very limited portion of indigent defense representation that is provided by the State Public Defender office. The U.S. Supreme Court has never directly announced whether it is unconstitutional for a state to delegate these responsibilities to its counties and cities. However, when a state chooses to place the responsibility on its local governments, the state must guarantee not only that those local governments are capable of providing adequate representation but also that they are in fact doing so. The State of Nevada has no governmental agency charged with ensuring that local governments can and are meeting the parameters of the Sixth Amendment in providing services.

In 2017, Nevada’s legislature took a preliminary step toward state government oversight of the right to counsel by establishing the Nevada Right to Counsel Commission (NRTCC) to study the provision of indigent defense services in jurisdictions with populations less than 100,000. The Sixth Amendment Center (6AC) conducted this study on behalf of the NRTCC. Chapter I (pages 5 – 23) gives an overview of the criminal justice system in Nevada to allow the reader to understand the various levels of courts in which the right to counsel is provided and the prosecutorial and law enforcement agencies that enforce state and local criminal laws.

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Early on in the study, it became apparent that Nevada’s decades of efforts to ensure the effective assistance of the right to counsel are a critical prelude to the issues that confront the rural counties today. The history recounted in Chapter II (pages 24 – 43) provides a deep understanding of why rural actors and policymakers are wary of efforts to force rural counties to use the services of the State Public Defender, even if it were fully funded by the state. Simply put, the historical context shows that decisions by rural policymakers to move out of the state public defender system have not been based solely on a desire to provide services as inexpensively as possible. Five and a half decades of expanding right to counsel responsibilities under both federal and state law, in interaction with changes in Nevada’s statutory law, have led county after county to strike out on their own in legitimate attempts to ensure adequate right to counsel services where the state has failed to do so. Much of Chapter II focuses on the Nevada Supreme Court’s efforts to fix systemic deficiencies in Nevada’s right to counsel systems. However, it is only one of the three branches of state government. The Court does not have the power of the purse and cannot, because of separation of powers concerns, tell the legislature how to spend taxpayer resources.

Hallmarks of a structurally sound indigent defense system include the early appointment of qualified and trained attorneys who have sufficient time to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. The 6AC collected and analyzed available data, conducted interviews with policymakers and criminal justice stakeholders, and observed court proceedings. The provision of the right to counsel in Nevada’s rural counties is evaluated against Sixth Amendment case law and national standards in Chapters III, IV, and V.

Chapter III (pages 44 – 109) details the current right to counsel delivery systems established by county and city governments in rural Nevada. Nationally, there are only two models for the delivery of indigent defense services. Jurisdictions either employ government staff attorneys and/or they compensate private attorneys to provide representation.

Carson City and Storey County, alone among the rural jurisdictions, use the State Public Defender office to provide primary (but not conflict) representation. Only the three rural counties of Elko, Humboldt, and Pershing have a county funded and administered public defender office, furnished and equipped at government expense and staffed by full-time government employees who receive a salary and benefits. Churchill, Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties instead provide right to counsel services by contracting with private attorneys for a fixed annual fee and out of which the attorney must provide all overhead necessary to serve as an attorney. In many instances, these contract attorneys are also responsible for paying for much of the case-related expenses that are necessary to the defense of the indigent defendants whom they are appointed to represent.
Cities receive almost no direction at all from the state about how to provide representation to indigent defendants charged in the municipal courts with misdemeanors that carry possible jail sentences. There are four free-standing municipal courts in all of the 15 rural counties combined: Fallon Municipal Court within Churchill County; Fernley Municipal Court and Yerington Municipal Court within Lyon County; and Ely Municipal Court within White Pine County.

Chapter IV (pages 110 – 150) assesses the rural indigent defense systems regarding:
1. the manner in which attorneys are selected and whether the defense function is independent;
2. the extent to which attorneys have necessary qualifications, training, and supervision;
3. the workloads imposed on attorneys and whether they have sufficient time;
4. the ways in which funding for attorney fees, overhead, and case-related expenses create conflicts of interest for the attorneys.

Chapter V (pages 151 – 163) assesses whether attorneys are entering cases early enough in the process to be effective and explains some of the court processes that encourage indigent defendants to forgo counsel altogether.

6AC’s findings and recommendations are set out in Chapter VI (pages 164 – 180).

1. The State of Nevada has a Fourteenth Amendment obligation to ensure effective Sixth Amendment services in every court at every level everywhere in the state. This means that the State of Nevada must, at the very least, have an entity authorized to promulgate and enforce systemic standards that align with the parameters outlined in United States v. Cronic. No such entity currently exists.

2. The State of Nevada has only very limited oversight of primary representation (not conflict representation) in just two jurisdictions (Carson City and Storey County) that use the State Public Defender. However, the State Public Defender system suffers from undue political interference and inadequate funding.

3. The State of Nevada does not require uniform indigent defense data collection and reporting. Without objective and reliable data, right to counsel funding and policy decisions are subject to speculation, anecdotes and, potentially, even bias.

4. The majority of rural counties stepped into the void created by the State of Nevada to fund and administer local indigent defense structures that fit the uniqueness of each individual jurisdiction. However, without guidance from the State of Nevada on how to create local structures that meet the parameters of the Sixth Amendment, the local indigent defense systems suffer, to various degrees, with:
   - a pervasive lack of independence from judges, prosecutors, and county/city governance;
   - a pervasive lack of institutionalized attorney supervision and training;
• a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants;
• a pervasive lack of independent defense investigations in all but the most serious felony cases;
• a pervasive lack of support services including social workers, legal secretaries/paraprofessionals, mental health services, and translation services for non-English-speaking indigent defendants;
• fixed fee contracts that pay the same no matter how few or how many cases the attorney handles, and that require the attorney to pay for overhead out of the fixed compensation, and that in some instances require the attorney to pay for conflict counsel out of the fixed compensation;
• excessive caseloads in those rural counties with populations greater than 15,000.

5. Despite most rural cities and counties requiring attorneys to report caseload information, in many places the attorneys simply do not do so. In places where attorneys do report this information, most cities and counties do not make any use of the data because the data is not maintained uniformly, even among attorneys providing representation in the same jurisdiction.

6. Without the State of Nevada tracking which attorneys are providing representation in which courts and/or which public defense attorneys are employed in other court functions (e.g., magistrates, prosecutors) it is impossible for local policymakers to gauge workloads even in those jurisdictions trying to review excessive caseloads.

7. Rural counties administering and funding their own local indigent defense systems, for the most part, do not have standards for the selection of qualified attorneys with the experience to match the complexity of the cases to which they are assigned. While most rural attorneys appear to be qualified to handle the criminal cases to which they are appointed, this is serendipitous. There is nothing to prevent future local policymakers from hiring non-qualified lawyers offering the lowest costs to cover the greatest number of cases.

8. The vast geographical distances, the paucity of attorneys in many areas of the state, the structure of Nevada’s courts, and its procedures layered on top of all that seems to render it nearly impossible for the individual counties and cities alone to provide public defense systems that can ensure effective assistance of counsel. All of this results in:
• delays for indigent defendants in receiving appointed counsel and in the timely conclusion of the criminal proceedings against them;
• judges not adhering to Court ordered indigency determination procedures, resulting in over-appointment and under-appointment (depending on jurisdiction);
imposition of recoupment of public defense costs on indigent defendants (along with other fines and fees) without determining a defendant’s ability to pay;
• judges refusing to appoint counsel to misdemeanor defendants facing jail time where the judge predicts a suspended sentence;
• uncounseled defendants negotiating directly with prosecutors and then pleading guilty to misdemeanors with a suspended sentence, and doing so at initial appearance/arraisonment;
• judges sentencing convicted indigent defendants to pay fines & fees without determining their ability to pay, and attorneys failing to advocate on behalf of indigent defendants against imposition of these fines & fees.

9. Although defendants have a right to appeal misdemeanor convictions from non-lawyer judge courts (justice courts and municipal courts) and to take that appeal to a district court where the judge is a lawyer, these misdemeanor convictions most often result from cases where the defendant did not have a lawyer in the non-lawyer court to begin with. As a result, the defendant is on their own and incapable of making a defense and of making an appropriate record in the non-lawyer court and of taking the necessary steps to obtain review by a court where the judge is a lawyer. And the appellate review is based solely on the record made in the court of the non-lawyer judge.

With no pre-existing, uniform “cookie-cutter” indigent defense service delivery model that states must apply, the question for Nevada policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, is simply how best to do so given the uniqueness of the state. The following recommendations serve to guide policymakers to Nevada-specific answers to overcome the systemic deficiencies highlighted in the report.

1. The State of Nevada should create a permanent Board of Indigent Defense Services (BIDS). BIDS will provide advice and guidance to an executive branch organization, the Office of Indigent Defense Services (OIDS), to oversee the provision of defender services in the state.

2. The State of Nevada should authorize OIDS to promulgate standards including, but not limited to: a) attorney qualifications; b) attorney training; c) early appointment of counsel; d) attorney supervision; e) attorney workload; f) uniform data collection and reporting; and g) contracting. Standards should undergo a public comment period and be approved by an official branch of government.

3. Local governments should be authorized to select the method of delivering indigent defense services that most appropriately serves their local needs. When the Office of Indigent Defense Services (OIDS) promulgates a new standard, and it is approved under Nevada regulatory practices, local governments should be given
a set reasonable amount of time to create and submit plans to the OIDS regarding: a) how their localized systems intend to meet said standard; and b) the associated budget to meet the standard. If plans are approved by OIDS, all new spending to meet said standards should come from the state and not local governments.

4. OIDS should additionally: a) qualify, train, and supervise attorneys that local governments may contractually engage; b) conduct on-going system evaluations against standards; c) review, approve, and fund requests for trial-related expenses (investigators and experts); and d) collect uniform data. OIDS should also oversee the State Public Defender office. The State Public Defender’s appellate responsibilities should be expanded to include direct appeals.

5. The Nevada Supreme Court should adopt an administrative rule specifically requiring all courts to conduct on the record individualized colloquies using the court ordered indigency standard to determine if a defendant can afford to reimburse government all or a part of their indigent defense representation if a court elects to impose public defense recoupment fees. OIDS should be statutorily authorized to collect data on assessments and recoupments and to conduct assessments to see that the practice is correctly followed.

6. The Nevada Legislature should create a student loan forgiveness program to encourage young lawyers to serve as public defenders in those counties with less than 100,000 populations.

7. The Nevada Legislature should draft legislation directing the Legislative Commission to conduct an interim study of the court structure.

We suggest that the Nevada Legislature retain a national court management organization to study the current criminal court structure in the state with an aim of improving court efficiency. To be clear, the 6AC are not experts in this realm because court management involves functions that go beyond just indigent defense services. Although such a study should not be limited to the following, we urge that the following questions be a focus:

- Should municipal courts be consolidated with the justice courts for all misdemeanors, including those brought by municipal prosecutors?
- Should district courts judges preside over all court hearings regarding felonies and gross misdemeanors?
- Should district court judges preside over all misdemeanor cases arising in conjunction with felony/gross misdemeanors?