THE RIGHT TO COUNSEL IN SANTA CRUZ COUNTY, CALIFORNIA

EVALUATION OF TRIAL LEVEL INDIGENT REPRESENTATION SERVICES

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SIXTH AMENDMENT CENTER
The Right to Counsel in Santa Cruz County, California: Evaluation of Trial Level Indigent Representation 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. See SIXTH AMENDMENT CENTER, https://sixthamendment.org/.

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This report solely reflects the opinions of the authors and does not necessarily reflect the views of Santa Cruz County.

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The County of Santa Cruz, California commissioned this evaluation and report.

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EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment. California has delegated this responsibility to county boards of supervisors and/or the superior court judges in each county in all trial-level cases.

In its attempt to fulfill the right to counsel responsibilities delegated to it by the state, Santa Cruz County has chosen to use private attorneys to provide all indigent representation services. For 45 years, the County of Santa Cruz has contracted with the law firm of Biggam, Christensen & Minsloff (BCM) to provide primary indigent representation services. For conflict representation, the county has contracted for decades with two other law firms: Page, Salisbury & Dudley; and Wallraff & Associates. In 2014, Santa Cruz County created the Criminal Defense Conflicts Program (CDCP) in the county counsel’s office, administering a panel of private attorneys who are available to be appointed on a case-by-case basis in cases where all three of the contract law firms have a conflict of interest.

However, Santa Cruz County does not have an office or person charged with oversight of the entire indigent representation system, and the county cannot accurately say how many people or cases, and of what case types, require appointed counsel nor by whom the representation is being provided, if at all. In the absence of this information, it is impossible for the county to determine how much the provision of indigent representation should cost or how to provide it effectively. It is toward that end that the County of Santa Cruz commissioned the Sixth Amendment Center to conduct an evaluation of indigent defense services.

As explained in chapter I, the Sixth Amendment Center independently and objectively evaluates indigent defense services through data collection and analysis, interviews with criminal justice stakeholders, and courtroom observations. Indigent defense services are assessed against Sixth Amendment caselaw that establishes the hallmarks of a structurally sound indigent representation system, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources 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. Chapter II explains the current Santa Cruz County criminal justice system in which the indigent defense providers operate.
Chapters III through VI comprise the substantive assessment. Chapter III explains existing indigent defense services, including the qualifications, selection, training, and supervision of the attorneys who provide right to counsel representation.

A detailed discussion of the funding and independence of the public defense function is contained in chapter IV. For decades, Santa Cruz County has delegated all decision-making about the provision of the right to counsel to the private law firms with which it enters into contracts. At the same time, the county does not require that the contract law firms explain: how much money is spent on overhead and what is acquired; how much money is paid to partners, associate attorneys, and staff; nor what services are provided in exchange. For example, the partners from the primary contract law firm were unwilling to disclose the amount of salaries and other forms of compensation that the law firm provides to associate attorneys, citing the contract provision that gives the law firm the right to control the manner and means by which it provides the indigent representation services under the contract. Because of the lack of transparency, the Santa Cruz County Board of Supervisors, county administration, and taxpayers have no way of knowing the law firm’s profit margin or the partners’ compensation in relation to providing a core, constitutionally-obligated government function.

What is known is that the contracts entered into with each of the three institutional providers require the respective law firms to provide representation in an unlimited number of cases in exchange for which the law firms are each paid a flat annual fee along with the possibility of additional compensation in “extraordinary circumstances.” These contracts create conflicts of interest between the financial interests of the law firms, partners, and associates, and the case-related interests of the indigent people whom they are appointed to represent.

From the county’s point of view, the contracts have been funded for the most part at the level the law firms requested, so the county assumed the funding was sufficient to ensure effective representation. Yet the law firm partners have failed to negotiate with the county for contract terms that ensure sufficient time and resources to provide effective representation, in part based on the understood threat that the county might open the contract process and turn to a low-bid approach to contracting. The law firm partners asked for what they thought they could get without jeopardizing their own operations, rather than bargaining for what was actually needed to provide effective representation to each and every person appointed to their firm.

The financial conflicts derived from the flat-fee compensation method have prevented the law firms from investing in needed infrastructure. As one example, all of the contract law firms have some sort of computers, but all are inadequate for attorneys to manage their appointed cases, and attorneys often purchase their own laptops and cellphones to have access while they are in court. Many of the case-related functions typically done on-line or on computers are instead performed manually.
Similar financial conflicts extend to the private counsel system administered by the CDCP. For most types of cases, an attorney appointed through the CDCP is paid an initial flat fee based on the type of case and can be paid additional flat fees for certain events occurring in the case. The event-based fee structure has caused some lawyers to remove themselves from the CDCP, because they have determined it is “untenable financially” to work on cases for a flat fee per event. One attorney, for example, was appointed in a felony case about three years ago that remained at the pre-indictment stage at the time of this evaluation. The attorney had devoted well over 100 hours to the case and filed multiple motions, but the attorney had been paid a grand total of only $2,500. Because the attorney believed the case likely would resolve by plea, the attorney did not expect to be paid anything more.

Chapter V explains how these financial conflicts impair the early and continuous representation by the same attorney throughout the life of a case. If an attorney is appointed early in the criminal process, that appointed attorney can effectively represent a client if given the time, training, and resources to do so. Yet early appointment of counsel will not result in effective representation if that trust is breached. What good is it from the defendant’s perspective if the lawyer provided early in the case is taken away and replaced with someone else?

The BCM law firm frequently uses “horizontal representation,” whereby appointed clients are represented by a series of attorneys, rather than a single attorney representing a client from appointment through disposition of the case. BCM assigns one “quarterback” attorney to each felony courtroom to handle the initial stages of the felony cases in that courtroom, and a different attorney later is assigned the case for the trial stage. As a result, any felony defendant in Santa Cruz County who pleads not guilty at arraignment on the complaint most likely will be represented by a different attorney, or series of attorneys, at the next proceedings in the case. As the American Bar Association explains, “horizontal representation” is uniformly implemented as a cost-saving measure in the face of excessive workloads, and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: “Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant’s right to appeal, if necessary.”

Chapter V also details how the practices of the Santa Cruz County Superior Court create a risk of denying the right to counsel to indigent defendants in misdemeanor cases. First, a group announcement is made at the start of court detailing all defendants’ rights. However, the group colloquy is insufficient to ensure that every defendant understand the rights they may potentially waive. For example, out-of-custody defendants sometimes arrive in the courtroom after the group colloquy has begun or even after it is completed. The judges try to confirm, as each defendant is called up individually, whether they heard and understood the judge’s earlier
announcement. But the judge does not know who was or was not present at what stage of the colloquy, and the defendant does not know what they did not hear.

Of perhaps the most concern, the judges tell indigent defendants that they must pay a $50 fee within two months in order to receive an appointed lawyer. The court is required to ask the defendant whether they are financially able to pay all or part of that $50 fee, and the fee cannot be assessed at that time if the defendant says they cannot pay it. Yet announcing from the bench that invoking the right to counsel may cost money may chill the exercise of the right to counsel.

Finally, the practice of the misdemeanor court judges asking the prosecutor to announce a plea offer on the record, as a means of quickly resolving cases, raises additional concerns. Without doubt, many defendants can little afford multiple court appearances – losing income through lost working hours (if not entire days), finding alternate care of dependents for whom they are responsible, obtaining transportation to and from the courthouse in Santa Cruz or Watsonville, etc. – making their desire to get the cases over with in a single court appearance quite understandable. Nevertheless, having seen other people waive the right to counsel and plead guilty, and without an individualized colloquy at the outset to ensure the choice to forego the right to counsel in order to further consider the prosecutor’s plea offer is made knowingly, voluntarily, and intelligently, some defendants can experience subtle pressure to do likewise without fully understanding all of the consequences.

Chapter VI details how flat-fee compensation and the lack of continuous representation affects attorney workload. Santa Cruz County has not set limits on the number of cases that an attorney representing indigent clients may handle in a year. No entity has been charged with setting maximum indigent defense caseload limits to ensure sufficient time to provide effective assistance of counsel. The individual law firms have no internal caseload policies or standards.

The primary contract law firm has caseloads far above the national standards, and the three contract firms combined do not have enough attorneys to handle the total appointed caseload effectively. Under national standards, in fiscal year 2018-19, Santa Cruz County required a minimum of 44.14 full-time equivalent (FTE) attorneys to provide effective assistance to all indigent clients in the new case appointments made during that fiscal year. Though 99% of these cases were appointed to the three contract law firms, in February 2020 the law firms assign this caseload to only 32.5 FTE attorneys.
Additionally, indigent representation system lawyers in Santa Cruz County do not have adequate support staff, such as secretaries, paralegals, and social workers. As stated in chapter VI, when an attorney lacks support resources, the attorney must personally perform work that is not only outside the attorney’s expertise, but also takes up valuable time that should be devoted to developing legal arguments and preparing the client’s case.

Many felony attorneys at the BCM law firm speak openly about their “exhaustion” and need for a mental health break from crushing caseloads. One felony attorney who described the felony caseload as excessive stated that he was in trial 34 out of 52 weeks last year. Another felony attorney stated that he had nine felony jury trials in 2018. Another felony attorney stated that he is near the breaking point and may need to leave. Former BCM law firm attorneys agree that the excessive caseload is the primary reason for the law firm’s high rate of turnover among associate attorneys. As one former felony attorney noted, “people leave unexpectedly from burnout.”

All of these findings are summarized in chapter VII:

- Santa Cruz County does not have an office or person charged with oversight of the entire indigent representation system (both primary and conflict).
- Santa Cruz County’s indigent representation system lacks independence from potential undue political influence.
- Past Santa Cruz County administrations made a choice to enter into flat-fee contracts with for-profit law firms and to compensate private lawyers with fixed fee rates. These compensation methods result in a system-wide conflict of interest.
- The attorneys in the primary contract law firm have excessive caseloads in comparison to national caseload standards. In most felony cases, indigent defendants are deprived of continuous representation by the same attorney. Both excessive caseloads and the lack of continuous representation by the same attorney can result in a constructive denial of the right to counsel.
- Santa Cruz County has not allocated an adequate amount of funding to provide the effective right to counsel. The indigent representation system in Santa Cruz County suffers from the failure to invest in indigent defense infrastructure, including technology and human capital.
- The practices of the Santa Cruz County Superior Court may chill the free exercise of the right to counsel by indigent people who are accused of misdemeanors and face a potential loss of liberty in misdemeanor proceedings.

Chapter VIII details the Sixth Amendment Center’s recommendations:
Recommendation 1: Santa Cruz County policymakers should advocate for legislative approval of and appropriation of necessary funding to fulfill the aims of the State of California’s settlement agreement in Phillips v. California.

For years, California has been part of a national debate about the inherent value of a coordinated statewide indigent representation system versus decentralized county-based systems. Advocates of providing representation through decentralized county-based systems point to some of California’s more affluent counties, noting that those counties’ indigent representation services have garnered national respect and received awards from prestigious national organizations that consider them to be among the best in the United States. Meanwhile, less affluent California counties often struggle to meet the state’s obligation to provide the effective right to counsel.

Many of the California counties with better indigent representation systems fear that any attempt to get the state involved will result in the leading programs getting worse. For example, if the state created an organization to disseminate state money based on counties meeting mandatory standards, the argument goes, it would give counties that currently exceed those standards a reason to cut services down to the minimum level of services sanctioned by the state. What this argument leaves out are those counties – like Santa Cruz – that at times may have the resources to ensure effective representation to each and every indigent person, but that for a variety of reasons have not used their resources accordingly.

The State of California’s dereliction of its constitutional obligations to provide effective representation to indigent people has been the subject of a class action lawsuit that culminated during the course of this evaluation. In July 2015, the American Civil Liberties Union (ACLU) filed suit against the State of California and Fresno County, alleging that California “has delegated its constitutional duty to run indigent defense systems to individual counties” and does not provide any oversight to ensure those county systems actually provide constitutionally required representation. In January 2020, the plaintiffs entered into a settlement agreement with the State of California. Without admission of fault or wrongdoing, California agreed to expand the mission of the Office of the State Public Defender (OSPD). Under the settlement agreement, OSPD will provide support for California counties’ trial-level, non-capital public defense systems, that may include but not be limited to: training for trial-level attorneys; indigent defense structure technical assistance to counties; and “efforts to identify further steps that could be taken to improve California counties’ provision of trial-level indigent criminal defense.”

Santa Cruz County policymakers should advocate for legislative approval of and appropriation of necessary funding to fulfill the aims of the State of California’s settlement agreement in Phillips v. California.
Recommendation 2: To provide transparent and efficient oversight and funding of an indigent representation system that is capable of ensuring effective assistance of counsel to each indigent person, Santa Cruz County should:

A. Immediately hire a full-time chief public defender to oversee and administer all indigent representation services. The chief public defender should be appointed to a four-year term of office, removable only for just cause and eligible for re-appointment.

B. Authorize and fund the chief public defender to establish an indigent representation system and to hire executive staff.

C. Require the chief public defender to promulgate uniform policies and standards for all indigent representation system services.

D. Authorize and fund the chief public defender to create a public defender office division and a conflicts counsel division, with a sufficient number of attorneys, support staff, and supervisors in each division, and with adequate compensation and resources, to ensure conflict-free and effective assistance of counsel to every indigent person.

Restructuring indigent representation services in Santa Cruz County will not be quick or easy. There will be many times when the constitutional obligations under the Sixth Amendment will force serious debate, especially given the potential fiscal impacts of the coronavirus pandemic. The county administration and board of supervisors need to hear accurate information from a chief public defender, without the fear of dismissal for telling the county what a particular decision will mean to people of limited means.

The chief public defender requires a physical office space and an executive staff to help oversee the entirety of the Santa Cruz County indigent representation system. In addition to the chief public defender, the indigent representation system must have at least an information technology professional, a finance professional, a training professional who is an attorney, and an administrative assistant, in order to effectively and efficiently collect and analyze the information needed to accurately project the number and type of attorneys and resources necessary to provide consistently effective representation.

By implementing proper processes for data collection and analysis, the indigent representation system will be able to more accurately predict its staffing and resource needs, permitting Santa Cruz County to budget accordingly. For all of these reasons, Santa Cruz County must provide adequate funding to the indigent representation system to obtain and operate the technology necessary to, among other things: monitor the indigent representation system’s true workload year by year; determine...
whether attorneys have sufficient time and sufficient resources to provide effective representation in each case; and develop and present accurate, timely, and transparent indigent representation system budgets to the county for review and approval.

The chief public defender should be authorized to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel throughout the county’s restructured indigent representation system, including the representation provided by any county-employed attorneys and the representation provided by any appointed private attorneys. The chief public defender should promulgate standards as soon as is practicable related to attorney qualifications, attorney performance, attorney supervision, time sufficiency, continuity of services whereby the same attorney provides representation from appointment through disposition, client communication, and data collection.

The chief public defender should be the county’s point person in building out the new indigent representation system, including establishing a public defender office division and a conflicts counsel division, determining the types and numbers of cases to be handled by each division, and deciding when and how to hire attorneys and staff in the public defender office division and how many attorneys and staff are necessary in the conflicts counsel division.

**Recommendation 3: Santa Cruz County policymakers should create a standing criminal and juvenile justice coordinating group to debate and resolve indigent representation issues that are beyond the sole control of the Santa Cruz County administration.**

Many of the issues raised in the delivery of indigent representation services in Santa Cruz County are beyond the sole control of the county administration. For example, the judiciary is a separate branch of government that is funded by the state, and Santa Cruz County’s ability to influence the policies of the superior court is therefore limited. Still, the county can create a forum where all of the independent stakeholders in the county’s justice system can meet together and attempt to coordinate their policies and practices for the benefit of all of the county’s citizens.

There are at least three critical issues that should be undertaken by a standing criminal and juvenile justice coordinating work group:

- **Allowing criminal cases arising in Watsonville to be heard in the Watsonville courthouse.**

There is widespread opinion among attorneys and some judges that the high number of no-shows at early criminal proceedings is due to the majority of misdemeanor cases being heard at the courthouse in Santa Cruz rather than in Watsonville. There is limited and infrequent public transportation between Watsonville and Santa Cruz.
and the major highway between the two municipalities often is heavily congested with traffic. This is especially true for people trying to head north from Watsonville to Santa Cruz at morning rush hour. Maintaining a Watsonville office location of the public defender office division will be important to ensure access to justice for the people of Watsonville.

- **Adopting uniform indigency screening and advice of rights policies.**

The level of justice a person receives should not be dependent on whichever courtroom his case is assigned. There should be uniform policies related to indigency screening procedures and the advice of rights.

- **Reducing criminal prosecutions that carry the possibility of incarceration, thus reducing constitutionally required indigent representation services.**

The issue of excessive indigent representation system workload arises because appointed attorneys do not control their own workload. Rather, legislatures define crimes, police enforce those laws, prosecutors decide to proceed with cases, and courts determine a defendant’s eligibility for an appointed attorney. The Sixth Amendment Center does not favor building indigent representation bureaucracies for the sake of building bureaucracies. We continually remind policymakers that, if only one person requires appointed counsel, then all the structure that is needed is to provide that one person with effective representation. Workload concerns can just as easily be addressed by decreasing the need for appointed counsel in the first place by, for example, diverting a greater number of people out of the criminal justice system entirely for appropriate offenses. Short of advocating that the legislature reclassify appropriate petty and/or regulatory offenses to non-jailable violations, local decisions of the district attorney could decrease the number of cases in which the Sixth Amendment requires appointed counsel.