

THE RIGHT TO COUNSEL IN SANTA CRUZ COUNTY, CALIFORNIA

EVALUATION OF TRIAL LEVEL INDIGENT REPRESENTATION SERVICES



SEPTEMBER 2020



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.

Prepared for

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

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.

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INDIGENT REPRESENTATION SERVICES

SEPTEMBER 2020

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CHAPTER I

THE RIGHT TO COUNSEL IN SANTA CRUZ COUNTY

Santa Cruz County is one of California’s 58 counties.¹ California has delegated to its counties the responsibility for providing effective assistance of counsel to indigent people at the trial court level in: (1) criminal and juvenile justice proceedings as mandated by the Sixth and Fourteenth Amendments to the U.S. Constitution; and (2) a large number of other criminal and civil proceedings as required by California law. This report is concerned with the trial-level indigent representation services established and funded by the County of Santa Cruz.

A. The right to counsel in California

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”² In 1963 in *Gideon v. Wainwright*, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”³ As the U.S. Supreme Court has noted, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”⁴

Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at

¹ CAL. CONST. art. XI, § 1; CAL. GOV. CODE §§ 460, 23000, 23001, 23002, 23011, 23012 (West 2019). See CAL. GOV. CODE §§ 23600 through 23658 (West 2019) (designating county seat of each of the 58 counties).

² U.S. CONST. amend. VI.

³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁴ *United States v. Cronin*, 466 U.S. 648, 654 (1984). See also *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

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.⁵ In subsequent cases, the U.S. Supreme Court found that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time not only in felonies but also in misdemeanors,⁶ misdemeanors with suspended sentences,⁷ direct appeals,⁸ and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.⁹ Children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.¹⁰ Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.¹¹ The attorney must also be effective,¹² subjecting the prosecution's case to "the crucible of meaningful adversarial testing."¹³

The California constitution guarantees that "[t]he defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . ."¹⁴ Although states are free to construe their own laws more broadly than the federal constitution has been construed, California provides that:

In criminal cases the rights of a defendant . . . to the assistance of counsel . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁷ *Alabama v. Shelton*, 505 U.S. 654 (2002).

⁸ *Douglas v. California*, 372 U.S. 353 (1963).

⁹ *Halbert v. Michigan*, 545 U.S. 605 (2005).

¹⁰ *In re Gault*, 387 U.S. 1 (1967). "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21." *Id.* at 36.

¹¹ As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

¹² *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

¹³ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

¹⁴ CAL. CONST. art. I, § 15.

shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.¹⁵

California statutes guarantee that every indigent person, adult and juvenile, “who is charged with the commission of any contempt or offense triable in the superior courts” is entitled to public counsel “at all stages of the proceedings, including the preliminary examination,” and continuing on direct appeal.¹⁶ There is one superior court in each of California’s 58 counties that is the only trial court, so all cases are triable in that superior court.¹⁷

Crimes in California are either felonies, misdemeanors, or infractions.¹⁸ An infraction does not carry the possibility of incarceration, and so an indigent defendant charged with an infraction is not entitled to appointed counsel,¹⁹ but failure to appear in court on an infraction constitutes a misdemeanor.²⁰ All misdemeanors and felonies in California carry the possibility of incarceration as a punishment,²¹ so a person charged with any of these crimes who cannot afford to hire their own attorney is entitled to have an attorney provided to represent them at public expense.

¹⁵ CAL. CONST. art. I, § 24.

¹⁶ CAL. GOV. CODE § 27706(a) (West 2019); CAL. WELF. & INST. CODE §§ 633, 634, 634.6, 679 (West 2019); CAL. RULES OF CT. r. 5.403(a), 5.663(c).

¹⁷ CAL. CONST. art. VI, §§ 4, 10.

¹⁸ CAL. PENAL CODE § 16 (West 2019). California counties are authorized to adopt ordinances, and a violation of a county ordinance is by default a misdemeanor (and therefore a jailable offense) unless the ordinance expressly makes it an infraction. CAL. CONST. art. XI, § 7; CAL. GOV. CODE § 25132 (West 2019) (eff. Jan. 1, 2019). Cities are authorized to adopt ordinances, and a violation of a city ordinance is by default a misdemeanor (and therefore a jailable offense) unless the ordinance expressly makes it an infraction. CAL. CONST. art. XI, § 7; CAL. GOV. CODE § 36900 (West 2019). The maximum imprisonment that a city can impose for violation of its ordinances is six months and the maximum fine is \$1,000. CAL. GOV. CODE § 36901 (West 2019). A city can by ordinance provide for imprisonment for violation of its ordinances to be in either its own city jail or the county jail, but either way the city is responsible for the cost of city prisoners. CAL. GOV. CODE § 36903 (West 2019).

¹⁹ CAL. PENAL CODE § 19.6 (West 2019).

²⁰ CAL. PENAL CODE § 853.7 (West 2019).

²¹ CAL. PENAL CODE § 17 (West 2019) (eff. Jan. 1, 2019). California maintains the death penalty as an available punishment, and special statutes and rules govern the provision of counsel in capital cases. *See, e.g.*, CAL. CONST. art. I, § 27; CAL. PENAL CODE § 15 (West 2019). Executions are not currently being carried out due to a moratorium imposed by the Governor on March 13, 2019 and extending throughout his term in office. Cal. Governor’s Exec. Order No. N-09-19 (Mar. 13, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>. Nonetheless, according to the ABA, “[a]lthough California’s last execution was in 2006, it remains home to the largest death row in the country with 737 condemned men and women” and [citing Pew Research] “the state’s death row has grown by 100 prisoners since the last execution was carried out in 2006.” ABA DEATH PENALTY REPRESENTATION PROJECT, 2019 YEAR-END REPORT & NEWSLETTER 4-5 (2020).

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”²² but they cannot provide less. Though the federal Constitution does not require it,²³ California statutorily guarantees appointed counsel to indigent defendants in some later stages of a criminal case for defendants sentenced to death.²⁴ California also statutorily provides appointed counsel to indigent parties in a significant number of civil proceedings.²⁵

²² *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

²³ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

²⁴ These are:

- writ of certiorari to the United States Supreme Court from judgment of the California Supreme Court on direct appeal. CAL. GOV. CODE § 15421 (West 2019); CAL. PENAL CODE § 1240 (West 2019).
- in state postconviction proceedings, with the same attorney handling a federal habeas corpus petition where appointed *and paid* by the federal court. CAL. GOV. CODE §§ 68661.1, 68662 (West 2019); CAL. PENAL CODE § 1509 (West 2019).

²⁵ These include:

- for the parents/guardian or adult relative of a child who is the subject of a juvenile court hearing in which the child may be adjudged a ward of the court. CAL. WELF. & INST. CODE §§ 658, 679 (West 2019).
- regarding the nature and conditions of pretrial detention, of preadjudication restrictions, of treatment, or of punishment, for both adults and juveniles. CAL. GOV. CODE § 27706(g) (West 2019).
- involuntary extended commitment proceedings of persons determined to be “insane” at the time of the offense. CAL. PENAL CODE § 1026.5 (West 2019).
- involuntary commitment proceedings of “mentally disordered” offenders. CAL. PENAL CODE § 2972 (West 2019) (eff. Jan. 1, 2020).
- indeterminate commitment proceedings of “sexually violent predators.” CAL. WELF. & INST. CODE § 6603(a) (West 2019) (eff. Jan. 1, 2020).
- for “collection of wages and other demands” for \$100 or less if the attorney believes “the claim urged is valid and enforceable.” CAL. GOV. CODE § 27706(b) (West 2019).
- defense of civil litigation if the attorney believes “the person is being persecuted or unjustly harassed.” CAL. GOV. CODE § 27706(c) (West 2019).
- involuntary mental health proceedings. CAL. GOV. CODE § 27706(d) (West 2019); CAL. WELF. & INST. CODE §§ 5150, 5226, 5256.4, 5276, 5302, 5326.7(e), 5346 (West 2019).
- involuntary conservatorship proceedings. CAL. GOV. CODE § 27706(d) (West 2019); CAL. PROB. CODE §§ 1471, 1826, 1828 (West 2019); CAL. WELF. & INST. CODE § 5365 (West 2019).
- for a child, without regard to indigency, who is the subject of a juvenile court dependency proceeding “unless the court finds that the child . . . would not benefit from the appointment of counsel” (and the attorney appointed to represent the child may be a district attorney, public defender, or other member of the bar). CAL. WELF. & INST. CODE §§ 317(c), 681, 681.5 (West 2019).
- for the parents/guardian of child who is the subject of a juvenile court dependency proceeding

B. California delegates its right to counsel responsibilities to its counties

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 for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.²⁶ Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”²⁷

California has delegated to its counties the responsibility for providing effective assistance of counsel to indigent people at the trial court level in: (1) criminal and juvenile justice proceedings as mandated by the Sixth and Fourteenth Amendments to the U.S. Constitution; and (2) a large number of other criminal and civil proceedings as required by California law. Each county board of supervisors, or the individual superior court judges in the county, or the board and judges collectively, determine the method(s) used to provide representation to indigent people at the trial level. Counties are responsible at the outset for funding all trial-level indigent representation services.

The U.S. Supreme Court has never directly announced whether it is unconstitutional for a state to delegate its right to counsel responsibilities to its counties. However,

involving out-of-home care for the child. CAL. WELF. & INST. CODE § 317(b) (West 2019).

- for putative fathers in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child. *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (due process requires appointment of counsel to represent indigent defendants in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child).

²⁶ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [T]he Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, . . . we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

²⁷ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 cmt. (2002).

when a state chooses to place this responsibility on 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.²⁸

1. Establishing and overseeing the provision of the right to counsel

The U.S. Constitution holds the State of California responsible for providing and overseeing attorneys to effectively represent indigent defendants.²⁹ In all trial-level cases,³⁰ California has delegated this responsibility to county boards of supervisors

²⁸ *Cf.* Robertson v. Jackson, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility’ . . . remains at the state level.”); Osmunson v. State, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

²⁹ Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment.”).

³⁰ Each of the six courts of appeal contracts with a non-profit appellate project to qualify, train, and provide resource assistance to a panel of private lawyers who are appointed to represent indigent clients in direct appeals (other than in death penalty cases). The non-profit appellate projects are: First District Appellate Project; California Appellate Project – Los Angeles (second appellate district); Central California Appellate Program (third and fifth appellate districts); Appellate Defenders, Inc. (fourth appellate district); and Sixth District Appellate Program. *See* CAL. GOV. CODE § 68511.5 (West 2019), CAL. RULES OF COURT r. 8.300, 8.391, 8.403, 8.482.

The State Public Defender (appointed to a four-year term by the Governor, subject to confirmation by the Senate), with up to 15 staff attorneys and the number of support staff necessary, is authorized to represent indigent defendants in *only* two types of cases. CAL. GOV. CODE §§ 15400, 15401, 15402, 15421 (West 2019). Its primary responsibility is to represent death sentenced defendants on automatic appeal to the California Supreme Court and an ensuing petition for writ of certiorari to the United States Supreme Court. CAL. GOV. CODE §§ 15420, 15421(a), (b) (West 2019); *see* CAL. RULES OF COURT r. 8.605. Secondarily, it can handle appeals in noncapital criminal cases if “the State Public Defender determines that taking a limited number of those cases is necessary for staff training” or if the office were ever in a situation where it had sufficient manpower to handle all of the death sentenced appeals *plus* non-capital appeals. CAL. GOV. CODE § 15421(c) (West 2019).

Under contract from the California Judicial Council, the non-profit California Appellate Project - San Francisco (CAP-SF) serves as a resource center for private attorneys appointed to capital cases on direct appeal and on through habeas corpus proceedings. *See* CAL. RULES OF COURT r. 8.605, 8.652.

The California Habeas Corpus Resource Center, in the judicial branch, employs up to 34 attorneys who may be appointed by the superior court judge that imposed a death sentence to represent indigent

and/or the superior court judges in each county. In each county, indigent people may be represented by a public defender office, a private attorney under contract, a private attorney appointed on a case-by-case basis, or almost any combination of these methods.

Public defender office. A county board of supervisors may, but is not required to, establish a public defender office for the county; and two or more counties may join together to establish and operate a public defender office.³¹

If a county establishes a public defender office, the county board of supervisors determines whether the public defender is elected or appointed.³² If elected (only the case in San Francisco), the public defender is elected countywide to a four-year term of office.³³ If appointed, the public defender is appointed by and serves at the will of the board of supervisors.³⁴ Whether elected or appointed, the public defender must have been licensed to practice law in all California courts for at least one year prior to taking the position.³⁵

The legislature mandates that a public defender in the counties of Los Angeles, Orange, and San Diego must be full-time and cannot engage in the practice of law outside of the public defender office.³⁶ In all other counties, the board of supervisors chooses whether a public defender is full-time or part-time and whether

death-sentenced state prisoners in their state postconviction proceeding, federal habeas corpus petitions if the federal court will pay them, and petitions for executive clemency. CAL. GOV. CODE §§ 68661, 68661.1, 68662 (West 2019); *see* CAL. RULES OF COURT I. 8.605, 8.652. The California Supreme Court selects an executive director, who serves at the will of the court, to manage the center. CAL. GOV. CODE § 68664 (West 2019).

³¹ CAL. GOV. CODE § 27700 (West 2019).

³² CAL. GOV. CODE § 27702 (West 2019).

³³ CAL. GOV. CODE § 27704 (West 2019).

³⁴ CAL. GOV. CODE § 27703 (West 2019).

³⁵ CAL. GOV. CODE § 27701 (West 2019).

³⁶ CAL. GOV. CODE §§ 27705, 28020, 28022, 28023, 28024 (West 2019).

Understanding the definition of “public defender”

The phrase “public defender” is not used uniformly across the country. It is generally understood to mean an attorney appointed to represent indigent people at little or no cost to them. Depending on the locale, the phrase “public defender” may be used generically in referring to any attorney provided at government expense or with little or no charge to the client, whether that attorney is: a government employee; or a private attorney employed by a non-profit organization; or a private attorney employed by a for-profit organization; or a solo practitioner.

California statutes use the phrase “public defender office” to denote a governmental agency that employs attorneys who are appointed to represent indigent people at little or no cost to them and use the phrase “public defender” in referring to the head of that governmental agency.^a This report uses both of those phrases in accordance with the usage in California law.

^a *See, e.g.*, CAL. GOV. CODE § 27708 (West 2019) (“In each county the board of supervisors shall provide suitable rooms for the use of the public defender and office furniture and supplies with which to properly conduct the business of his office. Such expenses are a charge upon the county or counties *in which the public defender is employed.*”) (emphasis added); CAL. GOV. CODE § 27711 (West 2019) (“The annual salary of each public defender shall be . . . fixed by the county”).

allowed to have a private law practice, although no public defender is allowed while holding the position to defend a person accused of crime in any other county.³⁷

In counties that establish a public defender office, the public defender “shall” represent indigent adults and children:

- “charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings, including the preliminary examination;”
- in “serious habitual offender” proceedings for juveniles;
- in all appeals “where, in the opinion of the public defender, the appeal will or might reasonably be expected to result in the reversal or modification of the judgment of conviction” (note that this does not require a public defender to appeal in every case where the defendant so desires);
- to collect wages and other demands of the person for \$100 or less “where, in the judgment of the public defender, the claim urged is valid and enforceable in the courts;”
- in civil litigation in “which, in the judgment of the public defender, the person is being persecuted or unjustly harassed;” and
- in involuntary guardianships, involuntary conservatorships, and involuntary mental health treatment proceedings.³⁸

A public defender is statutorily required to file a written report annually with the board of supervisors of all services rendered.³⁹

For conflicts or “some other present inability,” defined as “a lack of personnel, lack of expertise, or lack of other resources,” counties with public defender offices may agree (in a “reciprocal or mutual assistance agreement”) for their public defenders to represent indigent people in another county that has a public defender office.⁴⁰

Private attorneys under contract. A superior court may contract with one or more “responsible attorneys” to provide representation to indigent adults and children.⁴¹ Where a superior court contracts with one or more private attorneys, state law does not impose any requirements for how the courts go about selecting the attorneys with whom they contract; courts are free to create their own requirements if they choose to do so. The court must consult with the county board of supervisors regarding the amount of the contract.⁴²

Private attorneys appointed case by case (“assigned counsel”). Each superior court judge may choose and appoint an individual private attorney to represent the indigent

³⁷ CAL. GOV. CODE § 27705.1 (West 2019).

³⁸ CAL. GOV. CODE § 27706 (West 2019).

³⁹ CAL. GOV. CODE § 27710 (West 2019).

⁴⁰ CAL. GOV. CODE § 27707.1 (West 2019).

⁴¹ CAL. PENAL CODE § 987.2(a), (b) (West 2019).

⁴² CAL. PENAL CODE § 987.2(b) (West 2019).

person in a specific case.⁴³ State law does not impose any requirements for how the courts go about selecting the attorneys whom they appoint; courts are free to create their own requirements if they choose to do so.

Where judges appoint individual private attorneys on a case-by-case basis, the judges or the county are “encouraged” but not required by state law to:

- (1) Establish panels that shall be open to members of the State Bar of California.
- (2) Categorize attorneys for panel placement on the basis of experience.
- (3) Refer cases to panel members on a rotational basis within the level of experience of each panel, except that a judge may exclude an individual attorney from appointment to an individual case for good cause.
- (4) Seek to educate those panel members through an approved training program.
- (5) Establish a cost-efficient plan to ensure maximum recovery of costs [from indigent defendants].⁴⁴

2. Funding the right to counsel

The U.S. Constitution holds the State of California responsible for ensuring adequate funding for the right to counsel of indigent defendants.⁴⁵ California has delegated to its counties all responsibility at the outset for funding indigent representation services at the trial court level,⁴⁶ regardless of the method(s) a county uses to provide those services.⁴⁷

⁴³ CAL. PENAL CODE § 987.2(c) (West 2019).

⁴⁴ CAL. PENAL CODE § 987.2(c) (West 2019).

⁴⁵ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

⁴⁶ Whenever an attorney other than a public defender is appointed by a court of appeal or the California Supreme Court, the attorney is paid “a reasonable sum for compensation and necessary expenses” by the state controller from funds appropriated to the Judicial Council for that purpose. CAL. PENAL CODE § 1241 (West 2019); *see* CAL. GOV. CODE § 68511.5 (West 2019), CAL. RULES OF COURT r. 8.300, 8.391, 8.403, 8.482, 8.605, 8.652. The state funds representation of indigent defendants on direct appeal, habeas corpus, and post conviction proceedings through the courts of appeal, the State Public Defender, the California Habeas Corpus Resource Center, and the Judicial Council. CAL. GOV. CODE §§ 15400 *et seq.*, 68660 *et seq.*, (West 2019).

⁴⁷ CAL. GOV. CODE §§ 27707.1, 27708, 27711 (West 2019) (funding for public defender office overhead, case-related expenses, and attorney compensation); CAL. PENAL CODE §§ 987.2(a), 987.2(b) (West 2019) (funding for private attorneys under contract); CAL. PENAL CODE § 987.2(a) (West 2019) (funding for private attorneys appointed case-by-case).

To whatever extent the California legislature makes funding available each year, counties can apply for state reimbursement of three types of indigent representation expenditures:

- *Homicide cases* – In accordance with rules and regulations established by the state controller, a county can apply to the state controller for “reimbursement of the costs incurred by the county in excess of the amount of money derived by the county from a tax of 0.0125 of 1 percent of the full value of property assessed for purposes of taxation within the county” in a homicide case.⁴⁸ The reimbursable costs include those incurred “by the public defender or court-appointed attorney or attorneys in investigation and defense,” but exclude “normal salaries and expenses” and also exclude any costs for which the superior court is responsible.⁴⁹
- *Crimes and involuntary detentions* – The state is allowed to reimburse counties for not more than 10% of the funds actually expended for providing appointed counsel for indigent people “charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act.”⁵⁰
- *Training* – In accordance with eligibility guidelines developed by the state Office of Emergency Services, local public defenders can be reimbursed out of the state’s “Local Public Prosecutors and Public Defenders Training Fund” for attending “statewide programs of education, training, and research.”⁵¹

C. This evaluation

1. A brief description of the Santa Cruz County indigent representation system

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. (The existing Santa Cruz County indigent representation system is explained in detail in chapter III.)

For 45 years, the County of Santa Cruz has contracted with the law firm of Biggam, Christensen & Minsloff to provide primary indigent representation services.⁵² For conflict representation, the county has contracted for decades with two other law firms: Page, Salisbury & Dudley; and Wallraff & Associates. Each of these contracts requires the respective law firm to provide representation in an unlimited number of cases in exchange for which the law firm is paid a flat annual fee along with the possibility of

⁴⁸ CAL. GOV. CODE §§ 15202, 15204 (West 2019).

⁴⁹ CAL. GOV. CODE § 15201 (West 2019).

⁵⁰ CAL. PENAL CODE § 987.6 (West 2019).

⁵¹ CAL. PENAL CODE §§ 11501 through 11504 (West 2019).

⁵² A LEGAL HISTORY OF SANTA CRUZ COUNTY 73-74 (Alyce E. Prudden ed., 2006).

additional compensation in “extraordinary circumstances.” The existing contracts with all three of these law firms expire on June 30, 2022.⁵³

Beginning December 1, 2014, the County of Santa Cruz 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.⁵⁴ 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, while attorneys appointed to homicides or complex serious felonies are paid an hourly rate of \$120 or \$125 as of July 1, 2019.⁵⁵

2. The future of the Santa Cruz County indigent representation system

Santa Cruz County is considering how best to provide indigent representation services when the existing contracts with the three law firms expire on June 30, 2022. All of the existing contracts contain a provision stating:

In July 2019, the COUNTY will begin planning efforts to transition the Public Defender function to a new model as follows:

<u>Fiscal Year</u>	<u>Deliverable</u>
2019-20	Study models and costs
2020-21	Develop transition plan
2021-22	Implement transition plan ⁵⁶

⁵³ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

⁵⁴ Santa Cruz County Board of Supervisors Index Sheet, INVENUM 69810 (agenda date Dec. 9, 2014).

⁵⁵ “Legal Services Agreement” between the County of Santa Cruz and a CDCP attorney, Exhibit A – Fee Schedule.

⁵⁶ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam ¶ 16 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam ¶ 6 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley ¶ 14 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa

The Biggam, Christensen & Minsloff contract additionally provides:

The COUNTY’s commitment through this process is to ensure a recruitment search, for all necessary positions, that embeds the right of first opportunity to staff employed with the Law Offices of Biggam, Christensen and Minsloff. Specific processes shall be identified in detail in the final plan.⁵⁷

Santa Cruz County does not have an office or person charged with oversight of the entire indigent representation system (both primary and conflict), 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. (*See* discussion in Appendix A.) 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 this evaluation.

Methodology. The Sixth Amendment Center independently and objectively evaluates indigent representation systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The Sixth Amendment Center’s evaluation of the indigent representation system in Santa Cruz County has been carried out through three basic components.

Data collection and analysis. Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. The Sixth Amendment Center obtained and analyzed extensive amounts of hard copy and electronic information.

Court observations. Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individual people experience as their cases advance from arrest, summons, or petition through disposition; (2) the process the appointed attorney experiences while representing each person at the various stages of a case; and (3) the substantive laws and procedural rules that govern

Cruz and the law firm of Page, Salisbury & Dudley ¶ 2 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates ¶ 14 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates ¶ 2 (extending the term through June 30, 2022).

⁵⁷ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam ¶ 16 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam ¶ 6 (extending the term through June 30, 2022).

the justice system in which indigent representation is provided. The Sixth Amendment Center conducted courtroom observations in the superior court to clarify these processes, travelling to Santa Cruz County for two site visits in December 2019 and February 2020. A third site visit had been intended to take place in March 2020 but had to be cancelled due to the coronavirus pandemic.

Interviews. No individual component of the justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, the Sixth Amendment Center conducted interviews orally and in writing with a broad cross-section of stakeholders before, during, and after site visits to Santa Cruz County, including judges, court administrators, prosecutors, defense attorneys, court personnel, law enforcement, probation officials, and county officials and their staff.

Assessment criteria. The criteria used to assess the effectiveness of indigent representation systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronin*⁵⁸ and *Strickland v. Washington*.⁵⁹ *Strickland* is used after a case is final to determine retrospectively whether the lawyer provided ineffective assistance of counsel, applying the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

Hallmarks of a structurally sound indigent representation system under *Cronin* include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The

Understanding *Cronin* through the American Bar Association's ABA Ten Principles of a Public Defense Delivery System

Adopted by the ABA House of Delegates in 2002, the *ABA Ten Principles*^a are self-described as constituting "the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." The *Ten Principles* include the markers of a *Cronin* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

^a AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

⁵⁸ 466 U.S. 648 (1984).

⁵⁹ 466 U.S. 668 (1984).

absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

The coronavirus pandemic & Santa Cruz County's justice system

During the course of this evaluation, the coronavirus pandemic struck in the United States and worldwide. As has been widely reported, the novel coronavirus that causes the “COVID-19” disease was first detected in late-December 2019 in Wuhan, Hubei Province in China.^a The first U.S. case was confirmed on January 21, 2020 in Washington state.^b On March 11, 2020, the World Health Organization officially declared a pandemic.^c

With 53 confirmed cases of the virus in California by March 4, 2020, Governor Gavin Newsom declared a state of emergency^d and two weeks later issued a statewide “stay at home” order^e that was modified on May 7, 2020 to permit some limited services and public activities but otherwise remained in effect as of June 8, 2020.^f

Santa Cruz County issued its own shelter order on March 16, 2020,^g which was extended on April

29, 2020,^h and which remained in effect until May 26, 2020, when certain activities were allowed to resume.ⁱ “The first known COVID-19 case in the county was identified on March 6,” followed by the first confirmed death resulting from the virus on March 28, 2020.^j The county's health services agency provides daily updates about the coronavirus pandemic in Santa Cruz County.^k

Due to the public safety dangers caused by the coronavirus, justice officials in the State of California and in Santa Cruz County have temporarily altered many justice system procedures. Throughout this report, a sidebar appears wherever procedures are temporarily different as a result of the coronavirus pandemic, explaining the changes.

^a *WHO Statement regarding cluster of pneumonia cases in Wuhan, China*, WORLD HEALTH ORGANIZATION (Jan. 9, 2020), <https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china>; *Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/dpk/diseases-and-conditions/coronavirus/coronavirus-2020.html> (last visited May 6, 2020).

^b *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (Jan. 21, 2020).

^c *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

^d California Governor's Proclamation of a State of Emergency (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

^e California Governor's Exec. Order No. N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

^f California State Public Health Officer Order (May 7, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%205-7-2020.pdf>.

^g County of Santa Cruz Health Services Agency, Order of the Health Officer of the County of Santa Cruz Directing All Individuals Living in the County to Shelter at Their Place of Residence (Mar. 16, 2020), <http://santacruzhealth.org/Portals/7/Pdfs/Coronavirus/Shelter%20in%20Place%20Order%20March%2016%202020.pdf?ver=20200318>, *superseded by* County of Santa Cruz Health Services Agency, Order of the Health Officer of the County of Santa Cruz Directing All Individuals Living in the County to Continue Sheltering at Their Place of Residence Through May 3, 2020 (Mar. 31, 2020), <https://www.santacruzhealth.org/Portals/7/Pdfs/Coronavirus/PHO%20Order%20Extending%20SIP%2020200331.pdf>.

^h County of Santa Cruz Health Services Agency, Order of the Health Officer of the County of Santa Cruz Directing All Individuals Living in the County to Continue Sheltering at Their Place of Residence (Apr. 29, 2020), <https://www.santacruzhealth.org/Portals/7/Pdfs/Coronavirus/PHO%20Order%20Extending%20SIP%20Effective%20May%201%202020.pdf?ver=20200430>.

ⁱ County of Santa Cruz Health Services Agency, Order of the Health Officer of the County of Santa Cruz Directing All Individuals Living in the County to Continue Sheltering at Their Place of Residence and Providing Modifications to Prior Orders (May 26, 2020), <https://www.santacruzhealth.org/Portals/7/Pdfs/Coronavirus/May%2026%20PHO%20Order.pdf?ver=20200526>.

^j *County Confirms First Death from COVID-19*, COUNTY OF SANTA CRUZ HEALTH SERVICES AGENCY (Mar. 29, 2020), http://santacruzhealth.org/Portals/7/Pdfs/Coronavirus/COVID-19%20Death%203_29_2020.pdf.

^k *COVID-19 Information & Updates Santa Cruz County*, COUNTY OF SANTA CRUZ HEALTH SERVICES AGENCY, <http://santacruzhealth.org/HSAHome/HSADivisions/PublicHealth/CommunicableDiseaseControl/CoronavirusHome.aspx>.

CHAPTER II

THE JUSTICE SYSTEM IN SANTA CRUZ COUNTY

Criminal and juvenile justice is often referred to metaphorically as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. Each leg of the stool has different responsibilities, but the structures, policy decisions, and procedures of each affect the others. The same is true of the judges and the attorneys representing each side in civil proceedings.

The trial-level right to counsel in Santa Cruz County is carried out in the superior court. Decisions about the number and type of criminal and juvenile cases in the superior court are made by law enforcement officers as they make arrests and by prosecutors in the district attorney's office as they institute cases. The indigent representation system in the County of Santa Cruz is layered on top of the court and prosecution. The indigent representation system has no control over its own workload, and each provider must effectively represent each and every person to whom they are appointed unless a conflict of interest arises.

A. The superior court judges, courthouses, and court schedule

As in each of California's 58 counties, there is one superior court in Santa Cruz County that is the only trial court and has original jurisdiction over all cases, habeas corpus proceedings, and proceedings for extraordinary relief.⁶⁰

Judges. At the time of this evaluation, the Santa Cruz Superior Court has 12 judges,⁶¹ each elected countywide to a six-year term.⁶² In addition to its judges, the superior court has two commissioners.⁶³

⁶⁰ CAL. CONST. art. VI, §§ 4, 10.

⁶¹ The specific number of judges assigned to the superior court in each county is established by statute, but to the extent that the legislature makes appropriation for them there are 100 or more additional superior court judges who are allocated across the state according to a judicial needs study carried out by the Judicial Council. CAL. GOV. CODE §§ 69580 through 69611, 69614, 69614.2, 69614.3, 69615 through 69619.6 (West 2019). All superior court judges must be, for 10 years before taking office, either a licensed California attorney or a California judge of a court of record. CAL. CONST. art. VI, §§ 1, 15. While in office, they may not practice law and may not have other public employment or public office. CAL. CONST. art. VI, §§ 1, 17. The legislature establishes the compensation for judges, which may not be reduced during their terms of office, and provides for their retirement. CAL. CONST. art. III, § 4; CAL. CONST. art. VI, §§ 19, 20; CAL. GOV. CODE §§ 68202, 68203 (West 2019).

⁶² CAL. CONST. art. VI, § 16.

⁶³ A commissioner is a judicial officer who is subordinate to the authority of the superior court judges.

The superior court judges collectively choose from among them a presiding judge to serve at their pleasure.⁶⁴ The presiding judge determines how to “distribute the business of the court among the judges”⁶⁵ and is required to annually designate one or more judges to hear all juvenile court cases (dependency and delinquency).⁶⁶

Courthouses. There are two separate courthouses in Santa Cruz County, plus a small courtroom located in the juvenile detention center and a courtroom located in the main Santa Cruz jail. Following the 2008 worldwide financial recession, the superior court took steps to consolidate its administration and resources by, among other things, holding all jury trials and felony case proceedings in only the main Santa Cruz courthouse. There are some complaints that the much more modern Watsonville courthouse is under-utilized for criminal cases, requiring many poorer defendants from the Watsonville area of the county to find transportation to the main Santa Cruz courthouse. The court responds that the four courtrooms in Watsonville are almost always in use, primarily for civil cases and collaborative court projects.

Santa Cruz main courthouse. The main courthouse is a one-story 1960s construction located downtown in the county seat of Santa Cruz⁶⁷ and connected through a courtyard to the five-story county administration building. All jury trials are conducted in this courthouse. Also heard at the main courthouse are: all felonies arising anywhere in the county; all domestic violence misdemeanors arising anywhere in the county; all other misdemeanors arising outside of the Watsonville city limits and in-custody misdemeanors

Coronavirus temporary measures, as of June 2020

There is a courtroom inside of the main Santa Cruz jail. Prior to the pandemic, that courtroom was used only for the Behavioral Health Court collaborative court, presided over by Judge Guy on Thursday mornings.

Beginning in April 2020, the superior court is using this courtroom to conduct arraignments of adult defendants in custody, using remote video technology, twice a week on Tuesdays and Fridays.

See Emergency Standing Order Re: Appointment of Public Defender Upon Filing of Complaint in All Custody Cases (Calif. Super. Ct. Santa Cruz County Apr. 2, 2020); Statewide Emergency Order (Calif. Jud. Council Mar. 30, 2020); CAL. RULES OF COURT, App. I, emergency r. 3, 5.

CAL. CONST. art. VI, § 22; CAL. GOV. CODE § 69917 (West 2019).

⁶⁴ CAL. GOV. CODE §§ 69508, 69508.5 (West 2019).

⁶⁵ CAL. GOV. CODE § 69508 (West 2019).

⁶⁶ CAL. WELF. & INST. CODE § 246 (West 2019).

⁶⁷ Each superior court is required to have chambers at its county seat, but it can also choose to hold sessions of court at other locations, holding as many sessions of court at the same time as its number of judges. CAL. GOV. CODE §§ 24261, 69740, 69741.5 (West 2019).

Coronavirus temporary measures, as of June 2020

Adult criminal and juvenile delinquency matters are not being heard at the Watsonville courthouse. All criminal and delinquency trials at the Watsonville courthouse have been postponed.

All adult court proceedings are being conducted at the main Santa Cruz courthouse. All in-custody arraignments of adults are conducted on Tuesdays and Fridays by videoconferencing between a judge and prosecutor located at the main Santa Cruz courthouse and the defendant and defense attorney located at the main jail courtroom. For adult defendants, a single docket is held each day in the main Santa Cruz courthouse for all proceedings in all criminal case types, no matter to which court the case is allotted.

All juvenile court proceedings are being conducted in the Juvenile Hall courtroom in Felton, on Tuesdays and Fridays, and additionally as needed on Thursdays if any juveniles have been newly detained. The judge is physically present in the courtroom, but all attorneys, families, and juveniles who are on release are appearing remotely by telephone.

See Statewide Emergency Order (Calif. Jud. Council Apr. 29, 2020) (statewide extension of trial postponements to 90-day total); Statewide Emergency Order (Calif. Jud. Council Mar. 30, 2020) (statewide authorization of superior courts to issue orders); General Order (Calif. Jud. Council Mar. 27, 2020) (re Santa Cruz County superior court); Statewide Emergency Order (Calif. Jud. Council Mar. 23, 2020) (statewide suspension of trials for 60 days and allowing superior courts to adopt new rules); General Order (Calif. Jud. Council Mar. 18, 2020) (re Santa Cruz County superior court); Emergency Standing Order Re: Appointment of Public Defender Upon Filing of Complaint in All Custody Cases (Calif. Super. Ct. Santa Cruz County Apr. 2, 2020); CAL. RULES OF COURT, App. I, r. 3, 5, 7 (emergency rules related to COVID-19).

arising in Watsonville; and civil cases other than family law and small claims. There is no space in the main courthouse where attorneys can meet confidentially with their clients. As a result, attorneys meet with clients who are out of custody either in the courtrooms while court goes on or in public hallways, and they talk with their in-custody clients in the jury box while their clients are manacled and wearing orange jail jump suits.

Watsonville courthouse. The “Watsonville courthouse” is actually the third floor of the civic building in Watsonville; a much newer construction than the courthouse in Santa Cruz. Despite sufficient space to accommodate criminal jury trials, no criminal jury trials are held there. The only defendants who appear at the Watsonville courthouse are out of custody. Heard at the Watsonville courthouse are: misdemeanors arising within the Watsonville city limits; juvenile justice cases of juveniles on release (both delinquency and dependency) arising anywhere in the county; all family law cases; and civil small claims. There are four courtrooms, a large jury waiting area, and clerk offices with windows accessible from the hall. The facility has several private interview rooms off of the main third floor corridor where attorneys can meet privately with their clients.

Felton Juvenile Hall courtroom. There is a small courtroom inside of Juvenile Hall in Felton, where juvenile justice hearings are held for both detained and released juveniles. There is at least one private meeting room where attorneys can meet privately with their clients who are on release, but immediately before and during court proceedings the lawyers most often meet with their detained clients in a hallway between the courtroom and the secure part of the facility with guards standing close by.

Judicial assignments & court schedule. From time to time, judges are assigned to hear certain types of cases and at certain courthouses. Eight of the judges

and one commissioner hold sessions only at the main Santa Cruz courthouse. Three judges hold sessions only at the Watsonville courthouse. The juvenile justice judge holds sessions at both courthouses and the Felton courtroom, while a commissioner conducts traffic court on one day each week in Santa Cruz and on one day each week in Watsonville. Beginning January 1, 2020, the judges’ assignments⁶⁸ and the schedule of court sessions are:

**Santa Cruz County Superior Court
Judicial assignments & court schedule**

Judicial officer	Dept	Monday	Tuesday	Wednesday	Thursday	Friday	
Santa Cruz courthouse	Presiding Judge Burdick	Dept 3	felony	felony	felony	felony	felony
	Judge Cogliati	Dept 6	felony	felony	felony	felony	felony
	Judge Salazar	Dept 7	felony	felony	felony	felony	felony
	Judge Connolly	Dept 4	domestic violence - criminal	domestic violence - criminal	domestic violence - criminal	domestic violence - criminal	domestic violence - criminal
	[judicial vacancy]	Dept 1	misdemeanor	misdemeanor	misdemeanor	misdemeanor	misdemeanor
	Judge Siegel	Dept 2	misdemeanor	misdemeanor	misdemeanor	misdemeanor	misdemeanor
	Commissioner Trexel					traffic	

Other judges and assignments to cases rarely handled by the indigent representation system are:
 Assistant Presiding Judge Volkman, Dept. 5: CEQA, class actions, writs of mandate;
 Judge Gallagher, Dept. 10: civil all law & motion, probate;
 Judge Guy, Dept. 11: “Behavioral Health Court”

Watsonville courthouse			misdemeanor (out-of-custody)			
	Judge Guy	Dept B	juvenile justice (out-of-custody)		juvenile justice (out-of-custody)	
	Commissioner Trexel					traffic

Other judges and assignments to cases rarely handled by the indigent representation system are:
 Judge Schmal, Dept. A: dependency, small claims;
 Judge Marigonda, Dept. C: family;
 Judge Baskett, Dept. D: family, domestic violence – restraining orders;
 Commissioner Kast-Davids: family, domestic violence - civil

Felton	Judge Guy	Dept B		p.m. only - juvenile justice		a.m. only - juvenile justice
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⁶⁸ *Judicial Assignments*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ, <https://santacruzcourt.org/info/judicial-assignments>.

Appellate courts and court administration

The California Supreme Court is the court of last resort, may transfer any case on appeal from a court of appeal to itself, has jurisdiction over direct appeals in death penalty cases, and has original jurisdiction in habeas corpus proceedings and proceedings for extraordinary relief.^a The state's supreme court is made up of the chief justice and six associate justices, all elected statewide to 12-year terms.^b

The 58 counties of the state are divided into six districts, with a court of appeal sitting in each district.^c Each court of appeal has one or more divisions, and every division has a presiding justice and two or more associate justices.^d Santa Cruz County, along with the counties of Monterey, San Benito, and Santa Clara, comprise the Sixth Appellate District, with one division of seven justices who sit in San Jose.^e Courts of appeal justices are elected districtwide to 12-year terms.^f Every court of appeal has appellate jurisdiction over all cases originating in the superior courts and has original jurisdiction in habeas corpus proceedings and proceedings for extraordinary relief.^g

The Judicial Council is a body within the judicial branch of California government that took over all functions previously performed by the administrative office of the courts.^h The Judicial Council is the rule-making body for the entire judicial system, and it promulgates forms used in every court throughout the state.ⁱ

^a CAL. CONST. art. VI, §§ 10, 11, 12.

^b CAL. CONST. art. VI, §§ 2, 16(a).

^c CAL. CONST. art. VI, § 3; CAL. GOV. CODE § 69100 (West 2019).

^d CAL. CONST. art. VI, § 3.

^e CAL. GOV. CODE §§ 69100(f), 69106 (West 2019).

^f CAL. CONST. art. VI, § 16(a).

^g CAL. CONST. art. VI, §§ 10, 11.

^h CAL. CONST. art. VI, § 6; CAL. CONST § 68500.3 (West 2019).

ⁱ CAL. CONST. art. VI, § 6(c), (d); CAL. CONST § 68511 (West 2019).

B. The district attorney's office and probation department

1. The district attorney's office

The district attorney for Santa Cruz County is elected countywide to a four-year term.⁶⁹ The district attorney is the “public prosecutor,” responsible for prosecuting all crimes and prosecuting actions for recovery of debts, fines, penalties, and forfeitures due to the state or county.⁷⁰

For the Santa Cruz County fiscal year ending June 30, 2020, the district attorney's office is authorized 106 full-time equivalent positions.⁷¹ In addition to the elected district attorney, there is one chief deputy and 37 full-time assistant district attorneys in the office. The office is divided into three divisions: consumer protection, with three attorneys; victim-witness assistance, with all non-attorney staff; and criminal prosecutions, with 34 assistant district attorneys.⁷² All three divisions operate out of the district attorney's suite of offices on the second floor of the county administration building, connected to the main courthouse in downtown Santa Cruz.

⁶⁹ CAL. CONST. art. XI, §§ 1, 4; CAL. GOV. CODE §§ 24000, 24009, 24200 (West 2019). In each county, there is an elected district attorney, who must be a registered voter of the county and admitted to practice before the California Supreme Court. CAL. CONST. art. XI, §§ 1, 4; CAL. GOV. CODE §§ 24000, 24001, 24002, 24009, 24200 (West 2019). While in office, the district attorney cannot represent any person charged with a crime in any county and cannot represent any private plaintiff against any city, district, or political subdivision of the state. CAL. GOV. CODE §§ 26540, 26543 (West 2019).

⁷⁰ CAL. GOV. CODE §§ 26500, 26501, 26502, 26521 (West 2019).

⁷¹ COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, pp. 213-14.

⁷² COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, pp. 213-14.

Imbalance of resources between prosecutors and appointed attorneys

The U.S. Supreme Court determined that, because governments “quite properly spend vast sums of money to establish machinery to try defendants,” a poor person charged with crime cannot get a fair trial unless a lawyer is provided at state expense.^a And as the U.S. Supreme Court said in *United States v. Cronin*, “while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”^b Prosecutors and defense attorneys have different roles, but both the prosecution and the defense must have the resources they need at the level their respective roles demand. For these reasons, national standards, as summarized in the eighth of the *ABA Ten Principles*, uniformly call for parity between the prosecution and defense with respect to resources.^c

^a *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

^b *United States v. Cronin*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

^c AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 (2002).

The 34 prosecutors in the criminal division include:

- 8 felony prosecutors (2 in each of 3 felony courtrooms, plus 2 floaters);
- 5 domestic violence prosecutors (4 plus 1 supervisor in the domestic violence courtroom);
- 5 misdemeanor prosecutors (covering the 3 misdemeanor courtrooms, although one position is currently vacant); and
- 1 juvenile prosecutor.

The district attorney's office has a staff of 15 inspectors, including the chief inspector, who investigate cases for the office.⁷³ Each inspector is provided a county car. In addition to inspectors, criminal prosecution division of the district attorney's office has a total of 33 other administrative and support staff: seven administrative officers and assistants; one criminalist;⁷⁴ one program coordinator; and 24 assistants, secretaries, and paralegals.⁷⁵

The employees in the district attorney's office are all county employees whose compensation is determined and paid by the county.⁷⁶ As county employees, in addition to their compensation they have health insurance and disability benefits and are eligible for retirement. Attorneys and judges throughout the county are aware that the attorneys in the district attorney's office are paid at a higher rate than the indigent representation system attorneys. The salary paid to the full-time assistant prosecutors as of May 2020 ranges from a low of \$87,876 per year to a high of \$205,728 per year.⁷⁷ The following table shows the position titles, requirements and job descriptions, and monthly pay level ranges for the attorneys in the district attorney's office, as defined by the Santa Cruz County Personnel Department (annual pay is calculated by the Sixth Amendment Center):⁷⁸

⁷³ COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, pp. 213-14.

⁷⁴ The Santa Cruz County Personnel Department defines a "criminalist" as a person who "[u]nder general supervision, performs duties involved in crime scene investigations and identification of evidence by performing chemical, physical, and microscopic analysis in the laboratory and in the field; interprets the results of findings; prepares materials for presentation in criminal court; appears in court as an expert witness" and "performs other work as required." "Criminalist I & II (Series Specification)" in *Job Salary Schedule*, COUNTY OF SANTA CRUZ, PERSONNEL DEPARTMENT, <http://sccounty01.co.santa-cruz.ca.us/personnel/Specs/BM2spec.html>.

⁷⁵ COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, pp. 213-14. The remainder of the non-attorney staff authorized by the county budget to the district attorney's office are in the consumer protection division and the victim-witness assistance division.

⁷⁶ CAL. CONST. art. XI, §§ 1, 4.

⁷⁷ *Job Salary Schedule*, COUNTY OF SANTA CRUZ, PERSONNEL DEPARTMENT, <http://sccounty01.co.santa-cruz.ca.us/personnel/salsched/salsched.asp>.

⁷⁸ *Job Salary Schedule*, COUNTY OF SANTA CRUZ, PERSONNEL DEPARTMENT, <http://sccounty01.co.santa-cruz.ca.us/personnel/salsched/salsched.asp>.

**Santa Cruz County District Attorney’s Office
Job Descriptions and Compensation**

Position	Requirements & Job Description	Monthly Pay		Annual Pay	
		First Step	Last Step	First Step	Last Step
Atty I – DA	Graduation from law school. The entry and first professional level. Incumbents are required to be members of the California State Bar but need no experience practicing law and work under the direction of a more experienced attorney.	\$7,323	\$8,911	\$87,876	\$106,932
Atty II – DA	One year of experience as an attorney practicing criminal law. The second professional level. Incumbents will handle routine cases in Municipal Court with normal guidance from a more experienced attorney. Incumbents may be assigned on-going administrative responsibility for a functional area.	\$9,249	\$11,240	\$110,988	\$134,880
Atty III - DA	Two years of experience as an attorney practicing criminal law. The third professional level. Incumbents will generally handle any case in Municipal Court or Juvenile court and less complex cases in Superior Court with only occasional guidance. Incumbents may be assigned on-going administrative responsibility for a functional area.	\$10,986	\$13,346	\$131,832	\$160,152
Atty III - DA(C)	Two years of experience as an attorney practicing criminal law. A Supervising Attorney assignment.	\$12,085	\$14,678	\$145,020	\$176,136
Atty IV - DA	Three years of experience as an attorney practicing criminal law. The fully qualified journey level. Incumbents generally handle the more complex cases in any court in the County. Incumbents may be assigned on-going administrative responsibility for a functional area or rotate between a variety of special or supervisory assignments.	\$12,821	\$15,586	\$153,852	\$187,032
Atty IV - DA(C)	Three years of experience as an attorney practicing criminal law. A Senior Trial Attorney assignment.	\$14,104	\$17,144	\$169,248	\$205,728
District Attorney	An elected official.	\$22,026	\$22,026	\$264,312	\$264,312

2. The probation department

The county's probation department operates under the orders of the superior court.⁷⁹ In Santa Cruz County, the chief probation officer is appointed by the board of supervisors in collaboration with the superior court.⁸⁰ The chief probation officer oversees the county's probation department and is responsible for the Juvenile Hall, community supervision, and pre-sentence investigative reports, among other things.⁸¹

The probation department has three substantive divisions:

- the adult division makes detention or release recommendations, monitors defendants on pre-trial release, conducts plea and sentencing investigations, and provides community-based supervision;
- the juvenile division handles intake, investigation, and pre- and post-adjudication services for juveniles; and
- the juvenile hall division is responsible for the confinement of detained juveniles between the ages of 12 and 18 and makes detention or release recommendations for them.

For the Santa Cruz County fiscal year ending June 30, 2020, the probation department is authorized 128.5 full-time equivalent positions.⁸² The chief probation officer and all employees in the probation department are county employees whose compensation is determined and paid by the county.⁸³ As county employees, in addition to their compensation they have health insurance and disability benefits and are eligible for retirement.

⁷⁹ CAL. GOV. CODE § 27771 (West 2019).

⁸⁰ CAL. GOV. CODE § 27770 (West 2019).

⁸¹ CAL. GOV. CODE §§ 27771, 27772, 27773 (West 2019).

⁸² COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, p. 197.

⁸³ CAL. GOV. CODE §§ 27770, 27772 (West 2019).

CHAPTER III

OVERSIGHT AND ADMINISTRATION OF THE INDIGENT REPRESENTATION SYSTEM

Each state is responsible for ensuring that, where an attorney is appointed to represent an indigent defendant, that appointed attorney is able to provide effective representation. Attorneys provide representation to indigent people within the structures of the system a state creates. In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent representation systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.⁸⁴

The Court explains further in *Cronin* that, when a lawyer provides representation within an indigent representation system that constructively denies the right to counsel, the lawyer is presumptively ineffective.⁸⁵ When a system is determined to be deficient, the government bears the burden of overcoming that presumption of attorney ineffectiveness. The government may argue that the appointed lawyer in a specific case will still be effective despite the structural impediments in the system, but it is the government’s burden to prove this. As a federal court of appeals noted over 30 years ago, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”⁸⁶

⁸⁴ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

⁸⁵ *United States v. Cronin*, 466 U.S. 648, 657-62 (1984).

⁸⁶ *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

A. The indigent representation system in Santa Cruz County

The U.S. Constitution holds the State of California responsible for providing and overseeing attorneys to effectively represent indigent people.⁸⁷ California has delegated responsibility for all trial-level representation of indigent people to county boards of supervisors and/or the superior court judges in each county. As introduced in chapter I, Santa Cruz County has chosen to use private attorneys to provide all indigent representation services.

The contract law firms. 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.⁸⁸ For conflict representation, the county has contracted for decades with two other law firms: Page, Salisbury & Dudley (PSD); and Wallraff & Associates (Wallraff).

Santa Cruz County entered into the existing contract with BCM in 2012, initially for a six-year term.⁸⁹ The county contracted separately with PSD and with Wallraff in 2014 for a four-year term.⁹⁰ The contracts with all three law firms were extended in 2018 for another four years with limited change, other than to the amounts the county pays to the law firms and the addition of one required attorney at the BCM law firm in exchange for additional compensation in “clean slate” cases.⁹¹ (For detailed

⁸⁷ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

⁸⁸ A LEGAL HISTORY OF SANTA CRUZ COUNTY 73-74 (Alyce E. Prudden ed., 2006).

⁸⁹ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

⁹⁰ “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

⁹¹ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (for the term of July 1, 2014 through June

information about “clean slate” cases, *see* pages 114-116.) Each of these contracts requires the respective law firm to provide representation in an unlimited number of cases in exchange for which the law firm is paid a flat annual fee along with the possibility of additional compensation in “extraordinary circumstances.”

The CDCP private attorney panel administered by county counsel. Beginning December 1, 2014, the County of Santa Cruz 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.⁹² In addition to administering the CDCP, the county counsel’s office also oversees and approves all case-related expenses of both the CDCP attorneys and the three contract law firms (other than investigation costs paid by the contract law firms out of their contract compensation).

The same county counsel’s office may provide legal services and/or advice to the county’s school districts and boards, organizations that contract to operate the county fair, the county auditor-controller, and any superior court judge.⁹³ The county counsel’s office also defends or prosecutes all civil actions and proceedings in which the county or any of its officers are involved.⁹⁴

B. Attorney qualifications, training, and supervision

In *Powell v. Alabama*, – the case the U.S. Supreme Court points to in *United States v. Cronin* as representative of the constructive denial of the right to counsel⁹⁵ – the judge overseeing the Scottsboro Boys’ Alabama trial appointed as defense counsel a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.⁹⁶ The *Powell* Court

30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

⁹² Santa Cruz County Board of Supervisors Index Sheet, INVENUM 69810 (agenda date Dec. 9, 2014).

⁹³ CAL. GOV. CODE §§ 26520, 26520.5, 26522, 26523, 26524, 26526, 26529 (West 2019).

⁹⁴ CAL. GOV. CODE § 26529 (West 2019).

⁹⁵ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”)

⁹⁶ *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants. *Id.*

concluded that defendants require the “guiding hand” of counsel;⁹⁷ that is, the attorneys a government provides to represent indigent people must be qualified and trained to help those people advocate for their stated legal interests.

1. Selecting qualified attorneys to represent indigent people

Although attorneys graduate from law school with a strong understanding of the principles of law and legal theory and generally how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be, for example, a criminal defense lawyer or a juvenile delinquency defense lawyer.⁹⁸ Specialties must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.⁹⁹

Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them. As national standards explain, an attorney’s ability to provide effective representation in a criminal case depends on their familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”¹⁰⁰ The American Bar Association

⁹⁷ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

⁹⁸ Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 *GEO. J. LEGAL ETHICS* 915, 915 (2001-2002) (“[B]ecause legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

⁹⁹ *See, e.g.*, AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (2002) (“Defense counsel’s ability, training, and experience match the complexity of the case.”). The commentary explains further that: “Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 cmt. (2002).

¹⁰⁰ NATIONAL LEGAL AID & DEF. ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

observed more than 25 years ago that “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”¹⁰¹

Similarly, the National Juvenile Defender Center notes that “juvenile defense [is] a specialized practice requiring specialized skills,”¹⁰² and “[t]he role of the juvenile defender has evolved to require a challenging and complex skill set needed to meet core ethical obligations.”¹⁰³ For these reasons, attorneys appointed to represent juveniles “must be skilled in juvenile defense” and “knowledgeable about adolescent development and the special status of youth in the legal system,”¹⁰⁴ because otherwise children “may face unnecessary detention and excessive confinement, . . . decreased educational and/or employment opportunities, restriction of access to public benefits and privileges, and compromised immigrations status, as well as placement on lifelong registries.”¹⁰⁵

California statutes and court rules do not establish any particular qualifications that an attorney must meet before they are appointed to represent an indigent person in any type of case other than in: death penalty cases;¹⁰⁶ representation of children in delinquency cases;¹⁰⁷ representation of children in family law custody and visitation proceedings;¹⁰⁸ and certain types of appointments in guardianship and conservatorship proceedings.¹⁰⁹

California statutes impose mandatory qualifications an attorney must have to represent a child in any delinquency proceeding.¹¹⁰ The attorney must either: have practiced at least 50% juvenile delinquency law with demonstrated competence during each of the three most recent calendar years; or have completed a minimum of 12 hours of training or education in juvenile delinquency during the past 12 months.¹¹¹

¹⁰¹ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992).

¹⁰² NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 9 (2012).

¹⁰³ NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 8 (2012).

¹⁰⁴ NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 (2012).

¹⁰⁵ NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 cmt. (2012).

¹⁰⁶ See CAL. RULES OF COURT r. 4.117 (qualifications for appointed trial counsel in capital cases), r. 4.562 (qualifications of attorneys for appointment in death penalty-related habeas corpus proceedings), r. 8.605 (qualifications of counsel in death penalty appeals).

¹⁰⁷ See CAL. RULES OF COURT r. 5.664 (qualifications for counsel appointed to represent children in delinquency proceeding under Welfare & Institutions Code §§ 601, 602).

¹⁰⁸ See CAL. RULES OF COURT r. 5.242 (qualifications for counsel appointed to represent the best interest of the child in a custody or visitation proceeding under Family Code § 3150).

¹⁰⁹ See CAL. RULES OF COURT r. 7.1101 (qualifications and continuing education required of counsel appointed by the court in guardianships and conservatorships).

¹¹⁰ CAL. RULES OF COURT r. 5.664(b).

¹¹¹ CAL. RULES OF COURT r. 5.664(b).

The contract law firms. The county’s contract with BCM requires, beginning in 2018, that the law firm maintain a minimum staffing of 21 full-time equivalent attorneys who are members in good standing of the California Bar.¹¹² The county contracts with the two conflict law firms require each law firm, beginning in 2014, to “have available the services of no less than 5 full time attorney equivalents” who are members in good standing of the California Bar.¹¹³ Beyond having a valid California bar card, Santa Cruz County has not established any qualifications that any of the contract law firm attorneys must have before they can be appointed to represent any indigent person in any type of case in the superior court.

In fact, the contracts expressly state that it is the law firm that has “the right to control the manner and means” of carrying out the indigent representation services it is paid by the county to provide.¹¹⁴ The partners at each of the law firms choose the attorneys whom they hire. The three contract law firms have not established any mandatory qualifications that the attorneys they employ must have before they can be appointed to represent any indigent person in any type of case in the superior court.

Despite the lack of mandatory hiring qualifications, the law firms’ attorneys by and large have extensive experience in the areas in which they represent indigent people. This is the result of the hiring decisions made over decades by the partners at the three contract law firms, but there is nothing in the county’s contracts that requires the law firms to continue these same historical hiring practices. Under the county’s contracts

¹¹² “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 2 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 2 (extending the term through June 30, 2022).

¹¹³ “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹¹⁴ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 11 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 13 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

This provision is not actually contained in the 2014 contract with the Page law firm; it appears that a page of text, which should have appeared between pages 10 and 11, was inadvertently omitted from that contract. “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022).

with the law firms, an attorney newly graduated from law school and only just having passed the California bar exam, without any courtroom experience or supervision, can be appointed to represent any indigent adult in any criminal case, up to and including a case carrying a possible sentence of life in prison.

Biggam, Christensen & Minsloff. As of February 2020, the BCM law firm has three partners and 24 associate attorneys, for a total of 27 attorneys. None of the three partners carry a caseload, and one of them works part-time. Of the 24 associate attorneys, one was out on maternity leave. Of the 23 available associates, one does not handle any cases. The 22 available associate attorneys who handle the entirety of the caseload appointed to the BCM law firm are presently assigned as:

- 12 felony attorneys:
 - 3 felony “quarterbacks” assigned to superior court departments 3, 6, and 7; and
 - 9 felony trial attorneys;
- 2 domestic violence attorneys assigned to superior court department 4;
- 6 misdemeanor attorneys:
 - 2 assigned to superior court department 1
 - 2 assigned to superior court department 2; and
 - 2 assigned to superior court department B and also handle the juvenile justice cases;
- 1 conservatorship/LPS attorney; and
- 1 “Clean Slate” program attorney.

Although the BCM law firm attorneys have specific case-type assignments, there is nothing in the county’s contract that precludes the law firm from assigning any of its attorneys to any type of case.

The BCM law firm does not have a hiring committee and all hiring decisions are made primarily by partner Larry Biggam. The overwhelming consensus among judges and attorneys both within and without the BCM law firm is that Mr. Biggam “has an eye for talent” and is excellent at identifying attorneys practicing elsewhere who will become zealous client advocates. Even the most outspokenly critical attorneys who have worked for the BCM law firm expressed feelings of special validation that come with being hired by Mr. Biggam.

Of the 24 associate attorneys at the BCM law firm in February 2020, nine were hired since July 1, 2016. At least another seven joined the firm between 2000 and 2016. Of the remaining eight, at least two have been with the firm for more than two decades. There is some expressed concern about a lack of diversity among the attorneys at the BCM law firm; there are only two attorneys of color.¹¹⁵

¹¹⁵ The Biggam contract with the county demands that “[n]o person shall, on the grounds of race, creed, color, sex, national origin, sexual preference or physical handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program conducted under this agreement.” “Agreement for Public Defender Services” between the County of Santa

With few exceptions, the law firm does not hire attorneys straight out of law school. Those exceptions tend to be attorneys who interned or worked as a paralegal at the law firm while attending law school, or who were hired directly out of law school decades ago. Of the 24 associate attorneys at the BCM firm in February 2020, only three were hired directly out of law school.

Instead, the firm typically hires attorneys who have three to four years of experience working in indigent representation systems in nearby counties; often counties that pay less than the salary offered at the BCM law firm. As one attorney put it, “You pay your dues in other counties, learning how to do it, and then you get hired by Larry [Biggam].” Of the 24 associate attorneys at the BCM firm in February 2020, at least 13 and quite likely more were hired away from the public defense system of another California county.

That these hires have experience in other counties does not necessarily mean it is good experience. According to many in the Santa Cruz legal community, Mr. Biggam often recruits attorneys who are in deeply compromised personal and/or professional circumstances, causing them to jump at a position with the BCM law firm at any level of pay. Examples include attorneys from another county that has quickly laid-off a significant number of attorneys, attorneys in “terrible” county public defense systems, and attorneys working in unpaid volunteer positions who were in need of compensated employment. Some attorneys describe Mr. Biggam as believing that lawyers earn their stripes by doing a tour of duty in a troubled public defense system.

For an attorney to be hired and assigned to misdemeanor cases, Mr. Biggam says the attorney’s resume must demonstrate “a series of criminal law internships. We then place the new lawyers in misdemeanors with a more experienced court partner. They ‘catch cases’ within a week of arrival.”

For an attorney to be hired and assigned to felony cases, Mr. Biggam says the attorney usually has already tried several jury trials in other public defender offices in California. For attorneys already working in the BCM law firm, there are no specific qualifications an attorney must meet to be assigned to felony cases beyond a desire to be a felony attorney and willingness to go to trial.

Attorneys at the BCM law firm refer to assignment to juvenile justice cases as a “break” from what they perceive as the more rigorous requirements of adult criminal representation or as a training ground for the newest hires to the firm. At least one BCM law firm attorney who was assigned for a period of time to the juvenile justice

Cruz and Lawrence P. Biggam, ¶ 14 (for the term of July 1, 2012 through June 30, 2018), *amended* by “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

department B cases, after extensive experience at BCM handling felony trials, did not have the state-required qualifications to be appointed to represent juveniles in delinquency proceedings.¹¹⁶

Page, Salisbury & Dudley. As of February 2020, the PSD law firm has six attorneys (two partners and four associates) who all work full-time and carry a caseload. It is notable that of the six attorneys, two are over the age of 70 and another two are over the age of 60. All six attorneys at the PSD law firm have over 15 years of experience.

Mr. Page says the last time he hired a new attorney to the firm directly out of law school was 12 years ago. The most recent attorney to join the firm began in January 2020, but the lawyer came with 15 years of experience, including as a public defense attorney in another county. The most recent hire before that was in December 2018 of an attorney off of the CDCP panel.

The PSD law firm attorney assigned to all juvenile justice cases chooses that assignment and is wholly dedicated to juvenile defense, having begun practice as an attorney in juvenile law over 25 years ago.

Wallraff & Associates. As of February 2020, the Wallraff law firm has five attorneys (one full-time partner, three full-time associates, and one part-time associate) who all carry a caseload. At least four of the attorneys (if not all of them) have nine or more years of experience.

The CDCP. Individual private attorneys who desire to be appointed to conflict cases of indigent people in Santa Cruz County must join the Criminal Defense Conflicts Program. The program is administered by a part-time assistant attorney in the county counsel's office, and its policies and procedures are available on-line through the county website.¹¹⁷ The CDCP administrator has sole authority to select the private attorneys who are then eligible to be appointed through the program.¹¹⁸

A private attorney completes an application and mails or otherwise delivers it along with their resume to the CDCP administrator.¹¹⁹ On the application, the attorney provides:

- name, address, and telephone numbers;

¹¹⁶ See CAL. RULES OF COURT r. 5.664(b).

¹¹⁷ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures*, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹¹⁸ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ I, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹¹⁹ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ I, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

- state bar number, number of years admitted to the California bar, and whether they have been disciplined by the California bar with details;
- that they have read the CDCP policies and procedures and meet or exceed the minimum criteria for appointment;
- the types of cases for which they are qualified along with proof of those qualifications; and
- face sheets of their insurance policies of the type required by the county.¹²⁰

The CDCP requires all attorneys, in order to be appointed to represent indigent people through the CDCP, to:

- have a working phone, email, and fax;
- be a member in good standing of the California bar and notify the administrator within five days of any discipline imposed by the bar;
- provide references if requested by the administrator;
- have attended at least 12 hours of continuing legal education in the past 12 months; and
- provide a list of cases if requested by the administrator.¹²¹

In addition to these minimum qualifications, the types of cases and the qualifications (referred to as “general guidelines”) that the CDCP requires an attorney to have in order to be appointed are shown on the table on page 39.¹²²

The qualification requirements for the adult criminal Class 3 through 5 cases likely are sufficient to ensure an indigent defendant is represented by a qualified attorney, in that they require substantial experience and multiple jury trials. In the other types of cases, the required qualifications are likely insufficient to ensure that the attorney can provide effective assistance of counsel to an indigent defendant, because:

- For adult criminal Class 1 misdemeanor cases, all that is required is a bar card and 12 hours of legal education in the past year unless the administrator asks for more. This means an attorney newly graduated from law school and only just having passed the California bar exam, without any courtroom experience, can be appointed to represent without supervision any indigent person charged with a misdemeanor and facing a possible sentence of up to six months in the county jail.
- For adult criminal Class 2 non-serious felony cases, an attorney with only one

¹²⁰ *Santa Cruz County Criminal Defense Conflicts Program Attorney Application Form*, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Program%20Application%20Form.pdf.

¹²¹ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶¶ III, IV.A-B, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹²² *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ III, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

CDCP minimum attorney qualifications

Case type	CLE	Practice experience	Trial experience
Adult Criminal Class 1 misdemeanor^a	12 hours in past 12 months		list of cases if requested
Juvenile Delinquency Class 1 misdemeanor^b			
Adult Criminal Class 2 non-serious felony^c	12 hours in past 12 months	1 year criminal law; OR 50 misdemeanor cases	3 trials to verdict
Juvenile Delinquency Class 2 non-serious felony^d			
Adult Criminal Class 3 serious felony^e	12 hours in past 12 months; AND	3 years criminal law	20 felony matters (at least 4 to jury verdict)
Juvenile Delinquency Class 3 serious felony^f	12 hours sex & child abuse		
Adult Criminal Class 4 homicides / complex serious felony^g	12 hours in past 12 months; AND significant training (>12 hours) sex & child abuse	5 years (at least 3 years criminal law)	30 felony matters AND 10 felony trials; OR significant experience serious/violent felony (at least 5 to jury verdict)
Juvenile Delinquency Class 4 juvenile homicides / complex serious felony^h			
Adult Criminal Class 5 death penalty / special circumstances felonyⁱ	12 hours in past 12 months; AND significant training (>12 hours) sex & child abuse; AND Calif Death Pen Seminar OR 15 hours capital case defense training in past 2 years	10 years active criminal law	significant experience serious/violent felony (at least 10 to jury verdict); AND Principal attorney 1 first degree murder trial to jury verdict
All Juvenile Delinquency	12 hours in past 12 months juvenile delinquency	3 years (at least 6 months juvenile delinquency); OR 1 year juvenile delinquency prosecutor or public defender; OR 5 trials and 4 juvenile delinquency cases through disposition	
Civil Matters	12 hours in past 12 months civil area (family, administrative law, guardian & conservatorship)	3 years in civil area (family, admin law, guardian & conservatorship); OR 5 trials and 4 relevant matters to judgment; OR 1 year county counsel or public defender in relevant area	

^a Defined by CDCP as: "Cases where only misdemeanor crimes are charged." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 2.

^b Defined by CDCP as: "Cases where only misdemeanor crimes are charged or a Section 777 petition is filed and not consolidated with another petition." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 8.

^c Defined by CDCP as: "Cases where the most serious crime charged is a non-'serious' felony, including extradition cases. 'Serious' felonies are listed in Penal Code Section 1192.7." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 3.

^d Defined by CDCP as: "Cases where the most serious crime charged is a 'non-serious' felony and not listed in Welfare and Institutions Code section 707(b)." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 9.

^e Defined by CDCP as: "Cases where the most serious crime charged is a 'serious' felony as defined by Penal Code Section 1192.7, except those falling into the specific definition of Class 4 or Death Penalty." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 4.

^f Defined by CDCP as: "Cases where the most serious crime charged is a 'serious' felony as defined by Welfare and Institutions Code section 707(b)." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 10.

^g Defined by CDCP as: "Cases where the most serious crime charged is murder and the death penalty will not be sought or determined not to be likely by the Administrator after review of available police reports; or, the case involves a serious complex felony." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 5.

^h Defined by CDCP as: "Cases where the most serious crime charged is murder or the case involves a serious complex felony." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 11.

ⁱ Defined by CDCP as: "Cases where the most serious crime charged is murder, special circumstances are alleged, and the District Attorney indicates death is being sought." "Legal Services Agreement Between County of Santa Cruz and ____" (sample), Exhibit A – Fee Schedule, p. 6.

year of criminal law practice experience and who has never conducted a jury trial (requiring only 3 trials to verdict, which could be misdemeanor bench trials) can be appointed to represent without supervision any indigent person charged with a non-serious felony and facing a possible sentence of up to a year in county jail or 16 months or more in state prison.

- For juvenile delinquency cases, an attorney can be appointed whose only experience is in prosecuting juvenile delinquency cases but who has no experience, training, or supervision in defending those cases. This is of particular concern when an attorney is appointed to represent a juvenile who is the subject of a hearing to transfer the child to adult court for prosecution.¹²³

The CDCP administrator has sole authority to determine whether a private attorney meets the qualification requirements to be appointed through the program in each type of case.¹²⁴ If an attorney does not want to be appointed to certain types of cases for which they are qualified, the attorney notifies the administrator. Once an attorney is approved by the administrator to receive appointments through the CDCP, the attorney signs a contract with the county.¹²⁵

As of February 2020, there are in total 20 private attorneys plus the Sixth District Appellate Panel eligible for appointment to represent indigent people in conflict cases in Santa Cruz County. Most of the attorneys now eligible for appointment through the CDCP have accepted indigent case appointments for 15 or more years, either through direct appointment or because they were previously employed by one of the contract law firms. By type of case, there are eligible for appointment:

- 19 attorneys - Adult Criminal Class 1 misdemeanor
- 18 attorneys - Adult Criminal Class 2 non-serious felony
- 17 attorneys - Adult Criminal Class 3 serious felony
- 15 attorneys - Adult Criminal Class 4 homicide / complex serious felony
- 6 attorneys - Adult Criminal Class 5 death penalty / special circumstances felony
- 6 attorneys - Juvenile Delinquency Class 1 misdemeanor
- 6 attorneys - Juvenile Delinquency Class 2 non-serious felony
- 6 attorneys - Juvenile Delinquency Class 3 serious felony
- 7 attorneys - Juvenile Delinquency Class 4 homicide / complex serious felony
- 3 attorneys - Civil
- 4 attorneys, plus the Sixth District Appellate Panel - Misdemeanor appeals
- 2 attorneys, plus the Sixth District Appellate Panel - Writs

¹²³ See CAL. WELF. & INST. CODE § 707 (West 2019).

¹²⁴ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ I, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹²⁵ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.C, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

2. Training indigent representation system attorneys

To ensure that attorneys continue to be competent from year to year to handle the cases to which they are appointed, national standards require that the indigent representation system provide attorneys with access to a “systematic and comprehensive” training program,¹²⁶ at which attorney attendance is compulsory.¹²⁷ Training must be tailored to the types and levels of cases for which the attorney is appointed.¹²⁸ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Likewise, an attorney who is appointed in juvenile matters must be trained in the latest developmental sciences, effective adolescent interviewing techniques, and the operations and laws governing schools, social service agencies, mental health agencies, and other institutions serving children.¹²⁹ Ongoing training, therefore, is an active part of the job of being an indigent representation system attorney.

All licensed attorneys in California are required to complete, within 36-month periods, at least 25 hours of continuing legal education, four hours of which must be in legal ethics.¹³⁰ State law and court rules do not impose any further ongoing training requirements for attorneys appointed to represent indigent people in any type of case other than in: death penalty cases;¹³¹ representation of children in delinquency cases;¹³²

¹²⁶ NATIONAL ADVISORY COMM’N ON CRIM. JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std. 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(b) (4th ed. 2017) (“In addition to knowledge of substantive legal doctrine and courtroom procedures, a core training curriculum for criminal defense counsel should seek to address: investigation, negotiation and litigation skills; knowledge of the development, use, and testing of forensic evidence; available sentencing structures including non-conviction and non-imprisonment alternatives and collateral consequences; professional responsibility, civility, and a commitment to professionalism; relevant office, court, and prosecution policies and procedures and their proper application; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it.”)

¹²⁷ *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) (“Defense counsel is provided with and required to attend continuing legal education”). The commentary explains: “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 cmt. (2002).

¹²⁸ *See* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION std. 4-1.12(c) (4th ed. 2017) (“Counsel defending in specialized subject areas should receive training in those specialized areas.”)

¹²⁹ *See* NATIONAL JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS std. 1.3 (2013).

¹³⁰ CAL. RULES OF COURT r. 9.31(c); CAL. BUS. & PROF. CODE § 6070 (West 2019) (eff. Jan. 1, 2019).

¹³¹ *See* CAL. RULES OF COURT r. 4.117 (qualifications for appointed trial counsel in capital cases), r. 4.562 (qualifications of attorneys for appointment in death penalty-related habeas corpus proceedings), r. 8.605 (qualifications of counsel in death penalty appeals).

¹³² *See* CAL. RULES OF COURT r. 5.664 (qualifications for counsel appointed to represent children in

representation of children in family law custody and visitation proceedings,¹³³ and certain types of appointments in guardianship and conservatorship proceedings.¹³⁴ Of relevance to this evaluation, to remain eligible to represent a child in a delinquency proceeding, an attorney must complete at least 8 hours of continuing education related to juvenile delinquency during each calendar year.¹³⁵

The contract law firms. The county’s contracts with the three contract law firms do not establish any ongoing training or education requirements for the attorneys employed by the law firms who are appointed to represent indigent people, requiring only that the law firms provide attorneys who are members in good standing of the California bar.¹³⁶

The three contract law firms do not require their attorneys to receive any additional or more specific on-going training beyond the 25 hours of CLE within 36-month periods that is necessary to remain in good standing with the California bar.¹³⁷ They do not require that their attorneys who are appointed to juvenile delinquency cases complete at least 8 hours of continuing education related to juvenile delinquency during each calendar year, as mandated by court rule 5.664(c).¹³⁸ Nonetheless, the attorneys employed in the three contract law firms tend to choose criminal law and procedure, or juvenile delinquency, in the CLE courses they attend.

All three of the contract law firms pay the tuition cost of the 25 hours of CLE that each attorney must complete within every 36-month period in order to remain in good

delinquency proceeding under Welfare & Institutions Code §§ 601, 602).

¹³³ See CAL. RULES OF COURT r. 5.242 (qualifications for counsel appointed to represent the best interest of the child in a custody or visitation proceeding under Family Code § 3150).

¹³⁴ See CAL. RULES OF COURT r. 7.1101 (qualifications and continuing education required of counsel appointed by the court in guardianships and conservatorships).

¹³⁵ CAL. RULES OF COURT r. 5.664(c).

¹³⁶ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 2 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 2 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹³⁷ See CAL. RULES OF COURT r. 9.31(c); CAL. BUS. & PROF. CODE § 6070 (West 2019) (eff. Jan. 1, 2019); *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.A, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹³⁸ CAL. RULES OF COURT r. 5.664(c).

standing with the California bar. The BCM law firm also pays the cost of travel to and lodging during out-of-town CLE programs that the firm approves its attorneys to attend from time to time.¹³⁹

The county criminal defense bar association and the BCM law firm jointly plan a monthly training program to which all of the contract law firm attorneys are invited, but not required, to attend. The BCM law firm is a state-certified CLE provider, and a BCM law firm attorney manages the attendance records and generates the certificates of attendance for these monthly programs. Recent topics at these monthly programs have included dispositions in domestic violence cases, sentencing and caseload management in felony cases, pitching plea deals to prosecutors, *Brady* evidence, and how to present slide shows in court.

Absence of formal internal training. None of the three contract law firms provide any formal internal training for attorneys newly hired to the firms or as their attorneys are assigned to represent indigent people in a new type of case. (See side bar on pages 45-46, providing an example of an effective training program.) As has been mentioned, many of the attorneys employed in the contract law firms have extensive experience. Nonetheless, no matter how experienced an attorney may be, they must learn about ongoing changes to the law and forensics and technology, they must learn the law and procedures and rules when first beginning to handle a different type of case, and if new to Santa Cruz County they must learn the local court procedures and rules. As one attorney with more than five years' experience put it: "I think about effectiveness a lot [because] I don't know if I'm practicing my mistakes."

Informal mentoring & case discussion. Attorneys describe the method of training at the BCM law firm as "being thrown into the caseload, and you learn as you go." Attorneys express concern that new lawyers at the BCM law firm are sometimes thrown into a full misdemeanor caseload before they are ready, and "it's on other lawyers to train them." Because there are two BCM attorneys in each misdemeanor courtroom, generally one is more experienced and can help the new person unless they are in trial or occupied with other duties in the courtroom. Before BCM attorneys are placed on a felony assignment, they usually serve as second chair on a few felony cases, but even so they do not receive any formal training in handling felony cases.

When BCM hires a new lawyer (even an experienced one), the firm assigns a more senior attorney to be available as a mentor. But it is "entirely opt-in" as to whether the new attorney seeks help from the assigned mentor. "There is mentoring only to the extent that colleagues are open to discussing cases."

¹³⁹ Attorneys employed by the BCM law firm have attended, at law firm expense, training programs and CLE provided by: the National Criminal Defense College in Macon, Georgia; the National Association of Criminal Defense Lawyers; the California Public Defender Association; and the California Attorneys for Criminal Justice.

The BCM law firm holds three meetings each week at which attorneys can discuss any questions or concerns about their cases. The Monday noon meeting is a full staff meeting, including a criminal case law update provided by the firm's research attorney. On Wednesday, the felony lawyers and investigators meet. On Thursday, the misdemeanor lawyers and investigators meet.

PSD law firm attorneys meet together twice a week for lunch. The Wallraff law firm has weekly meetings of all attorneys.

The CDCP. The CDCP does not pay for or reimburse program attorneys for the CLE hours they must complete to remain in good standing with the California bar or to remain qualified in juvenile delinquency cases, and the CDCP does not directly provide training to program attorneys.¹⁴⁰

The CDCP administrator reports that occasionally some CDCP attorneys have sought assistance from the administrator to help them obtain the qualifications necessary for higher level case types. When this has occurred, the administrator reports having offered to compensate these attorneys at \$75 per hour to sit as second chair at trial to an attorney already qualified for the higher level of case types. This seems to be an offer made on an attorney-by-attorney basis, without any notification to all CDCP attorneys.

¹⁴⁰ The only mention of ongoing training is that “[p]rogram attorneys may attend continuing legal education training provided by Biggam, Christensen and Minsloff, the County’s Main Public Defender Firm, or other training opportunities identified by the administrator.” *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ V, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

What an effective training program looks like

In Indiana, like in California, each county is responsible for establishing and operating its own indigent representation system. The Marion County Public Defender Agency (MCPDA) has an extensive in-house training program for its attorneys. Additionally, MCPDA consistently sends some number of its staff attorneys to highly-regarded outside training programs each year.

MCPDA signs written contracts with each public defender employee, with slight modifications depending on the unit where the employee works. Attorneys are hired for either the juvenile or the adult criminal sides of the office. New attorneys at the public defender office are provided one-page descriptions of the scope of work expected from them in the division to which they are assigned. All staff attorneys follow a uniform path of progress through the various departments of the office.

The MCPDA employment contract with each staff attorney specifies that the office will provide free CLE accredited in-house training on criminal defense and requires every staff attorney to obtain at least half of their annual CLE requirements in defense-related topics. The office's training unit provides four types of training programs:^a two-week training for new hires; monthly meetings for the domestic violence and level 6 felony attorneys; promotional practicals every six months; and 20 to 25 hours annually of continuing legal education.

Newly hired staff attorneys all participate in a two-week training program that usually occurs in mid-May. The first day involves completing human resources paperwork, learning about the various computer systems in the office, and other logistical matters. At the beginning of the first week, the attorneys are introduced to the structure of the agency and the work performed by each of the agency's divisions. Then intensive training begins. The new attorneys are broken up into small groups, and each group receives a mock case to work on. A full afternoon is dedicated to developing the theme and theory of a case. Over

the course of several days, training staff teach the attorneys about each step of a trial, in bite-sized pieces, in a three-part process where the attorneys first receive instruction, then apply that to the sample case, and finally present that stage of a mock trial in small groups. The attorneys usually spend a day or two shadowing the attorneys they will replace in misdemeanor or juvenile delinquency court. On the final Friday of the two-week new attorney training program, the new attorneys receive the files for which they will begin to be responsible on the following Monday.

In order to promote from one division to the next, an attorney must do a "promotional practical" where they develop and present portions of a mock case and are evaluated by the heads of the division into which they are seeking promotion and other senior office attorneys. The presentations are videotaped so that attorneys can see themselves and receive immediate feedback. Promotional practicals are offered every six months.

All attorneys hired into the juvenile delinquency division are generally expected to remain there because they intend to devote their careers to representing children and families. The division has a mixture of veteran leadership and invigorated youthful attorneys. The attorneys progress through three rankings: attorney 1 handling misdemeanor and low-level felonies; attorney 2 handling major felonies; and attorney 3 handling waivers of children into adult courts. Supervision is taken seriously. The division has four juvenile-certified trainers on staff and is seen as a national leader in juvenile defense.

For attorneys who begin with the agency in adult criminal representation, there is also an established track. Attorneys begin in the misdemeanor division, where they typically remain for approximately one year. The misdemeanor division holds a staff meeting every Friday afternoon to discuss any cases and problems anyone is having.

The next stop is the domestic violence division, which handles both misdemeanors and felonies. Before attorneys receive their first domestic

^a In 2015, the training department was developing a program to address attorney staff who are not meeting expectations. The chief public defender was also looking to develop an evidence boot camp geared toward excluding hearsay.

violence case, the department supervisor trains them on the distinctions between a misdemeanor case and a felony case, how to conduct a bail review hearing, the particular concerns about sentencing in felony cases, and the collateral consequences incurred by a defendant when convicted of a crime of domestic violence. Attorneys typically have their first jury trial experience while working in the domestic violence division. Next attorneys move to the low-level felony division, where the attorneys engage in much more extensive discovery and motion practice.

The training staff hold monthly meetings with all attorneys assigned to the domestic violence and low-level felony divisions. These meetings are held on four days each month, so that every attorney can attend no matter what days they are in court, and roughly one-fourth of the attorneys participate on each of the days. In these meetings, the training staff instruct the attorneys on any relevant changes to the law and rules, have staff attorneys practice particular skills, and brainstorm current cases with the attorneys. On average, an attorney is employed with the office for a minimum of two to three years before moving into the major felony division.

The chief operating officer also conducts a file review with every staff attorney at least once a year. The chief operating officer picks one file to review and the attorney picks one file to review. Each MCPDA division has a supervisor and most have one or more assistant supervisors. In all divisions except the misdemeanor unit, an experienced attorney is assigned as the team lead in every courtroom.

The MCPDA training staff also present two one-hour CLE programs each month that are available to all staff and contract attorneys for free and to outside attorneys for \$25. On the Columbus Day holiday each year, MCPDA presents a two-hour CLE program in conjunction with a golf tournament that serves as a major fundraiser for the training department. On the Veterans' Day holiday each year, MCPDA presents a three-hour CLE program on ethics. Once every two years, the MCPDA and the Marion County prosecutor's office jointly present a six-hour CLE program for newly licensed attorneys.

3. Supervising indigent representation system attorneys

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competence to handle cases over time, and indigent people do not get to choose which attorney is appointed to represent them. For these reasons, national standards require that all attorneys who are appointed to represent indigent people must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent client.¹⁴¹ Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer appointed if they are no longer competent.

The contract law firms. The county’s contracts with the three contract law firms do not establish any requirement for supervision, performance assessment, or method of removing the attorneys who are appointed to represent indigent people. The two conflict contract law firms do not have any supervision structure or process, do not have formalized performance standards, and do not conduct performance assessments of their attorneys. The BCM law firm partners say they supervise the firm’s attorneys and conduct performance reviews of them, but attorneys state that these things occur in name only. Many of the law firms’ attorneys expressed as a positive the fact that there is no one “micromanaging, nit-picking, or second-guessing” their work.

Both judges and the BCM firm attorneys suggest that the most important role of the BCM law firm partners is in addressing any complaints about attorney performance. As one judge expressed it, “when we have a problem” we can go directly to the partners. And the attorneys say “Biggam, Christensen & Minsloff management has your back with judges,” providing “a security blanket for us to operate beneath.”

Some judges say the BCM law firm can terminate poorly performing attorneys in a way that government perhaps could not. But most attorneys who leave the BCM law firm were not terminated; they chose to do so because of the lack of advancement possibilities (and insufficient compensation, as discussed in chapter IV). “You rise from misdemeanors to felony trials and that is it.” There is no place in the system to move into a supervisory or management level or to teach the next generation of indigent representation system lawyers. There is “no upward trajectory.”

The CDCP. The contract that each CDCP attorney signs with the county requires the attorney to comply with the CDCP policies and procedures.¹⁴² It provides that the county can terminate the contract with a CDCP attorney for:

- failure to maintain good standing in the California bar;
- failure to adhere to the CDCP policies and procedures;

¹⁴¹ See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002).

¹⁴² “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 2.

- inability to function effectively as an attorney for a client;
- submitting an untrue invoice or repeatedly submitting non-compliant invoices;
- repeatedly failing to appear in court as required; or
- failure to consent to or complete a remedial plan.¹⁴³

The CDCP policies and procedures impose minimal performance requirements on the attorneys, consisting of:

- adhering to the highest standards of professional conduct;
- abiding by the rules of professional conduct;
- not delegating representation without prior approval of the administrator, other than for occasional stand-in appearances;
- contacting clients within five working days of assignment “or as soon as is practicable;” and
- cooperating in a performance evaluation or billing audit if asked to do so by the CDCP administrator.¹⁴⁴

Broadly, though, the contract provides that the CDCP attorney has “the right to control the manner and means of accomplishing” the representation of indigent people to which the attorney is appointed through the CDCP.¹⁴⁵

The contract with each CDCP attorney is amended at the end of its one-year term to extend for another one-year term. The administrator has never conducted a performance evaluation or a billing audit of any CDCP attorney. The administrator conducts oversight of the representation provided by the CDCP attorneys primarily through: talking regularly with the judges, prosecutors, appointed attorneys, law enforcement, and other service providers; emailing the CDCP attorneys if court dockets lack visible progress in appointed cases; regularly asking CDCP attorneys about the progress of pending cases and disposition of cases; reviewing attorney billings, claims, and work product; and occasionally spot-checking court dockets to ensure that court appearances match invoices.

¹⁴³ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 6.

¹⁴⁴ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹⁴⁵ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 12.

CHAPTER IV

INDIGENT REPRESENTATION SYSTEM FUNDING AND INDEPENDENCE

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”¹⁴⁶ For this to occur, an indigent person’s attorney must have the resources necessary to challenge the prosecution’s case. If the attorney lacks the necessary resources to challenge the state’s case – “if the process loses its character as a confrontation between adversaries”¹⁴⁷ – this is a structural impediment that results in a constructive denial of the right to counsel.

A. Sufficient resources & compensation

The U.S. Constitution holds the State of California responsible for ensuring adequate funding for the right to counsel under the Sixth and Fourteenth Amendments.¹⁴⁸ Again, California has delegated to its counties all of the responsibility at the outset for funding indigent representation services in the trial courts.¹⁴⁹

¹⁴⁶ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

¹⁴⁷ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984).

¹⁴⁸ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

¹⁴⁹ CAL. GOV. CODE §§ 27707.1, 27708, 27711 (West 2019); CAL. PENAL CODE §§ 987.2(a), 987.2(b) (West 2019). If the legislature allocates funding each year, counties can apply for state reimbursement of three types of indigent representation expenditures: certain costs in homicide cases that exceed a county’s taxation income, CAL. GOV. CODE §§ 15201, 15202, 15204 (West 2019); not more than 10% of the county’s expenditures for providing appointed counsel for indigent people “charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act,” CAL. PENAL CODE § 987.6 (West 2019); and local public defenders can be reimbursed out of the state’s “Local Public Prosecutors and Public Defenders Training Fund” for attending “statewide programs of education, training, and research,” CAL. PENAL CODE §§ 11501 through 11504 (West 2019).

1. The fiscal resources necessary for effective representation

The American Bar Association's *Standards for Criminal Justice* explain that attorneys must have adequate resources and support (including secretarial, investigative, and expert services) and adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) in order to render effective assistance of counsel.¹⁵⁰ To prevent financial conflicts of interests, all national standards require that: "Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses."¹⁵¹ Therefore, an attorney needs three types of resources to effectively represent each client:

- *Law office overhead.* For an attorney to be available to represent clients each day, certain expenses must be funded. These include office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. Private attorneys must incur all of these expenses, commonly referred to as "overhead," before representing a single client.¹⁵²
- *Case-related expenses.* Once an attorney is designated to represent a client in a given case, additional expenses inevitably arise. These are expenses that the attorney would not incur but for representing that client, and they include, for example, postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case; some cases requiring very little in the way of expense, other cases costing quite a lot.
- *Fair lawyer compensation.* This is the attorney's pay.

¹⁵⁰ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

¹⁵¹ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

¹⁵² "The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses," NATIONAL ASS'N OF CRIM. DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts for smaller law offices. See ALM LEGAL INTELLIGENCER, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

The government is responsible for providing the resources needed in each indigent person's case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the appointed private attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent representation system onto appointed private attorneys.¹⁵³

Although California law requires counties to provide the overhead needs (such as rooms, furniture, supplies, and support staff) of a public defender office in addition to the compensation paid to the public defender office attorneys,¹⁵⁴ state statutes do not impose any requirement that counties fund the overhead costs incurred by private attorneys in an indigent representation system. In derogation of national standards, state law requires only that private attorneys appointed to represent indigent people “shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court” or “by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid.”¹⁵⁵

¹⁵³ See, e.g., *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (concluding that “requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;” and that Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because doing so would be taking “private property for a public purpose without just compensation”); *Kansas ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state “has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses”); *Louisiana v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that “in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs”); *Wilson v. Mississippi*, 574 So.2d 1338, 1340 (Miss. 1990) (holding indigent defense attorneys are entitled to “reimbursement of actual expenses” including “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case,” in addition to a reasonable sum); *Oklahoma v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that the state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses”); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (finding that, because compensation rates did not cover attorney overhead, court appointed attorneys were forced to “involuntarily subsidize the State with out-of-pocket cash;” “[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial”).

¹⁵⁴ CAL. GOV. CODE §§ 27708, 27711 (West 2019).

¹⁵⁵ CAL. PENAL CODE § 987.2(a), (b) (West 2019).

State law provides very little guidance about the case-related expenses that a county must provide for the representation of indigent people. The only case-related expense that is expressly provided for indigent people represented by public defender offices is “the expense of printing or typewriting the briefs on appeal,” which must be paid by the county.¹⁵⁶ In criminal cases, the court pays the fees of court interpreters and translators,¹⁵⁷ but it is unclear whether this is only for services provided in-court for the benefit of all participants or whether it includes services in and out of court for an indigent person. State law does not make any express provision to provide investigators, experts, and other necessary items for the representation of an indigent person at trial, other than in capital cases or second degree murder cases involving a defendant who has previously served a prison term for first or second degree murder.¹⁵⁸

2. Fiscal resources provided by Santa Cruz County to the four institutional providers

Santa Cruz County provides all funding of the indigent representation system through a single budgetary unit known as “Public Defender – Department 59.”¹⁵⁹ Line items for this budgetary unit are:

- “PD K” – the primary law firm contract flat annual compensation;
- “PD conflicts K” – the two conflict law firm contracts flat annual compensation;
- “PD special” – the contracts with the CDCP attorneys, including attorney fees and case-related expenses reimbursed or funded, paid through the CDCP;
- “Prof/spec serv oth” – case-related expenses and extraordinary compensation reimbursed or funded to the three contract law firms, paid through the CDCP; and
- all other items – funds paid out directly by the county such as for leases, utilities, janitorial services, and insurance.

¹⁵⁶ CAL. GOV. CODE § 27709 (West 2019).

¹⁵⁷ CAL. GOV. CODE § 68092 (West 2019).

¹⁵⁸ CAL. PENAL CODE § 987.9(a), (b)(2) (West 2019) (eff. Jan. 1, 2018).

¹⁵⁹ *See, e.g.*, COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20 at p. 118.

The table below shows the budgeted revenue and expenditures for “Public Defender – Department 59” for the current 2019-20 fiscal year and shows actual expenditures for the preceding three fiscal years.¹⁶⁰

Santa Cruz County budgetary unit “Public Defender – Department 59”					
	Revenue	Expenditures			
	Budgeted FY2019-20	Budgeted FY2019-20	Actual FY2018-19	Actual FY2017-18	Actual FY2016-17
Public Defender	\$164,000	\$12,802,160	\$11,518,796	\$11,355,610	\$10,359,885
St-mandated reimb	-				
St-AB109	\$111,000				
PD fees	\$8,000				
PD registr fees	\$45,000				
Janitorial		-	-	\$2,580	\$2,580
Misc expense-serv		\$3,800	\$2,100	\$2,100	\$2,100
Duplicating serv		\$1,100	-\$7	--	\$593
Supplies		\$75,000	\$64,248	\$66,629	\$65,124
Prof/spec serv oth		\$1,850,000	\$1,462,346	\$1,329,831	\$1,233,182
PD conflicts K		\$2,414,738	\$2,333,080	\$2,254,176	\$2,138,688
PD K		\$7,503,638	\$7,249,938	\$7,004,738	\$6,504,740
PD special		\$865,960	\$327,015	\$616,840	\$342,564
Rents/leases		\$82,924	\$74,009	\$74,448	\$66,174
Utilities		\$5,000	\$6,067	\$4,268	\$4,140

3. The overhead, case related expenses, and compensation of the contract law firms and their staff attorneys

Each contract law firm agrees to provide representation in an unlimited number of cases of specific types, whenever appointed by the superior court in Santa Cruz County.¹⁶¹

¹⁶⁰ COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20 at p. 118; COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2018-19 at p. 108.

¹⁶¹ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 1 and Exhibit A (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 1 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 5 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 1 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of

a. Representation costs that are not paid by the contract law firms

The county either directly pays for or reimburses the contract law firms for:

Biggam, Christensen & Minsloff (BCM) law firm:¹⁶²

- the lease of the Watsonville Office space, and associated utility and janitorial costs;
- the actual cost of the BCM law firm’s professional errors and omissions insurance with a \$25,000 deductible;
- the actual cost exceeding \$73,154 of the BCM law firm’s “Employee Insurance Program;” and
- some case-related expenses – “transcripts, medical, psychological and psychiatric experts, interpreters, witness fees, and such specialized services as may be required . . . [and] the cost of collect phone calls from the jail.”

Page, Salisbury & Dudley (PSD) law firm and Wallraff law firm:¹⁶³

- some case-related expenses – “transcripts, medical, psychological and psychiatric experts, witness fees and such specialized services as may be required.”

The BCM law firm (but not the PSD firm or the Wallraff firm) is contractually required to report annually to the county administrative officer “the frequency and cost of other services in representing parties, including witness fees, scientific investigation, and other services.”¹⁶⁴

Experts. The costs of experts to consult, advise, and testify if needed in the cases of indigent people represented by any of the three contract law firms (as well as the CDCP attorneys) are paid by the county, outside of the compensation paid to attorneys. Attorneys at the three contract law firms submit a request to the CDCP administrator,

Santa Cruz and the law firm of Wallraff & Associates, ¶ 5 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 1 (extending the term through June 30, 2022).

¹⁶² “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶¶ 2, 7, 10(C) (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶¶ 2, 5 (extending the term through June 30, 2022).

¹⁶³ “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 6 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 6 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹⁶⁴ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 3 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

who authorizes the necessary funding, and all documents are filed under seal in the court.¹⁶⁵ All attorneys report that they have not experienced any difficulty in receiving funding for expert assistance in appointed cases whenever they request it.

b. Representation costs that must be paid by the contract law firms

The four-year contract amendments currently in place provide for the county to pay each of the three contracting law firms the following flat annual compensation:¹⁶⁶

	Biggam, Christensen & Minsloff		Page, Salisbury & Dudley	Wallraff & Associates
	regular services	“Clean Slate”	regular services	regular services
FY18-19	\$7,042,938	\$207,000	\$1,166,540	\$1,166,540
FY19-20	\$7,289,438	\$214,200	\$1,207,369	\$1,207,369
FY20-21	\$7,581,038	\$222,800	\$1,255,664	\$1,255,664
FY21-22	\$7,960,138	\$224,900	\$1,318,447	\$1,318,447

The only allowance for any of the contract law firms to be paid any additional compensation for the unlimited number of specific case types covered in the contract is in “extraordinary circumstances.” If a law firm believes it has been appointed in a case that could require “unusual time and expense,” the law firm must advise the county and then petition the court for extraordinary compensation or expenses, and if approved by both the court and the county, the law firm can be paid the expenses and additional compensation.¹⁶⁷ The BCM law firm is expressly authorized to seek extraordinary

¹⁶⁵ Standing Order No. 19-03, Criminal Conflict Program Administrator Authorization (Calif. Super. Ct. Santa Cruz County Feb. 4, 2019).

¹⁶⁶ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 4 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 3 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 1 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 1 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹⁶⁷ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 8 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 3 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 7 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 7 (for the term of July 1, 2014 through June 30, 2018), *amended*

compensation for Franklin hearings¹⁶⁸ (*see* side bar on “clean slate” representation, pages 114-116), but there is no similar provision in the PSD or the Wallraff contracts. Where the court and county approve extraordinary compensation to the BCM law firm, it is at the hourly rate of \$120 as of July 1, 2019;¹⁶⁹ there is no similar provision in the PSD or the Wallraff contracts.

Out of the compensation that the county pays to each law firm, the contracts require the law firms to pay for all costs of performing the contract (explicitly stated in the BCM contract¹⁷⁰). In addition to providing representation, the BCM law firm is contractually required to:¹⁷¹

- maintain a Santa Cruz Office;
- employ 21 FTE attorneys, 2 FTE paralegals, and 7 FTE investigators;
- have and pay for general office liability insurance;
- have professional errors and omissions insurance (paid for by the county) and be responsible for the deductible amount of \$25,000; and
- pay for the first \$73,154 of the BCM law firm’s “Employee Insurance Program.”

In addition to providing representation, the PSD firm and the Wallraff firm are each contractually required to:¹⁷²

by “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

If any of the BCM law firm attorneys are appointed in a type of case not specifically listed in the contract, the law firm is paid \$75.00 per hour capped at a maximum of \$1,000 per case. “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 4 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 3 (extending the term through June 30, 2022).

¹⁶⁸ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 8 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 3 (extending the term through June 30, 2022).

¹⁶⁹ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 8 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 3 (extending the term through June 30, 2022).

¹⁷⁰ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 5 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

¹⁷¹ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶¶ 2, 10(A), 10(B), 10(C) (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶¶ 2, 5 (extending the term through June 30, 2022).

¹⁷² “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement”

- employ 5 FTE attorneys and have investigators “as needed;” and
- have and pay for insurance: worker’s compensation; automobile liability; and comprehensive or commercial general liability.

Before any of the attorneys employed by the three contract law firms can take any case, the law firms must provide all of the necessary overhead. Because these private law firms employ associate attorneys, investigators, and support staff that the firms make available to accept appointments under their contracts with Santa Cruz County, the law firms also must pay the up-front cost of the employees’ salaries and benefits. Thus, the law firms’ employees’ salaries and benefits are part of the law firms’ overhead expenses.

In a private law firm, the firm’s owners are paid last – after covering all unreimbursed case-related expenses and all overhead expenses, including the compensation of employees, the funds that remain are the law firm’s profits, which the law firm owners can do with as they see fit. The more that a law firm’s owners can minimize the cost of overhead, the more money the firm’s owners will have at their disposal to potentially reinvest in infrastructure, to increase staff salaries and benefits, and/or to compensate themselves. The BCM partners are unwilling¹⁷³ to disclose the amount of salaries and other forms of compensation that the law firm provides to associate attorneys, citing the contract

between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹⁷³ Letter from Lawrence P. Biggam, Attorney-at-Law, Biggam, Christensen & Minsloff to David Carroll, Executive Director, Sixth Amendment Center (January 23, 2020) (“Compensation and benefits for staff . . . remains confidential. As a private independent law firm, we control the ‘Manner and means’ of providing defense services for the County. Suffice it to say that we have successfully recruited lawyers from other public offices in the state. Also there is a law in California which prohibits employers from asking prospective employees what salary they currently make. In this context, the County who retained you is a potential employer. But most importantly, this information is irrelevant to your analysis.”), on file at the Sixth Amendment Center.

Interpreters

Due to the county’s large Hispanic population (over 34% as of the 2010 census), the most common need in Santa Cruz County is for Spanish translations. For in-court translation, Spanish language interpreters are regularly present in the courtroom, to translate between Spanish and English for all of the court participants. But appointed lawyers need to communicate with Spanish-speaking clients and witnesses outside of the courtroom to provide the right to counsel to those indigent clients.

The CDCP authorizes hiring interpreters, payable at \$75 for the first hour, then \$50/hour additional. As a practical matter, though, the three contract law firms use their staff to provide Spanish-English translation in their appointed cases, paying for this interpreter cost out of the contract compensation and not being reimbursed for it. At the BSM law firm, five of the eight full-time staff investigators are bilingual and serve as on-duty Spanish-English translators in rotating half-day shifts. The PSD law firm bookkeeper is bilingual. The Wallraff law firm receptionist is bilingual.

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.¹⁷⁴ 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 a core, constitutionally-obligated government function.

Office space & physical resources. Each of the three contract law firms has its own office building in Santa Cruz, paying the costs of the building, utilities, and insurance. Getting to any of these Santa Cruz offices can be difficult for indigent people who reside outside of the Santa Cruz city limits. The BCM law firm is also required to maintain staff at the county-provided Watsonville office location.

Biggam, Christensen & Minsloff. The BCM office is two one-story buildings connected by a parking lot, located on North Pacific Avenue, and there is also a storage garage. It is about an eight-minute walk from the main Santa Cruz courthouse. In February 2020, the BCM firm was renovating a third building adjacent to the existing office and intended to provide additional office space. Even before the renovation, every attorney has an individual office, and there is ample meeting space.

The BCM firm's garage is filled with clothes purchased over the years for appointed clients to wear to court. (The BCM firm does not have to pay for these clothing items, as the CDCP approves up to \$200 for the purchase of court clothing for each indigent client.)

Page, Salisbury & Dudley. The PSD office is a two-story building, converted from a Spanish-mission style private residence, located on Center Street. It is a 10-minute walk from the main Santa Cruz courthouse. Every attorney has an individual office, with a waiting area and a large conference room.

Wallraff & Associates. The Wallraff office is located on Vernon Street, about 1 ½ miles from the main Santa Cruz courthouse. The office was converted from a residential home, in an area that is now industrial. Every attorney has an individual office, and there is a small waiting area and a conference room.

Technology. All of the contract law firms have some sort of computers, but all are inadequate to manage discovery in 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. Because law enforcement agencies use a variety of software, all of the contract law firms frequently do not have the software necessary to view digital discovery produced in appointed cases.

¹⁷⁴ See, "Agreement for Public Defender Services" between the County of Santa Cruz and Lawrence P. Biggam, ¶ 11 (for the term of July 1, 2012 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

Biggam, Christensen & Minsloff. The attorneys have computers, and some staff say that Wi-Fi is not available throughout the office. Some lawyers have firm-provided laptops, but others have purchased their own or purchased external hard drives because the firm-provided computers lack adequate storage space. The firm does not have computer software necessary to read .pdf documents. The law firm's technology does not allow the law firm or its attorneys to produce lists of cases being handled by each attorney at any given point in time. The calendaring system is still on paper, with staff literally cutting and gluing together weekly calendars.

By contrast, each of the BCM firm's eight investigators has a firm-provided laptop, iPhone, and digital camera.

Page, Salisbury & Dudley. Each attorney has a computer in their office (except Mr. Dudley does not use a computer or cell phone), though they are aged and inadequate to manage the increasingly extensive digital discovery in appointed cases. The computers crash often, and the office buys an external hard drive for each appointed case to store the discovery. The attorneys do not use computers for their legal research, instead researching cases by hand in law books.

Wallraff & Associates. The Wallraff law firm provides laptop and desktop computers to all of its attorneys. The firm has word processing software and internet Wi-Fi access to exchange discovery. The receptionist maintains caseload data for the law firm. The Wallraff law firm attorneys do not use calendaring software, instead maintaining their calendars manually.

Support staff. Each of the three contract law firms hire and pay for their own support staff. Prior to March 2020, there were no social workers employed by any of the contract law firms. There are no secretaries at the two conflict law firms, and there are no secretaries for the misdemeanor attorneys at the BCM law firm.

Biggam, Christensen & Minsloff. The BCM law firm is contractually required to employ two full-time equivalent paralegals.¹⁷⁵

Misdemeanor attorneys do not have secretaries; they must ask around to see which secretary might be available to help them on each task requiring assistance.

The BCM law firm hired a bilingual social worker to begin working March 4, 2020. The social worker is placed at the Watsonville office, because juvenile cases are handled at Watsonville and Felton.

¹⁷⁵ "Agreement for Public Defender Services" between the County of Santa Cruz and Lawrence P. Biggam, ¶¶ 2, 10(A), 10(C) (for the term of July 1, 2012 through June 30, 2018), amended by "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶¶ 2, 5 (extending the term through June 30, 2022).

Prosecutor investigative resources

The district attorney's office has 15 inspectors, including the chief inspector, who investigate cases for the office's criminal division and have three assistants to help them.^a These inspectors are county employees whose compensation is set and paid by the county. The annual salary paid to full-time DA inspectors as of May 2020 ranges from a low of \$84,192 per year to a high of \$150,024 per year.^b As county employees, in addition to their compensation they have health insurance and disability benefits and are eligible for retirement. Each inspector is provided a car by the county to use in conducting investigations.

The district attorney's office also has at its disposal the entire investigative resources of multiple law enforcement agencies, including the Santa Cruz County sheriff's department, local police forces, and the California highway patrol.

^a COUNTY OF SANTA CRUZ, ADOPTED BUDGET FISCAL YEAR 2019-20, pp. 213-14.

^b *Job Salary Schedule*, COUNTY OF SANTA CRUZ, PERSONNEL DEPARTMENT, <http://sccounty01.co.santa-cruz.ca.us/personnel/salsched/salsched.asp#D1>.

Page, Salisbury & Dudley. There are no secretaries, paralegals, or social workers at the PSD firm. The entire support staff at the PSD firm is one office manager, who has been with the firm since 1984 and expressed the intent to retire whenever the partners do, and one bilingual bookkeeper, who has been with the firm most recently since 2004. Each is paid an annual salary. The firm offers a limited health plan. Employees do not receive retirement benefits.

Wallraff & Associates. There are no secretaries, paralegals, or social workers at the Wallraff firm. The entire support staff at the Wallraff firm is one office manager and one bilingual receptionist who has been with the firm since 2003.

Investigators. Investigators are a case-related expense; there is no need to have an investigator unless and until an attorney is representing a client whose case requires investigation. Nonetheless, all three of the law firms are contractually required to pay for the investigators they use in representing the clients to whom they are appointed under the county contracts, and the county does not reimburse the law firms for this case-related expense.

The U.S. Supreme Court has determined that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel.¹⁷⁶ The American Bar Association's *Criminal Justice Standards for the Defense Function* explain the duty of every defense attorney to independently investigate the facts of each client's case, stating:

¹⁷⁶ *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.¹⁷⁷

As national standards explain, it is crucial that an investigator be available to assist the attorney with interviewing witnesses, else "the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously given or withdrawing from the case."¹⁷⁸

Biggam, Christensen & Minsloff. The BCM law firm employs eight full-time investigators (the firm is contractually required to employ seven, available for work on appointed cases¹⁷⁹), who are each paid an annual salary.¹⁸⁰ Five work out of the Santa Cruz office location. The other three split their time between the Santa Cruz office and the Watsonville office, so that there is always at least one investigator in Watsonville.

The BCM firm also regularly has six to eight undergraduate interns from UC-Santa Cruz, who receive an intensive two-day training and are then allowed to do investigation in uncomplicated misdemeanor cases and to assist staff investigators in felony cases if so requested. Each student serves an unpaid six-month internship, during which they work approximately 16 hours staggered over three or more days per week.

¹⁷⁷ AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-4.1(c) (4th ed. 2017).

¹⁷⁸ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

¹⁷⁹ "Agreement for Public Defender Services" between the County of Santa Cruz and Lawrence P. Biggam, ¶¶ 2, 10(A), 10(C) (for the term of July 1, 2012 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶¶ 2, 5 (extending the term through June 30, 2022).

¹⁸⁰ As an unwritten policy, the BCM law firm does not hire former law enforcement officers as investigators. Four of the current investigators are California licensed private investigators and another two have completed the three-year experience requirement but have not yet taken the test.

Attorneys submit investigative requests to the investigator supervisor, who assigns each request to a specific investigator. Investigators are not assigned to work on a specific case, nor to work with a specific attorney.

Page, Salisbury & Dudley. The PSD firm is contractually required to have available investigators “as needed” to work on appointed cases.¹⁸¹ The PSD law firm rents a space in its office to one investigator, whom the firm primarily uses when needed in its appointed cases, and also regularly uses two other investigators. Of the three, one of them speaks Spanish. The PSD firm pays hourly for the services of these investigators in appointed cases. The PSD firm attorneys do not have to get approval before contacting the investigators directly whenever they need investigative assistance in an appointed case.

Wallraff & Associates. The Wallraff firm is contractually required to have available investigators “as needed” to work on appointed cases.¹⁸² The Wallraff firm regularly works with a husband and wife team of two investigators, whom the Wallraff firm pays at \$85 per hour. To avoid the possibility of a conflict of interest, these investigators do not perform investigative work for the BCM firm or the PSD firm. The Wallraff firm attorneys do not have to get approval before contacting the investigators directly whenever they need investigative assistance in an appointed case.

Attorneys. The county contracts with the three law firms require them to collectively employ 31 full-time equivalent attorneys to provide all (primary and conflict) indigent representation services in the county.¹⁸³ As of February 2020, the three law firms together have 38 attorneys (36 full-time and 2 part-time). Among these 38 total attorneys, there are collectively 32 associate attorneys, whose salary and benefits (if any) must be paid by the law firms out of the county contract compensation, before any funds remain for the six partners to be paid.

¹⁸¹ “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022).

¹⁸² “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹⁸³ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 2 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶ 2 (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 9 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

The partners at each law firm determine the compensation and benefits (if any) that the law firm provides to its associate attorneys. There is generalized secrecy about exactly how much attorneys are paid at each of the contract law firms, but many Santa Cruz attorneys and judges have worked at one or more of the firms, and there are many attorney-spouses dispersed across the contract law firms and the CDCP, so as one attorney put it, the law firms tend to be a castle where everyone knows everyone else's secrets.

There are widespread concerns in the county about the “intellectual drain” of attorneys away from the indigent representation system. Appointed lawyers suffer from the high cost of living in Santa Cruz while often also trying to pay off student loans and trying to plan for retirement. They frequently leave for higher-paying positions with better benefits in either the district attorney's office or nearby Santa Clara County.

Biggam, Christensen & Minsloff. As of February 2020, the BCM law firm has three partners (two full-time and one part-time) and 24 full-time associate attorneys, for a total of 27 attorneys. (The BCM law firm is contractually required to employ 21 FTE attorneys, available to provide all primary indigent representation services in the county.¹⁸⁴)

Again, the BCM law firm partners are 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.¹⁸⁵

¹⁸⁴ “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶¶ 2, 10(A), 10(C) (for the term of July 1, 2012 through June 30, 2018), amended by “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam, ¶¶ 2, 5 (extending the term through June 30, 2022).

¹⁸⁵ See, “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 11 (for

Prosecutor attorney compensation

The attorneys in the district attorney's office are county employees whose compensation is set and paid by the county. As county employees, in addition to their compensation they have health insurance and disability benefits and are eligible for retirement. The county also pays the professional expenses of the district attorney's office attorneys, including bar dues, tuition and other costs of attending mandatory CLE, and professional malpractice insurance.

Attorneys and judges throughout the county are aware that the attorneys in the district attorney's office are paid much more than the indigent representation system attorneys of equivalent experience and job duties. The salary paid to the full-time assistant prosecutors as of May 2020 ranges from a low of \$87,876 per year to a high of \$205,728 per year.^a

^a *Job Salary Schedule, COUNTY OF SANTA CRUZ, PERSONNEL DEPARTMENT*, <http://sccounty01.co.santa-cruz.ca.us/personnel/salsched/salsched.asp#D1>.

Associate attorneys at the BCM law firm are paid an annual salary and seem to receive regular raises. It is suggested that the starting salary for a misdemeanor attorney at the BCM law firm is in the low \$70,000 range. More than a few interviewees stated that there is a significant disparity in pay between male and female attorneys who have similar experience and perform the same work at the BCM firm.¹⁸⁶ Because of the lack of transparency, the Santa Cruz County Board of Supervisors, county administration, and taxpayers have no way of knowing whether there is a gender-based disparity in pay.

Associate attorneys can also earn a bonus (though the details of any bonus and how it is earned are unclear). The firm provides health insurance to its associate attorneys and matches up to 3% on a 401k contribution plan. The firm pays the bar dues and cost of mandatory CLE for all associate attorneys.

Page, Salisbury & Dudley. As of February 2020, the PSD law firm has two partners and four associates, for a total of six full-time attorneys. (The PSD firm is contractually required to employ five FTE attorneys, available to provide one-half of the conflict indigent representation services in the county.¹⁸⁷)

Associate attorneys at the PSD law firm are paid an annual salary in the range of \$125,000 to \$150,000. The firm offers a health plan, but it is perceived to be of low quality so most of the attorneys opt to go on their spouse's plan when that is possible. PSD law firm associate attorneys do not receive any retirement benefits. The firm pays the bar dues, cost of mandatory CLE, and professional liability insurance for all associate attorneys.

the term of July 1, 2012 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

¹⁸⁶ The Biggam, Christensen & Minsloff contract with the county demands that "[n]o person shall, on the grounds of race, creed, color, sex, national origin, sexual preference or physical handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program conducted under this agreement." "Agreement for Public Defender Services" between the County of Santa Cruz and Lawrence P. Biggam, ¶ 14 (for the term of July 1, 2012 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

¹⁸⁷ "Agreement – Public Defender Conflict of Interest Services" between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022).

Wallraff & Associates. As of February 2020, the Wallraff law firm has one partner, three full-time associates, and one part-time associate, for a total of five attorneys. (The Wallraff firm is contractually required to employ five FTE attorneys, available to provide one-half of the conflict indigent representation services in the county.¹⁸⁸)

Associate attorneys at the Wallraff law firm are paid an annual salary, but there is not a set salary scale – reportedly no associate earns over \$200,000 per year. The firm provides a health savings account and matches up to 1.5% on a SEP-IRA. The firm pays the bar dues, cost of mandatory CLE, and professional liability insurance for all associate attorneys.

4. The overhead, case related expenses, and compensation of the CDCP attorneys

As of February 2020, there are in total 20 private attorneys plus the Sixth District Appellate Panel who are eligible to be appointed through the CDCP to represent indigent people in Santa Cruz County when all three of the contract law firms have a conflict. Each of these attorneys has individually signed a one-year contract with the county, agreeing to represent indigent people to whose cases they are appointed (on a case-by-case basis) in exchange for the fee set out in a schedule attached to the contract.¹⁸⁹

The county does not make any advance payment to a CDCP attorney; the attorney is not paid anything unless the attorney is actually appointed to represent an indigent person.¹⁹⁰ Merely being on the CDCP’s eligibility list does not mean that an individual attorney will ever be appointed in a case. (See discussion beginning at pages 92-93 regarding how an individual CDCP attorney is appointed.)

a. Representation costs that are not paid by the CDCP attorneys

When a CDCP attorney is appointed to an indigent person’s case, there are some costs of representation that the county either directly pays for or reimburses the CDCP attorney for:

¹⁸⁸ “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶¶ 9, 10 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

¹⁸⁹ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶¶ 2, 3, 5, and Exhibit A.

¹⁹⁰ If the attorney appears for an appointment, and the client fails to appear or retains private counsel, the CDCP attorney is paid \$100 for that appearance. See “Legal Services Agreement Between County of Santa Cruz and _____” (sample), Exhibit A p.13.

- allowable expenses – the actual cost of “filing fees, printing and photographic reproduction expenses, court reporter fees, and all directly related expenses;”¹⁹¹ and
- ancillary expenses¹⁹² – “reasonable and necessary ancillary expenses to investigate the case and to represent the client including but not limited to investigators, paralegals, and experts,” paid at previously established rates after approval from the CDCP administrator.¹⁹³

Out-of-pocket allowable expenses. To be reimbursed, the CDCP attorney must submit a receipt, canceled check, bank statement, credit card receipt, or invoice marked paid in full.¹⁹⁴

Interpreters. The costs of an interpreter when needed in the case of an indigent person represented by a CDCP attorney are paid by the county, outside of the compensation paid to the CDCP attorney. A CDCP attorney can spend up to \$500 per case on all allowable expenses in total, including an interpreter, without having to get advance approval from the administrator.¹⁹⁵ The CDCP administrator approves funding for interpreters, payable at \$75 for the first hour, then \$50 per each additional hour.¹⁹⁶

Investigators. The costs of investigation when needed in the case of an indigent person represented by a CDCP attorney are paid by the county, outside of the compensation paid to the CDCP attorney. A CDCP attorney can spend up to \$300 per case on investigative services without having to get advance approval from the administrator.¹⁹⁷ The CDCP administrator approves funding for investigators, paying \$65 per hour.¹⁹⁸ There is some suggestion from attorneys that it is difficult to find a skilled investigator willing to work at this hourly rate.

¹⁹¹ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.B; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.Q, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹⁹² Standing Order No. 19-03, Criminal Conflict Program Administrator Authorization (Calif. Super. Ct. Santa Cruz County Feb. 4, 2019).

¹⁹³ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.C; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.Q, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹⁹⁴ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 4.

¹⁹⁵ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.K, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹⁹⁶ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), Exhibit A p.12.

¹⁹⁷ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.I, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

¹⁹⁸ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), Exhibit A p.12.

Experts. The costs of experts to consult, advise, and testify when needed in the case of an indigent person represented by a CDCP attorney are paid by the county, outside of the compensation paid to the CDCP attorney. A CDCP attorney can spend up to \$1,000 per case on experts without having to get advance approval from the administrator.¹⁹⁹ CDCP attorneys submit a request to the CDCP administrator, who authorizes the necessary funding, and all documents are filed under seal in the court.²⁰⁰ The CDCP administrator approves funding for experts, setting the maximum fee allowed on a case-by-case basis.²⁰¹ Attorneys report that they have not experienced any difficulty in receiving funding for expert assistance in appointed cases whenever they request it.

b. Representation costs that must be paid by the CDCP attorneys

When a CDCP attorney is appointed to represent an indigent person, the CDCP attorney is paid according to the fee schedule attached to the attorney's contract with the county.²⁰² The amount and method of compensation depends on the type of case to which the attorney is appointed.²⁰³

- For most case types, the CDCP attorney is paid by event (with some discretionary exceptions). These case types are: adult criminal Class 1 through 3; juvenile delinquency Class 1 through 3; and OSC-Contempt cases. The table on page 68 shows the fee paid for each event in these case types.
- For five case types, the CDCP attorney is paid by the hour:
 - \$100/hour for misdemeanor appeal, up to \$2,500;
 - \$110/hour for writs, up to \$3,000;
 - \$120/hour for adult criminal Class 4;
 - \$125/hour for juvenile delinquency Class 4; and
 - \$125/hour for adult criminal Class 5.

¹⁹⁹ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.J, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²⁰⁰ Standing Order No. 19-03, Criminal Conflict Program Administrator Authorization (Calif. Super. Ct. Santa Cruz County Feb. 4, 2019).

²⁰¹ "Legal Services Agreement Between County of Santa Cruz and _____" (sample), Exhibit A p.12.

²⁰² "Legal Services Agreement Between County of Santa Cruz and _____" (sample), Exhibit A.

²⁰³ "Legal Services Agreement Between County of Santa Cruz and _____" (sample), Exhibit A pp. 2-11.

Event-Based Compensation

	Adult Crim	Juv Delinq	OSC- Contempt	Adult Crim	Juv Delinq	Adult Crim	Juv Delinq
	Class 1 misd	Class 1 misd		Class 2 non-serious fel ****	Class 2 non-serious fel	Class 3 serious fel ****	Class 3 serious fel
Initial Case Fee	\$375	\$375	\$575	\$750	\$800	\$1,000	\$1,100
Prel Hrg Fee per ½ day				\$200		\$250	
Post-Prel Hrg Case Fee*				\$450		\$600	
Standard Motion**	\$100	\$100	\$100	\$100	\$100	\$100	\$100
Substantial Motion***	\$300	\$300	\$350	\$400	\$350	\$400	\$400
Trial Fee per ½ day	\$200	\$250	\$250	\$275	\$300	\$350	\$350
Post-disposition Review Hrg		\$125			\$125		\$125
Review Hearings (max of 3)	\$75			\$100		\$100	
Post-disposition Reviews (max of 4)			\$75				

* Post-Preliminary Hearing Case Fee – Motion Fee: No separate fee is paid for motions for continuance, in limine motions or other similar matters; compensation for these matters falls within the case fee.

** Standard Motion – Standard boilerplate type motions such as routine joinder motions that are filed and argued.

*** Substantial Motion – Substantial motions that are filed and argued.

**** In adult criminal Class 2 and 3 – NOTE: The Administrator has the discretion to compensate panel attorneys for discovery review and multiple court appearances at the rate of \$75 per hour not to exceed \$2,250, when the facts of the case warrant it.

In the case types that are paid by event, a CDCP attorney can only be certain of being paid the initial case fee, without regard to how much or how little time the attorney must devote to that case. For example:

- If a misdemeanor case resolves by plea at any point between the initial appearance and conducting a trial, the initial case fee is the most the attorney will be paid in most circumstances, no matter how much time the attorney devotes to consulting with the client, negotiating with the prosecutor, and conducting necessary factual and legal research to reach a plea agreement.
- For a felony case that resolves by plea without a preliminary hearing, the initial case fee is the most the attorney will be paid in most circumstances, no matter how much time the attorney devotes to consulting with the client, negotiating

with the prosecutor, and conducting necessary factual and legal research to reach a plea agreement.

- Although the CDCP attorneys are allowed to be paid for motions, they are only paid if the motion is both filed and argued. No matter how much time an attorney devotes to researching, writing, and preparing to argue a motion, if that motion is either denied or granted without a hearing, then the attorney will not be paid for the work.

Worse yet is the situation referred to as “consolidated cases.” If a single defendant has more than one case pending at the same time, it is likely that the same attorney will be appointed to represent that defendant in all open cases. If a CDCP attorney is appointed to represent this defendant, the CDCP attorney is paid according to the fee schedule for the most serious of the defendant’s cases, but for each additional case of that same defendant, the attorney is paid only:

- \$200 for a Class 1 case;
- \$300 for a Class 2 case; or
- \$400 for a Class 3 case,

except the attorney will be paid at the regular fee schedule rate for any preliminary examination that the attorney actually conducts in each additional case.²⁰⁴

However much or little the CDCP attorney is paid for representing an indigent person, out of that compensation the CDCP attorney must pay for all costs of performing the contract (other than those the county explicitly agrees to pay for, explained in the previous subsection). In addition to providing representation, a CDCP attorney must:

- maintain the qualifications required to remain eligible for appointments through the CDCP:²⁰⁵
 - have a working phone, email, and fax, which requires the attorney to pay for both the equipment and the services;
 - be a member in good standing of the California bar, which requires the attorney to pay the cost of completing at least 25 hours of continuing legal education during a 35-month period, of which at least four hours must be in legal ethics;²⁰⁶ and
 - have attended at least 12 hours of continuing legal education in the past 12 months;
- maintain the specific qualifications required for appointment through the CDCP to specific types of cases, which may include additional training or CLE for

²⁰⁴ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), Exhibit A p. 13. “Only cases with completely separate appearance dates throughout the representation per client will be compensated by the rates listed. . . .” *Id.*

²⁰⁵ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶¶ III, IV.A-B, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/coun_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²⁰⁶ CAL. RULES OF COURT, r. 9.31(c); CAL. BUS. & PROF. CODE § 6070 (West 2019) (eff. Jan. 1, 2019).

- which the attorney must pay;²⁰⁷ and
- comply with the contractual requirement to have and pay for insurance (worker’s compensation; automobile liability; comprehensive or commercial general liability; and professional errors and omissions liability).²⁰⁸

Once the CDCP attorney has paid for all of the required items, then the CDCP attorney must decide for themselves what they are willing to pay for in providing representation to indigent people. If, for example, a CDCP attorney believes it is necessary to have an office or a secretary or a computer, the attorney must personally pay for that, because there are some costs of representation that the county will *not* reimburse the CDCP attorney for:

- “normal office expenses such as regular telephone and fax charges, and computer research;”²⁰⁹
- “secretarial, clerical, word processing or typist services (including overtime hours), or normal office operating expenses;”²¹⁰
- “in-county travel time and expenses;”²¹¹ and
- “out of county travel time and expenses,” unless expressly authorized in advance by the CDCP administrator.²¹²

What remains after paying all of these costs is the lawyer’s fee.

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,

²⁰⁷ *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ III, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²⁰⁸ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 10.

²⁰⁹ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.B; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.Q, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²¹⁰ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.B; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.Q, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²¹¹ “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.D; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.P, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

²¹² “Legal Services Agreement Between County of Santa Cruz and _____” (sample), ¶ 3.D, and Exhibit B; *Santa Cruz County Criminal Defense Conflicts Program Policies and Procedures* ¶ IV.P, COUNTY OF SANTA CRUZ, COUNTY COUNSEL, http://www.co.santa-cruz.ca.us/Portals/0/County/county_counsel/CDCP%20Policies%20and%20Procedures.pdf.

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.

B. Independence of the defense function

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”²¹³ Reflecting this command, the first of the American Bar Association’s *ABA Ten Principles of a Public Defense Delivery System* requires that the public defense function, including the attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”²¹⁴

In the 1979 case of *Ferri v. Ackerman*,²¹⁵ the United States Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court observed in *Polk County v. Dodson*²¹⁶ that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”²¹⁷ Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court noted in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”²¹⁸ Thus, governmental interference that infringes on an appointed lawyer’s independence to act in the stated interests of clients, or that places the appointed lawyer in a conflict of interest with the client, causes a constructive denial of the right to counsel under *Cronic*.²¹⁹

²¹³ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

²¹⁴ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 1 cmt. (2002).

²¹⁵ 444 U.S. 193, 204 (1979).

²¹⁶ 454 U.S. 312 (1981).

²¹⁷ 454 U.S. 312, 321-22 (1981).

²¹⁸ 454 U.S. 312, 313 (1981).

²¹⁹ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (“Thus, the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”) (internal citations omitted). *See also id.*, at 656 n. 17 (“Indeed, an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”) (citing *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979)).

1. The contract law firms

There is some concern within the legal community that the county's contracts with the three contract law firms are not awarded through a fair bidding process. One attorney says that after the BCM law firm first got the primary contract in 1975, no one could ever bid against them because they were just too big.

All three of the contract law firms believe they are in a “deeply compromised position” in contract negotiations with the county – unable to negotiate for fair terms with the county, based on the understood threat that the county might turn to low bid contracting.

Some associate attorneys believe they must stay in the good graces of both the county board of supervisors and the judges before whom they appear, lest their law firm lose the indigent representation contract. This fear can cause them to lean toward serving the will of the judges rather than zealously advocating for their appointed clients. As one law firm attorney stated: “I don't believe we could advocate at the highest levels, like for example [former elected public defender Jeff] Adachi did [in San Francisco],” because of the fear that the firm might lose its contract.

2. The CDCP

Prior to the CDCP's creation in 2014, the selection of counsel in conflict cases and approval of conflict case-related expenses was a function of the individual superior court judge in each case. When indigent representation is provided through a system overseen by judges, the appointed attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant they are appointed to represent as is their ethical and constitutional duty. For this reason, the county's decision to create the CDCP, and thereby remove judges from the process of selecting and appointing attorneys in conflict cases as well as approving case-related expenses, has eliminated several possible forms of improper judicial interference with the right to counsel.

As explained previously, the County of Santa Cruz established the CDCP within the county counsel's office, creating a risk of improper political interference with the right to counsel. The same county counsel's office that oversees the CDCP may also provide legal services and/or advice to the county's school districts and boards, organizations that contract to operate the county fair, the county auditor-controller, and any superior court judge.²²⁰ The county counsel's office also defends or prosecutes all civil actions

²²⁰ CAL. GOV. CODE §§ 26520, 26520.5, 26522, 26523, 26524, 26526, 26529 (West 2019).

and proceedings in which the county or any of its officers are involved.²²¹ The dual duties of the county counsel's office create the potential for a conflict of interest between the duty the county counsel's office owes to the county and the duty the county counsel's office owes to indigent clients whose representation it administers.

The CDCP as established by the county also creates the potential for a conflict of interest among indigent codefendants represented by any of the law firm attorneys and/or CDCP attorneys. This is because the CDCP administrator has approval authority over experts in the cases of all appointed attorneys, while at the same time having substantive access to the CDCP attorneys' case files.

²²¹ CAL. GOV. CODE § 26529 (West 2019).

CHAPTER V

EARLY APPOINTMENT OF COUNSEL & CONTINUOUS REPRESENTATION IN CRIMINAL AND JUVENILE JUSTICE CASES

“Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each state is responsible for ensuring that every indigent defendant who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.²²² All misdemeanors and felonies in California carry the possibility of incarceration as a punishment,²²³ so every person charged with any of these crimes who cannot afford to hire their own attorney is entitled under the Sixth and Fourteenth Amendments to have an attorney provided at public expense to represent them.²²⁴

In 2008, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”²²⁵ For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”²²⁶ without regard to whether a prosecutor is aware of the arrest.²²⁷ For all defendants, both in and out of custody, the beginning of formal judicial proceedings is signaled when prosecution is commenced,

²²² *United States v. Cronic*, 466 U.S. 648, 659 (1984). *See also In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

²²³ CAL. PENAL CODE § 17 (West 2019) (eff. Jan. 1, 2019). California maintains the death penalty as an available punishment, and special statutes and rules govern the provision of counsel in capital cases. *See, e.g.*, CAL. CONST. art. I, § 27; CAL. PENAL CODE § 15 (West 2019). Executions are not currently being carried out due to a moratorium imposed by the Governor on March 13, 2019 and extending throughout his term in office. Cal. Governor’s Exec. Order No. N-09-19 (Mar. 13, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>. Nonetheless, according to the ABA, “[a]lthough California’s last execution was in 2006, it remains home to the largest death row in the country with 737 condemned men and women” and [citing Pew Research] “the state’s death row has grown by 100 prisoners since the last execution was carried out in 2006.” ABA DEATH PENALTY REPRESENTATION PROJECT, 2019 YEAR-END REPORT & NEWSLETTER 4-5 (2020).

²²⁴ *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²²⁵ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). *See also Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

²²⁶ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

²²⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

Vocabulary and procedures of the adult and juvenile systems

Throughout this chapter, we discuss the stages of both adult criminal and juvenile justice (delinquency) cases. The vocabulary of juvenile justice proceedings is different than that of the adult criminal justice system. While the labels are different, the stages of the process for children parallel the stages of the process for adults.

Children	Case Stage	Adults
Detention hearing	A child is either detained or released to their parent or guardian – there is no right to bail for children. An adult will be detained or released, but may be required to undertake some form of bail.	Bail hearing
Response of admit or deny	The child or adult is called upon to respond to the charge for which they were arrested or cited.	Plea of guilty or not guilty
Automatic appointment of counsel	A child is not allowed to waive their right to counsel and, if not represented, counsel is automatically appointed. An adult is advised of their right to appointed counsel if indigent. The adult can waive the right to counsel and proceed unrepresented.	Advice of right to counsel
Plea of true or not true	The child or adult is called upon to respond to the charge for which they are being prosecuted.	Plea of guilty or not guilty
Jurisdictional hearing	A judge decides whether a child has committed the alleged delinquent act – there is no right to trial by jury for children. An adult may elect to have a trial by either judge or jury.	Trial
Disposition hearing	A child may be designated as a ward of the court and may be placed on probation or committed to a corrections facility.	Sentencing

“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”²²⁸

The Court in *Rothgery* carefully explains that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.²²⁹ In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.²³⁰ When an indigent defendant is actually deprived of counsel at a critical stage, the U.S. Supreme Court says that is unfair.²³¹

A. Citation or arrest

Citation/summons. For most infractions and misdemeanors, a person can be issued a citation to appear in court on a certain date.²³² For a felony in which only a complaint has been filed, upon request of the prosecutor a magistrate can issue a summons (instead of an arrest warrant) for the person to appear in court on a certain date.²³³ The date the person is to appear in court, pursuant to a citation or summons, is the first time they will appear in court before a judge. (*See* discussion of arraignment on the complaint beginning at page 78.)

Most people accused of a misdemeanor in Santa Cruz County are given a citation to appear, rather than being arrested.

Arrest. A person can be arrested in California for any public offense, including an infraction.²³⁴ In Santa Cruz County, a small number of people accused of a misdemeanor are arrested, while any person accused of a felony is almost always arrested.

Juvenile defendants. A juvenile who is arrested is taken to the Juvenile Hall located in Felton, where the probation department has great discretion in determining whether the

²²⁸ *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

²²⁹ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

²³⁰ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

²³¹ *United States v. Cronin*, 466 U.S. 648, 659 (1984).

²³² CAL. PENAL CODE §§ 816a, 827.1 (West 2019).

²³³ CAL. PENAL CODE § 813 (West 2019).

²³⁴ *See, e.g.*, CAL. PENAL CODE § 836 (West 2019) (warrantless arrest for any public offense committed in presence of a peace officer); CAL. PENAL CODE § 853.5 (West 2019) (discussing arrest for infraction); CAL. PENAL CODE § 1427 (West 2019) (discussing issuance of arrest warrant for misdemeanor or infraction); CAL. PENAL CODE §§ 816a, 827.1, 853.6 (West 2019) (discussing arrest for misdemeanor); CAL. PENAL CODE § 813 (West 2019) (discussing issuance of arrest warrant for felony).

case should be diverted²³⁵ or referred to the prosecutor for filing in court. Juveniles are either detained or released to their parent or guardian – there is no right to bail for juveniles under California law. Juveniles in Santa Cruz County are “rarely” detained. Juvenile defendants released to their parents are given a date to appear in court for arraignment on the complaint, which can be anywhere from one to six months from the date of arrest. A juvenile defendant who is not released must be brought before the judge for a detention hearing within 48 hours for a misdemeanor and within 72 hours for a felony.²³⁶

Adult defendants. There are several ways under California law that a person who has been arrested can be released quickly and without appearing before a judge.²³⁷ The sheriff in Santa Cruz County estimates that, among approximately 8,000-10,000 bookings per year, about 1,000 people bond out before appearing in court. Almost all misdemeanor defendants in Santa Cruz County are released before appearing in court with a judge; the limited number of misdemeanor defendants who are in custody when they first appear in court are usually accused of some sort of domestic violence offense.

²³⁵ CAL. WELF. & INST. CODE §§ 626(a), 654 (West 2019).

²³⁶ See, *In re Dennis H.*, 19 Cal. App. 3d 351 (Cal. Ct. App. 1971).

²³⁷ An officer may release a person arrested without a warrant, “instead of taking the person before a magistrate,” in five circumstances where no further criminal proceedings occur. CAL. PENAL CODE § 849(b), (c) (West 2019). A person who has been arrested, instead of being taken before a magistrate by the officer, may be released by the officer or arresting agency after signing a written notice to appear for arraignment, typically at a date & time that is at least 10 days after the arrest. CAL. PENAL CODE § 853.5 (West 2019) (infraction); CAL. PENAL CODE § 853.6(a) (1), (b), (g) (West 2019) (infraction or most misdemeanors). Jail officers, among others, can approve & accept bail, issue & sign an order for release of the arrested person, and set & give notice of the time and place the person must appear in court, whenever a person posts bail in cash or surety bond “in the amount fixed by the warrant of arrest, schedule of bail, or order admitting to bail.” CAL. PENAL CODE § 1269b(a), (g) (West 2019).

Bail and pre-trial release

California is in a bit of a purgatory about its system of bail & pretrial release. SB 10 was signed into law on August 28, 2018, and it was scheduled to go into effect on October 1, 2019.^a It authorized a change to California’s pretrial release system, from a money-based system to a risk-based release and detention system.^b (It would amend Government Code section 27771; repeal Penal Code sections 1268 through 1320.6; and add Penal Code sections 1320.7 through 1320.34.) But then, Referendum 1856 (18-0009), *Referendum to Overturn a 2018 Law That Replaced Money Bail System with a System Based on Public Safety Risk*, was certified by the Secretary of State on January 16, 2019 as qualified for the November 3, 2020 ballot. This has the effect of staying SB 10, leaving in place for now the money bail system.

^a SB 10, Cal. Stats. 2018, ch. 244, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10.

^b For an easy-to-read description of how things would be under SB 10, see DEPARTMENT OF FINANCE, SB 10 GENERAL OVERVIEW (Nov. 8, 2018), <https://www.courts.ca.gov/documents/sb10-overview.pdf>.

If not released in one of these ways though (for example, because they cannot afford the amount of bail required or they are arrested on an offense that is not bailable without a hearing²³⁸), a person who is arrested must be taken “without unnecessary delay” before a magistrate,²³⁹ “and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.”²⁴⁰ (*See* arraignment on the complaint, below.) For an adult defendant, the arraignment on the complaint is set on a court’s docket for the third court day following the arrest, so for example a defendant arrested at any time on a Monday will appear in court on Thursday, while a defendant arrested at any time on a Wednesday will appear in court on the following Monday.

Probable cause determination following warrantless arrest. In *County of Riverside v. McLaughlin*, the United States Supreme Court held that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest or the government risks being held responsible for an illegal detention.²⁴¹ It is not necessary for there to be an actual hearing, and a judge can make this determination without ever seeing the defendant. Instead, the court reviews the paperwork signed under oath by the officer. If the judge finds that there was not probable cause for the arrest, the person is released from jail. If the judge finds, based on the officer’s declaration, that there was probable cause for the arrest, the person remains in jail. In Santa Cruz County, a judge certifies probable cause by telephone for any defendant who is arrested and cannot be brought to court within 48 clock hours of the arrest.

B. “Arraignment on the complaint” and the right to counsel

The next step after a person is either arrested or cited is to appear in court before a judge at a proceeding referred to in Santa Cruz County as the “arraignment on the complaint.” Some defendants are in custody, while other defendants are out-of-custody. Whether a defendant is in or out of custody, this is the proceeding in California that triggers the right to counsel under *Rothgery v. Gillespie County*.²⁴²

In Santa Cruz County, the judge before whom a defendant appears for the arraignment on the complaint varies depending on the type of case, the arresting agency, and whether the defendant is in or out of custody. In most circumstances, a defendant appears before the same judge in the same courthouse and department for all further proceedings until the case is disposed.

²³⁸ CAL. PENAL CODE § 1270 (West 2019) (court order required for release on own recognizance); CAL. PENAL CODE § 1270.1 (West 2019) (hearing required to set different amount of bail in certain cases).

²³⁹ CAL. PENAL CODE §§ 821, 825, 849 (West 2019).

²⁴⁰ CAL. PENAL CODE § 825 (West 2019).

²⁴¹ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

²⁴² *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

Seven judges and one commissioner all conduct arraignment on the complaint proceedings for the cases allotted to their own court department.²⁴³ (See table of judicial assignments and court schedule, at page 23.)

- An adult accused of a domestic violence charge, whether felony or misdemeanor, appears in the main Santa Cruz courthouse in Department 4, which is available to conduct an arraignment on the complaint every day, Monday through Friday.
- An adult accused of a felony appears in the main Santa Cruz courthouse in either Department 3, 6, or 7. All three departments are available to conduct an arraignment on the complaint every day Monday through Friday for any case allotted to their department.
- An adult accused of a misdemeanor who was arrested/cited by any agency other than the Watsonville Police Department, and also any in-custody adult accused of a misdemeanor who was arrested by the Watsonville Police Department, appears in the main Santa Cruz courthouse in Department 1 or 2, which are available to conduct an arraignment on the complaint every day Monday through Friday for any case allotted to their department.
- An out-of-custody adult accused of a misdemeanor by the Watsonville Police Department appears in the Watsonville courthouse in Department B on Monday.
- A juvenile on release appears in the Watsonville courthouse in Department B on either Monday or Wednesday.
- A detained juvenile appears in the Felton Juvenile Hall courtroom in Department B on either Tuesday or Friday.
- An adult or juvenile accused of a traffic offense, and who is arrested/cited by any agency other than the Watsonville Police Department, appears in the main Santa Cruz courthouse before Commissioner Trexel on Thursday.
- An adult or juvenile accused of a traffic offense, and arrested/cited by the Watsonville Police Department, appears in the Watsonville courthouse before Commissioner Trexel on Friday.

The judge, a prosecutor, an indigent representation system attorney, and the defendant are all physically present in the courtroom during the arraignment on the complaint.

The contract Biggam, Christensen & Minsloff (BCM) law firm assigns attorneys to specific departments of court for arraignment on the complaint proceedings. The Page, Salisbury & Dudley (PSD) law firm and the Wallraff & Associates (Wallraff) law firm

²⁴³ The general rule is that: a domestic violence case is allotted to Department 4; Santa Cruz misdemeanor cases are allotted odd/even between Departments 1 and 2; Watsonville misdemeanor cases are all allotted to Department B; felony cases are allotted on rotation between Departments 3, 6, and 7; and juvenile justice cases are all allotted to Department B. There are two primary exceptions. (1) When multiple defendants are charged arising out of a single course of conduct (co-defendants), all of their cases are allotted to the same department. (2) If a defendant is arrested on a probation violation, the probation violation and any related new case are allotted to the department that had the original case underlying the probation violation.

Coronavirus temporary measures, as of June 2020

Adult criminal and juvenile delinquency matters are not being heard at the Watsonville courthouse. All criminal and delinquency trials at the Watsonville courthouse have been postponed.

All adult court proceedings are being conducted at the main Santa Cruz courthouse. All in-custody arraignments of adults are conducted on Tuesdays and Fridays by videoconferencing between a judge and prosecutor located at the main Santa Cruz courthouse and the defendant and defense attorney located at the main jail courtroom. For adult defendants, a single docket is held each day in the main Santa Cruz courthouse for all proceedings in all criminal case types, no matter to which court the case is allotted.

All juvenile court proceedings are being conducted in the Juvenile Hall courtroom in Felton, on Tuesdays and Fridays, and additionally as needed on Thursdays if any juveniles have been newly detained. The judge is physically present in the courtroom, but all attorneys, families, and juveniles who are on release are appearing remotely by telephone.

See Statewide Emergency Order (Calif. Jud. Council Apr. 29, 2020) (statewide extension of trial postponements to 90-day total); Statewide Emergency Order (Calif. Jud. Council Mar. 30, 2020) (statewide authorization of superior courts to issue orders); General Order (Calif. Jud. Council Mar. 27, 2020) (re Santa Cruz County superior court); Statewide Emergency Order (Calif. Jud. Council Mar. 23, 2020) (statewide suspension of trials for 60 days and allowing superior courts to adopt new rules); General Order (Calif. Jud. Council Mar. 18, 2020) (re Santa Cruz County superior court); Emergency Standing Order Re: Appointment of Public Defender Upon Filing of Complaint in All Custody Cases (Calif. Super. Ct. Santa Cruz County Apr. 2, 2020); CAL. RULES OF COURT, App. I, r. 3, 5, 7 (emergency rules related to COVID-19).

each assign attorneys to some departments, but not all, for arraignment on the complaint proceedings.

Although an indigent representation system attorney is present in each courtroom, that attorney cannot begin representing any indigent defendant unless and until the court appoints the attorney. Under state law, in counties that have a public defender office, the public defender is allowed to begin representing a person in a criminal or delinquency case before that person has been determined by a court to be entitled to appointed counsel, whenever the public defender determines that the person is not financially able to employ counsel.²⁴⁴ There is no such provision in state law allowing an appointed/contract private attorney system to similarly begin representing an indigent defendant *before* the judge makes the indigency determination and appoints counsel.

The “Hallway Speech.” Each morning at 8:15 a.m., prior to courtroom doors being unlocked at 8:30 a.m., one of the BCM law firm attorneys assigned to the misdemeanor departments of court appears in the hallway outside of the courtrooms and makes a loud announcement to everyone standing in the hall. The BCM attorney explains that he is the attorney of the day and urges that all defendants should consult with an attorney before disposing of their cases. The BCM attorney offers the financial affidavit form²⁴⁵ that defendants use to apply for appointed counsel. Of course, only out-of-custody defendants are standing in the court hallways, so in-custody defendants do not hear this hallway speech, and even out-of-custody defendants may arrive after the hallway speech has been given or may not comprehend English.²⁴⁶

²⁴⁴ CAL. GOV. CODE § 27707 (West 2019). That public defender office representation must cease, however, if a court makes a contrary determination and finds a defendant is not indigent and entitled to appointed representation.

²⁴⁵ *See*, SUPCR 1127, Defendant Financial Eligibility Statement for Appointment of Counsel and Reimbursement (rev’d Mar. 3, 2018) (form adopted for mandatory use in the Superior Court of Santa Cruz County).

²⁴⁶ During the Sixth Amendment Center’s site visits (December 2019 and February 2020), the “hallway speech”

The proceedings at the arraignment on the complaint. Broadly, there are three things that occur at the arraignment on the complaint proceeding:

1. the judge informs the adult defendant of the rights to which they are entitled including the right to appointed counsel if indigent and allows the defendant to request appointed counsel if they so desire, while for a juvenile who appears in court unrepresented the judge automatically appoints counsel;
2. the judge informs the defendant of the charges against them,²⁴⁷ and the adult defendant enters a plea to the charge, while a juvenile admits or denies the charge; and
3. for an adult defendant who is in custody on a bailable offense, the judge may set or reconsider previously-set bail and conditions of release, while for a detained juvenile the judge may reconsider continued detention or release.²⁴⁸

was delivered only in English. The BCM law firm partners state that the “hallway speech” is provided in both English and Spanish.

²⁴⁷ At the arraignment on the complaint, the charge is the written complaint.

Misdemeanor complaint. A misdemeanor prosecution is commenced by the filing of a complaint. CAL. PENAL CODE §§ 740, 804(b), 904 (West 2019). If a defendant was released from custody after signing a written notice to appear that was filed with a magistrate, that written notice constitutes a complaint to which the defendant may enter a plea. CAL. PENAL CODE § 853.9 (West 2019). If a defendant was released from custody after signing a written notice to appear that was not filed with a magistrate, the prosecutor can initiate prosecution by filing, within 25 days of the arrest, either that written notice to appear or a formal complaint with the magistrate before whom the defendant was ordered to appear in the notice. CAL. PENAL CODE § 853.6(e)(3)(B) (West 2019).

Felony complaint. A complaint is used to commence a felony proceeding against a person at a time when a grand jury indictment has not been returned and a prosecutor cannot yet file an information, and it causes the person accused to come before a magistrate for a preliminary examination. CAL. CONST. art. I, § 14; CAL. PENAL CODE §§ 738, 806 (West 2019). “A person charged with a felony by complaint . . . shall be taken without unnecessary delay before a magistrate . . . [who] shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant’s right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant’s request read the complaint to the defendant.” CAL. CONST. art. I, § 14; CAL. PENAL CODE § 859 (West 2019).

²⁴⁸ CAL. CONST. art. I, § 14; CAL. PENAL CODE §§ 858, 859, 859a, 976, 987, 988, 1270, 1270.1 (West 2019). The adult division of the Santa Cruz County probation department conducts pre-trial evaluations of in-custody defendants and recommends to the court whether a defendant should remain in jail pending resolution of a case or be released (with or without conditions). The probation department also monitors a defendant’s compliance with any conditions of pretrial release that a judge imposes.

1. Notice of the right to counsel

All misdemeanors and felonies in California carry the possibility of incarceration as a punishment and are assigned for trial proceedings to the superior court.²⁴⁹ Every indigent person, adult and juvenile, “who is charged with the commission of any contempt or offense triable in the superior courts” is entitled to public counsel “at all stages of the proceedings, including the preliminary examination.”²⁵⁰ This is the right to counsel about which the judge must advise defendants at the arraignment on the complaint.

California law provides that, in all cases other than death penalty cases,²⁵¹ the judge must tell the defendant they have the right to counsel *before* being arraigned and ask if the defendant “desires the assistance of counsel.”²⁵²

- A juvenile is never allowed to waive the right to counsel. Because the judge automatically appoints counsel to represent any juvenile who appears without counsel, the judge does not advise the juvenile of the right to counsel and does not determine whether a juvenile is indigent.
- An adult defendant can: notify the judge that they intend to or have obtained their own private attorney; request that the judge appoint counsel; or waive the right to counsel and choose to self-represent.

The group colloquy. Every superior court judge in a Santa Cruz County adult criminal courtroom does a group colloquy at the start of the court day, made as a general announcement to everyone present in the courtroom. The judges say that the move over time to judges doing a group colloquy, rather than reciting the entire colloquy to each defendant one-at-a-time, came about through a gradual process as the number of cases increased over the years.

²⁴⁹ CAL. PENAL CODE § 17 (West 2019) (eff. Jan. 1, 2019).

²⁵⁰ CAL. GOV. CODE § 27706(a) (West 2019); CAL. WELF. & INST. CODE §§ 634, 679 (West 2019).

²⁵¹ In a death penalty case, a defendant is not allowed to waive the right to counsel at the arraignment on the complaint. “In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him or her that he or she shall be represented by counsel at all stages of the preliminary and trial proceedings and that the representation is at his or her expense if he or she is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether he or she desires to employ counsel of his or her choice or to have counsel assigned, and allow him or her a reasonable time to send for his or her chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him or her. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel.” CAL. PENAL CODE § 987(b) (West 2019).

²⁵² CAL. PENAL CODE § 987(a) (West 2019).

The judges have not adopted a standardized colloquy, but all of the judges agree that they say pretty much the same thing, and new judges are given informal training on how to do it. One judge has reduced the group colloquy to writing and has offered it to and trains other judges on it as a model.

The group colloquy and individual colloquy in domestic violence and felony courts. In the domestic violence and felony courts, the group colloquy differs from that given in the misdemeanor courts, as explained below, in that no mention is made of the possibility to hear and accept the prosecutor's plea offer. Instead, the judges in these courts strongly encourage every defendant to request an appointed attorney if they are unable to hire an attorney on their own.

The group colloquy in misdemeanor courts. In the misdemeanor courts, each judge announces to the courtroom roughly the following:

- does anyone need an interpreter?
- this is arraignment, where you will learn what the charge is against you and enter a plea
- the first question is whether you want to represent yourself or have an attorney
- if you want to represent yourself, I will have the prosecutor announce what their offer is, then I will tell you what you would be sentenced to; you can sit down and take a little time to think about the offer and indicated sentence
- if you want an attorney, your case will be continued for two or three weeks for you to meet with your attorney
- if you want to apply for a public defender, fill out the financial form and turn it in to the bailiff; if I find you are eligible, you may have to pay a \$50 appointment fee within two months; once you sign the second form about your options to pay that fee, then the public defender will talk to you
- if you represent yourself or have a private attorney present, you can settle your case today in just this one court appearance, by entering a plea of either no contest or guilty, and then you will be sentenced
- [the judge explains all of the admonishments about sentencing that are required by statute to be explained]
- if you want to fight the charges, you have the right to do that
- [the judge explains all of the constitutional rights that are required by statute to be explained]
- if you want to set your case for trial, you will plead not guilty today, come back later for a pretrial conference, and then a trial readiness conference, and then your trial in Santa Cruz

Out-of-custody defendants sometimes arrive in the courtroom after the group colloquy has begun or even after it has completed. Although the judge asks at the beginning of the group colloquy whether anyone needs an interpreter, this is asked in English and so anyone who does not comprehend English will not understand the question. If the

Self-representation and subsequent probation violations

No one in Santa Cruz County knows how many people charged with misdemeanors waive their right to counsel and plead guilty at the arraignment on the complaint. It is not possible to determine this from the court's data management system in any systematic way. It is clear, though, that a significant number of defendants do so and then end up back in court on a probation violation where they often request and receive an appointed attorney.

judge is aware of a Spanish-speaking defendant on the docket that day, the judge tries to get an interpreter into the courtroom to translate the group colloquy for that defendant while it is taking place.

The individual colloquy in misdemeanor courts. After the group colloquy, the judge calls defendants to the podium, sometimes individually and sometimes in small groups of defendants charged with similar offenses such as DUI. 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. The judge advises the defendant of the charge of which they are accused. Then the judge asks whether the defendant wants to: represent himself and hear the prosecutor's offer, or talk to a lawyer.

If the defendant wants to represent himself and hear the prosecutor's offer, the assistant district attorney announces the plea offer on the record in the courtroom. The judge explains the offer to the defendant in plain terms and tells the defendant what the sentence would be. If the defendant wants to accept the offer and plead guilty, the defendant proceeds without counsel and disposes of the case that day with a guilty plea.²⁵³ If the defendant does not want to accept the prosecutor's offer, the judge asks whether the defendant wants to request appointed counsel.

²⁵³ At the point that a defendant determines that he wants to enter a guilty plea, he completes and signs a written, multi-page form that describes, among other things, the rights a defendant waives by entering a guilty plea.

2. Requesting appointed counsel & indigency determinations

When a defendant requests that the judge appoint counsel, the judge must determine whether the person “is financially able to employ counsel and qualifies for the services,”²⁵⁴ and the judge can require the person “to file a financial statement under penalty of perjury.”²⁵⁵

- For defendants who are in custody, typically the judges in Santa Cruz County automatically deem those defendants to be indigent and entitled to appointed counsel, without requiring them to complete a financial statement and without any oral questioning. One judge does orally question in-custody misdemeanor defendants, and if that causes the judge to believe the defendant might have the financial means to hire an attorney, then the judge requires the defendant to complete a financial statement.²⁵⁶
- For defendants who are not in custody, all of the judges in Santa Cruz County require each defendant to complete a financial statement.²⁵⁷

State law and court rules do not establish a threshold at which a defendant in criminal court is automatically or presumptively sufficiently indigent to receive appointed counsel. Neither have the superior court judges in Santa Cruz County adopted a threshold. As a result, the seven criminal court judges are free to adopt their own indigency standards.

For the most part, the judges focus primarily on how much money an out-of-custody defendant earns each month. In the felony and domestic violence courts, the judges’ rule of thumb is to appoint counsel to any defendant whose financial statement shows they earn less than \$2,500 to \$3,000 per month. In two of the three misdemeanor courts, the judges generally appoint counsel to any defendant whose financial

²⁵⁴ CAL. GOV. CODE § 27707 (West 2019).

²⁵⁵ CAL. GOV. CODE § 27707 (West 2019); CAL. PENAL CODE § 987(c) (West 2019). “The financial statement shall be confidential and privileged and shall not be admissible as evidence in any criminal proceeding except the prosecution of an alleged offense of perjury based upon false material contained in the financial statement. The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the financial statement at the conclusion of the proceedings for which such financial statement was required to be submitted. The financial statement shall not be confidential and privileged in a proceeding under Section 987.8 of the Penal Code.” CAL. GOV. CODE § 27707 (West 2019).

²⁵⁶ See, SUPCR 1127, Defendant Financial Eligibility Statement for Appointment of Counsel and Reimbursement (rev’d Mar. 3, 2018) (form adopted for mandatory use in the Superior Court of Santa Cruz County).

²⁵⁷ See, SUPCR 1127, Defendant Financial Eligibility Statement for Appointment of Counsel and Reimbursement (rev’d Mar. 3, 2018) (form adopted for mandatory use in the Superior Court of Santa Cruz County).

Coronavirus temporary measures, as of June 2020

The superior court is automatically appointing the contract BCM law firm to represent every defendant who requests appointed counsel, without requiring defendants to complete a financial affidavit or answer questions.

Emergency Standing Order Re: Appointment of Public Defender Upon Filing of Complaint in All Custody Cases (Calif. Super. Ct. Santa Cruz County Apr. 2, 2020). See Statewide Emergency Order (Calif. Jud. Council Mar. 23, 2020) (statewide authorization of superior courts to adopt new rules).

statement shows they earn less than \$2,000 per month. The other misdemeanor judge engages in oral questioning of every defendant but has no defined monthly earnings threshold for financial eligibility.

No one in Santa Cruz County knows how frequently a defendant, who has requested appointed counsel, is found by a judge to be not indigent and is denied appointed counsel. State statutes and court rules do not establish a procedure for a defendant to appeal from a court's decision that they are not indigent and therefore not entitled to appointed counsel, and the superior court in Santa Cruz has not adopted any such procedures. One contract law firm attorney says: "I've taken a lot of cases *pro bono* where the judge wouldn't appoint the public defender."

a. How judges appoint one of the four institutional providers

If the defendant "desires and is unable to employ counsel the court shall assign counsel to defend him or her."²⁵⁸ During the arraignment on the complaint proceeding, the judge specifies which of the four

²⁵⁸ CAL. PENAL CODE § 987(a) (West 2019). Before actually appointing counsel, the judge must notify the "defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel" and that, "if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost . . . [and] that the order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement against the property of the defendant in the same manner as any other money judgment." CAL. PENAL CODE § 987.8(f) (West 2019) (eff. Jan. 1, 2018).

Under state law, any such hearing and assessment of the defendant's ability to pay does not occur until the conclusion of the proceedings at the trial court level.

- For a person convicted of a felony or a misdemeanor - CAL. PENAL CODE §§ 987.8(b), 987.8(c), 987.8(i), 987.81 (West 2019) (eff. Jan. 1, 2018).
- For a person other than one convicted of a felony or a misdemeanor - CAL. GOV. CODE § 27712 (West 2019).

institutional providers is appointed to represent an indigent defendant.²⁵⁹ Which institutional provider is appointed by the judge depends on a variety of factors explained below.

Even if the BCM law firm is not appointed, the BCM law firm attorney present in the courtroom will immediately begin representing the defendant through the remainder of the arraignment on the case proceeding whenever the appointed institutional provider does not have an attorney present in the courtroom. (This and other procedures used by the courts and the indigent representation system frequently result in indigent defendants being transferred from attorney to attorney over the life of a case. This is known nationally as “horizontal representation.”)

Probation violation. If the defendant is being arraigned on a probation violation (or a parole violation, or community supervision violation), the judge appoints the law firm or CDCP attorney who represented the defendant in the underlying case whenever the defendant had appointed counsel in that underlying case, and the judge also appoints that law firm or CDCP attorney to any related new case against the defendant. Otherwise, the judge appoints a provider just as in a new case.

New case. The judges attempt in some fashion to determine whether the defendant is presently or has in the recent past been represented by any of the providers, and if so the judge appoints that law firm or CDCP. Some judges have their staff check the court’s data management system to identify past representation, either before or during court proceedings. All judges rely on the prosecutors and defense attorneys in the courtroom to advise the court if a particular provider should be appointed. (The theory is that if the BCM law firm was conflicted from representing a defendant in the past, then the BCM law firm will likely also be conflicted in the present.)

²⁵⁹ Even in a county that has a public defender office, the judge will have to determine which provider to appoint, because every county will have at least two methods of providing public counsel (public defender office – primary and/or secondary, private attorneys under contract, private attorneys appointed case by case). The state legislature has, to a small degree, guided the order a trial court judge must follow in designating the attorney to represent an indigent defendant in a particular case – leaning first toward any public defender office, then any secondary public defender office, then any attorneys under contract, then other individual attorneys. CAL. PENAL CODE § 987.2(a), (d), (e) (West 2019).

A county is only required to pay a private attorney appointed to represent an indigent person in a single case when: (1) “there is no public defender” office, or there is a public defender office but “because of a conflict of interest or other reasons, the public defender has properly refused;” and (2) in Los Angeles, Orange, and San Diego counties only, either “there is no contract for criminal defense services” with any attorneys, or all of the attorneys under contract “are unable to represent the person accused,” unless the court makes a finding of good cause and states the reasons on the record. CAL. PENAL CODE § 987.2(d), (e) (West 2019).

A judge can also deviate from the prescribed order when an indigent defendant has a pending charge in another county and counsel has been appointed in the other county’s case – in that situation, and under very specific circumstances, the judge can appoint that same attorney. CAL. PENAL CODE § 987.2(g) (West 2019).

Otherwise, the BCM law firm is appointed to represent the defendant, unless the BCM firm has a conflict of interest. In any case where the BCM firm has a conflict, the PSD law firm is appointed to cases that were filed on an odd-numbered date, and the Wallraff law firm is appointed to cases that were filed on an even-numbered date; unless one of the firms has a conflict of interest, in which case the other contract conflict law firm is appointed. If all three of the contract law firms have a conflict of interest, then the CDCP is appointed.

Conflicts of interest. The U.S. Supreme Court has repeatedly said that each and every defendant has a right to effective representation that is free from conflicts of interest.²⁶⁰ As recognized by the *California Rules of Professional Conduct*, a conflict of interest can arise in basically three ways: between two clients represented by a single lawyer at the same time; between a lawyer's current client and a lawyer's former client or a third person with whom the lawyer has a relationship; and between the lawyer's personal interests and the interests of the lawyer's client.²⁶¹ Generally, unless a client gives "informed written consent," a lawyer cannot represent a client if the lawyer has a conflict of interest.²⁶² Under the *California Rules of Professional Conduct*, in most instances, if one lawyer in a law firm is disqualified from representing a client due to a conflict of interest, then all of the lawyers in that same law firm are also disqualified from representing that client.²⁶³

Determining conflicts & appointing conflict-free counsel – multi-defendant cases.

If multiple defendants are being prosecuted for a single course of conduct (co-defendants), each defendant's case has its own case file number and appears separately on the court's docket, but all of those defendants' cases are allotted to the same court department. All of the judges review their dockets before court begins each day, to try to identify any co-defendants who are being arraigned, and the judges also rely on the prosecutor to notify them. (Co-defendants are not necessarily arraigned on the same days, as the date of the arraignment on the complaint varies depending on whether a defendant is in or out of custody and when the defendant was arrested.)

The prosecutor tells the judge which co-defendant's case carries the potentially most serious consequences, and the judge appoints the BCM law firm to represent that defendant (unless the BCM firm has a conflict). For a second and third co-defendant,

²⁶⁰ See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("[A]ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.")

²⁶¹ CAL. R. PROF'L CONDUCT r. 1.7, 1.9.

²⁶² CAL. R. PROF'L CONDUCT r. 1.7, 1.9.

²⁶³ CAL. R. PROF'L CONDUCT r. 1.10.

the judge appoints one to the PSD law firm and the other to the Wallraff law firm. For a fourth or more co-defendant, the judge appoints the CDCP.

Determining conflicts & appointing conflict-free counsel – other than multi-defendant cases. While conflicts are easily seen in a multi-defendant case, a law firm or attorney is unlikely to realize that other types of conflicts of interest exist until learning more about the facts of the case through discovery and investigation. This may arise days, weeks, or even months after the law firm or CDCP was appointed at the arraignment on the complaint, resulting in the originally appointed institutional provider having to withdraw and a new provider being appointed.²⁶⁴

b. How each institutional provider assigns a specific attorney to a specific case

During the arraignment on the complaint, the judge appoints an institutional provider – *not* a specific attorney. Instead, it is up to each of the three contract law firms and the CDCP to determine which of their attorneys will be assigned to each case, and that assignment process cannot always occur during the arraignment on the complaint. As a result, the BCM law firm attorney present in the courtroom immediately begins representing the defendant through the remainder of the arraignment on the complaint proceeding whenever the appointed institutional provider does not have an attorney present in the courtroom and in all cases appointed to the BCM law firm.

Biggam, Christensen & Minsloff attorney assignments. As of February 2020, the BCM law firm assigns one of 22 full-time associate attorneys to the individual cases of indigent defendants.

Juvenile justice cases. The BCM firm assigns two attorneys to staff the department B juvenile justice proceedings, including arraignment on the complaint. The two BCM firm attorneys have agreed among themselves that one takes all cases filed on odd-numbered dates and the other takes those filed on even-numbered dates, continuing to represent that defendant through disposition of the case. (These same two BCM attorneys also staff the department B misdemeanor proceedings.)

²⁶⁴ Whenever the BCM law firm identifies that it has a conflict of interest in a case, a BCM attorney requests that the case be placed on the court's calendar and notifies both the judge and the appropriate contract conflict law firm of the need for the BCM law firm to withdraw due to conflict. On the calendared day, the judge automatically and without question appoints either the PSD law firm or the Wallraff law firm (based on odd or even case file date).

If the PSD firm or Wallraff firm at some point identifies that it has a conflict of interest in the case, the same process occurs and the judge appoints the other of the two firms. Finally, if all three of the contract firms have declared a conflict of interest, the judge appoints the CDCP and the CDCP identifies a specific attorney to be assigned to the case. (Even the CDCP attorney assigned to the case can later realize they have a conflict of interest, and if that occurs the attorney notifies the CDCP administrator who identifies another CDCP attorney for the judge to appoint.)

Misdemeanor cases. The BCM firm assigns two attorneys to staff each of the three misdemeanor departments (six attorneys in total), including during arraignment on the complaint. Two attorneys are assigned to department 1, two attorneys are assigned to department 2, and two attorneys are assigned to department B. (The two BCM attorneys who staff department B misdemeanors also staff the department B juvenile justice proceedings.)

For cases appointed to the BCM law firm:

- The two attorneys in department 1 have agreed among themselves that one takes all cases filed on odd-numbered dates and the other takes those filed on even-numbered dates, continuing to represent that defendant through disposition of the case.
- The two attorneys in department 2 have agreed among themselves that whichever of them speaks to a defendant first will take that defendant's case, continuing to represent that defendant through disposition of the case.
- The two attorneys in department B have agreed among themselves that one takes all cases filed on odd-numbered dates and the other takes those filed on even-numbered dates, continuing to represent that defendant through disposition of the case.

Domestic violence cases. The BCM firm assigns two attorneys to staff the department 4 domestic violence proceedings, including arraignment on the complaint.

For cases appointed to the BCM law firm, these two BCM law firm attorneys have agreed among themselves to each take roughly half, continuing to represent those defendants through disposition of the case.

Felony cases. The BCM firm assigns one attorney, referred to at the BCM firm as a “quarterback,” to staff each of the three felony departments (three attorneys in total), including during the arraignment on the complaint. The BCM firm has nine other felony “trial” attorneys.

For cases appointed to the BCM law firm, the “quarterback” immediately begins representing the defendant through the remainder of that day's arraignment on the case proceeding. But the assignment of each felony case to a specific BCM attorney then follows one of three paths:

1. Continued arraignment – violence or sexual assault cases. The BCM law firm “quarterback” continues the arraignment for one or two days, so that whichever of the nine trial attorneys is assigned to the case will appear in court with the defendant for the entry of a plea to the complaint and continue to represent the defendant through disposition of the case.
2. Arraignment only – discretion of the BCM felony supervisor. The BCM law firm “quarterback” represents the defendant during the entry of a plea in the

arraignment on the complaint proceeding. That afternoon, the BCM law firm “quarterback” reviews all of the felony cases appointed to the BCM firm that day with the BCM felony supervisor. In the felony supervisor’s discretion, one of the nine trial attorneys may be assigned to the case to immediately represent the defendant at preliminary hearing and through disposition of the case.

3. Arraignment through preliminary hearing – default for drug or property cases. The BCM law firm “quarterback” represents the defendant during entry of a plea to the complaint and through the conclusion of the preliminary hearing. After the preliminary hearing, the BCM felony supervisor assigns the case to one of the nine trial attorneys, who represents the defendant through disposition of the case.²⁶⁵

Page, Salisbury & Dudley attorney assignments. As of February 2020, the PSD law firm assigns one of six full-time attorneys to the individual cases of indigent defendants.

Juvenile justice cases. The PSD law firm assigns one attorney to permanently staff the department B juvenile justice proceedings, including arraignment on the complaint. This attorney is assigned all of the juvenile justice cases to which the PSD law firm is appointed and represents the defendant from arraignment on the complaint through disposition of the case.

Adult criminal cases. The other five PSD law firm attorneys are each assigned to permanently staff one of the six criminal departments (with Mr. Dudley covering both misdemeanor departments) at the main Santa Cruz courthouse during arraignment on the complaint proceedings. (There is no PSD law firm attorney present during arraignment on the complaint proceedings in department B misdemeanors at the Watsonville courthouse.)

The PSD firm attorney assigned to each department at the main Santa Cruz courthouse immediately represents, at the arraignment on the complaint proceeding, every defendant appointed to the PSD firm in that department. After the arraignment on the complaint proceeding:

- All serious violent felonies are assigned to Mr. Dudley, who represents the defendant through disposition of the case.
- All other felonies are kept by the attorney who received them at arraignment on the complaint, and the attorney represents the defendant through disposition of the case.
- Misdemeanor and domestic violence cases that are not disposed at the arraignment on the complaint are distributed among the five attorneys, who each represent the defendant through disposition of the case.

²⁶⁵ State law requires that the appointed attorney who represents an indigent defendant at the preliminary examination must continue representing that defendant until the date set for arraignment on the information, unless otherwise relieved. CAL. PENAL CODE § 987.1 (West 2019).

Wallraff & Associates attorney assignments. As of February 2020, the Wallraff law firm assigns one of four full-time attorneys and one part-time attorney to the individual cases of indigent defendants.

Juvenile justice cases. The Wallraff law firm assigns its one part-time attorney to permanently staff the department B juvenile justice proceedings, including arraignment on the complaint. This attorney is assigned all of the juvenile justice cases to which the Wallraff law firm is appointed and represents the defendant from arraignment on the complaint through disposition of the case.

Adult criminal cases. The Wallraff law firm’s three full-time attorneys, other than Mr. Wallraff, take turns serving as the “coverage attorney” at the main Santa Cruz courthouse during arraignment on the complaint proceedings. Court staff in any of the main Santa Cruz courthouse criminal departments notify the Wallraff coverage attorney whenever any person’s case is appointed to the Wallraff law firm (unless there happens to be another Wallraff attorney already present in the courtroom), and that coverage attorney immediately represents, at the arraignment on the complaint proceeding, every defendant appointed to the Wallraff firm. (There is no Wallraff law firm attorney present during arraignment on the complaint proceedings in department B misdemeanors at the Watsonville courthouse.)

Each of the three full-time attorneys, other than Mr. Wallraff, are assigned to one of the three felony departments, and generally that attorney is assigned to all cases arising out of that attorney’s assigned felony department for representation through disposition of the case. Misdemeanor and domestic violence cases are assigned to the four full-time attorneys (including Mr. Wallraff) in rotation, to represent the defendant through disposition of the case.

CDCP attorney assignments. As of February 2020, the CDCP assigns one of 20 attorneys or the Sixth District Appellate Panel to the individual cases of indigent defendants, depending on the type of case. By type of case, there are eligible for appointment:

- 19 attorneys - Adult Criminal Class 1 misdemeanor
- 18 attorneys - Adult Criminal Class 2 non-serious felony
- 17 attorneys - Adult Criminal Class 3 serious felony
- 15 attorneys - Adult Criminal Class 4 homicide / complex serious felony
- 6 attorneys - Adult Criminal Class 5 death penalty / special circumstances felony
- 6 attorneys - Juvenile Delinquency Class 1 misdemeanor
- 6 attorneys - Juvenile Delinquency Class 2 non-serious felony
- 6 attorneys - Juvenile Delinquency Class 3 serious felony
- 7 attorneys - Juvenile Delinquency Class 4 homicide / complex serious felony

- 3 attorneys - Civil
- 4 attorneys, plus the Sixth District Appellate Panel - Misdemeanor appeals
- 2 attorneys, plus the Sixth District Appellate Panel - Writs

As the CDCP administrator receives an appointment from any court department, she calls CDCP attorneys who are eligible to be appointed in that type of case and then assigns an attorney who expresses their availability. This results in a highly unequal distribution of cases among the eligible CDCP attorneys. Many of the CDCP attorneys complain that there is no transparency in the assignment of a specific CDCP lawyer to a case. The administrator says she is able to assign every case within hours of receiving the appointment.

3. Entering a plea to the charge, and next steps

Once a defendant has requested and received appointed counsel, no critical stage in the case can occur unless the attorney is present and representing the defendant. Arraignment is a critical stage in a criminal case, during which the indigent defendant has the right to counsel and for that attorney to be present as an active participant in the proceedings.²⁶⁶ Plea negotiations and the entry of a guilty plea are also critical stages of a criminal case, during which the defendant has the right to “effective assistance of competent counsel.”²⁶⁷

The indigent representation system in Santa Cruz County ensures that every indigent defendant is actually represented by an appointed attorney during the defendant’s entry of a plea to the charge. As explained, even if the BCM law firm is not appointed, the BCM law firm attorney present in the courtroom immediately begins representing the defendant through the remainder of the arraignment on the case proceeding whenever the appointed institutional provider does not have an attorney present in the courtroom.

For indigent defendants whose cases are not resolved by a guilty plea at the first arraignment on the complaint proceeding, many of them will be represented by a different attorney and perhaps a series of different attorneys at the next proceedings in the case.

Juvenile justice cases. After the judge has appointed a provider to represent the juvenile defendant, the judge asks the juvenile whether they admit or deny the charge. All juvenile defendants appointed to any of the three contract law firms are continuously represented by the same attorney during entry of a plea to the charge and through disposition of the case.

²⁶⁶ Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961).

²⁶⁷ Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).

The juvenile attorneys in all three of the contract law firms are permanently assigned to the juvenile justice department. There is some concern that attorneys appointed in juvenile justice cases face judicial pressure that may cause them to shirk from advocating solely for the interests of the juveniles they are appointed to represent. For example, whereas California law clarifies that defense counsel in delinquency proceedings have a duty to “advocat[e]” in the child’s interest “at every stage of the proceedings,”²⁶⁸ the juvenile justice department judge refers to the prosecutor and the defense attorneys in her court as part of the juvenile court’s “team” which highly values prompt resolution of cases. The juvenile lawyers understand that they risk negative consequences for their clients in individual cases (*see* side bar on juvenile probationary sentences on page 95) by directly challenging the judge. Although the precise percentage is not known, many juvenile defendants in Santa Cruz County admit to the charges at arraignment on the complaint.

For juvenile defendants appointed to the CDCP:

- A BCM law firm attorney represents the juvenile defendant during entry of a plea to the charge.
- If the juvenile defendant denies the charge, then a CDCP attorney is assigned to represent the juvenile defendant from that point through disposition of the case.

If the juvenile defendant denies the charge, the judge sets a pretrial conference date: the following week for a detained juvenile; three weeks out if the juvenile is not detained.

A detained juvenile has a right to have their case adjudicated within 15 days; or within 30 days for a juvenile who is not detained.²⁶⁹ Juveniles can waive these requirements and often do in out of custody cases.

Adult criminal cases. Once the judge has appointed a provider to represent the defendant, the judge asks the defendant (other than in a death penalty case) whether they plead guilty or not guilty to the charge.²⁷⁰

Misdemeanors and domestic violence (misdemeanor or felony). Although the precise percentage is not known, many indigent misdemeanor defendants plead guilty at the arraignment on the complaint, after consulting with an appointed attorney. If the prosecutor and the appointed attorney believe they are likely to reach a plea agreement if given a little more time, the case can be continued for up to seven days, through a “continuation of the arraignment.”

²⁶⁸ CAL. RULES OF COURT I. 5.663 (2007).

²⁶⁹ CAL. WELF. & INST. CODE § 657 (West 2019).

²⁷⁰ CAL. PENAL CODE § 859a (West 2019) (felony); CAL. PENAL CODE §§ 976, 988 (West 2019) (misdemeanor).

Juvenile probationary sentences & prolonged supervision

In a juvenile justice case, following the disposition hearing, in Santa Cruz County most often the child is placed on some sort of probationary sentence. The great majority of youth and youthful offenders who admit to the charges are placed on some form of prolonged supervision with multiple conditions. Based on observations, a probationary sentence with more than ten conditions of probation is not uncommon in a Santa Cruz County juvenile delinquency disposition.

California law charges juvenile defense counsel with “advocating” on behalf of the child’s interest “at every stage of the proceedings,” including dispositional hearings (where probationary sentences are fixed) and postdispositional hearings (where probationary sentences are reviewed and potentially modified).^a However, the “team” approach to the juvenile justice department in Santa Cruz County undercuts defense counsel’s ability to advocate independently and zealously on behalf of their client’s interest on a case-by-case basis. Because multiple conditions of probation can create pathways to prolonged supervision and violation, defense counsel is aware that, with each additional condition of probation imposed, the more likely it is their youthful client will violate one or more conditions and face greater consequences as a result.

For example, a standard probation condition in juvenile practice in Santa Cruz County is to have youth attend school. This seems logical but the same conduct can be addressed in a less intrusive manner via status offense jurisdiction. Setting conditions of release pre-trial that are not related to court appearance or re-offending, such as school attendance, can lead to detention and school failure. Research has shown that youth who do not graduate high school are eight times more likely to be arrested at some later point.^b

In the absence of any supervising attorney to address systemic concerns attendant to the juvenile court’s routinely sentencing children to prolonged supervision with multiple conditions of probation, it is understandable that attorneys appointed in juvenile justice cases in Santa Cruz County have determined that it is not in their individual client’s interest to raise such systemic issues in the context of a specific case. For example, a supervising attorney (or a chief defender responsible for the entire indigent representation system) could argue that, because most children involved in juvenile justice cases “have not committed serious offenses and half of them appear in the system only once,”^c unnecessary court involvement or probation oversight after a case has been filed can lead to unintended net widening and more intrusive systemic involvement via further probation violations that undercuts the very mission of the juvenile justice system. Similarly, rather than adopting a team-oriented approach, a juvenile defense lawyer with sufficient independence would be free to advocate in the child’s interest in a specific case that, in lieu of general conditions of probation that are automatically ordered in addition to special conditions, the juvenile court’s focus should be on limiting conditions to only those related to the conduct that is to be deterred.

^a CAL. RULES OF COURT r. 5.663 (2007).

^b ACLU OF MASSACHUSETTS AND CITIZENS FOR JUVENILE JUSTICE, ARRESTED FUTURES: THE CRIMINALIZATION OF SCHOOL DISCIPLINE IN MASSACHUSETTS’S THREE LARGEST SCHOOL DISTRICTS 1-10 (2012), <https://www.cfjj.org/arrested-futures>.

^c NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2 (2013).

All misdemeanor defendants and domestic violence defendants appointed to the BCM law firm are continuously represented by the same attorney during entry of a plea to the charge and through disposition of the case.

For misdemeanor defendants appointed to the CDCP, or in department B to either the PSD firm or the Wallraff firm:

- A BCM law firm attorney represents the defendant during entry of a plea to the charge.
- If the defendant pleads not guilty, then a Wallraff, or CDCP, or PSD attorney is assigned to represent the defendant from that point through disposition of the case.

For misdemeanor defendants appointed to the PSD firm or the Wallraff firm in the Santa Cruz courthouse:

- An attorney with the appointed firm represents the defendant during entry of a plea to the charge.
- If the defendant pleads not guilty, then for PSD cases any one of four PSD attorneys is assigned, and for Wallraff cases any one of four Wallraff attorneys is assigned to represent the defendant from that point through disposition of the case.

If a misdemeanor case is not disposed of by a plea at the arraignment (or continued arraignment) on the complaint, the judge sets a “pre-trial conference” date. Any misdemeanor defendant still in custody has a right to a trial within 30 days.

Felonies. At the arraignment on the complaint, the prosecution delivers to the defendant’s attorney the complaint, the defendant’s criminal history, and all police reports generated to that point. Felony defendants can plead guilty at the arraignment on the complaint while their attorney is present with them in court.²⁷¹ Nearly all indigent felony defendants plead not guilty at the arraignment (or continued arraignment) on the complaint, after consulting with an appointed attorney. The exception is where the prosecutor agrees to a plea to a misdemeanor, in which instance the defendant may plead guilty at the arraignment on the complaint.

Only a small number of felony defendants, appointed to either the PSD firm or the Wallraff firm, are continuously represented by the same attorney from their first appearance for arraignment on the complaint through disposition of the case. Any felony defendant who pleads not guilty at arraignment on the complaint will most

²⁷¹ CAL. PENAL CODE § 859a (West 2019). Further, “[n]o plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel.” CAL. PENAL CODE § 1018 (West 2019).

likely be represented by a different attorney, or series of attorneys, at the next proceedings in the case.

If a felony defendant pleads not guilty, the judge schedules a preliminary examination,²⁷² unless the defendant while accompanied by counsel waives the right to have a preliminary examination.²⁷³ Very few felony defendants waive their right to a preliminary examination in Santa Cruz County during the arraignment on the complaint proceeding.

If the defendant waives the right to preliminary examination, the judge enters an order holding the defendant to answer and the prosecutor is required to file an information in the superior court within 15 days.²⁷⁴

The preliminary examination is to be held within 10 court days of the defendant's not guilty plea, unless both the state and the defendant waive that right (colloquially, to "waive time") or good cause exists for a continuance.²⁷⁵ If the defendant does "waive time," which is very common in violent or sexual assault cases, then the preliminary examination in Santa Cruz will be set on the court's docket anywhere from one to three months out, and it may not actually occur until five or six months after the arraignment on the complaint.

Coronavirus temporary measures, as of June 2020

The time for holding a preliminary examination is extended to within 15 court days of the defendant's not guilty plea.

General Order (Calif. Jud. Council Mar. 27, 2020) (re Santa Cruz County superior court extending time periods for various proceedings); General Order (Calif. Jud. Council Mar. 18, 2020) (re Santa Cruz County superior court extending time periods for various proceedings).

²⁷² CAL. PENAL CODE § 859b (West 2019).

²⁷³ CAL. PENAL CODE § 860 (West 2019).

²⁷⁴ CAL. PENAL CODE § 860 (West 2019).

²⁷⁵ CAL. PENAL CODE § 859b (West 2019).

C. Preliminary examination (in felony cases)

The preliminary examination is an adversarial hearing at which counsel for both the state and the defendant can examine witnesses and introduce evidence.²⁷⁶ The judge, a prosecutor, an indigent representation system attorney, and the defendant are all physically present in the courtroom.

The purpose of the preliminary examination is for the judge to determine whether there is probable cause to believe that the alleged offense has been committed and that it was committed by the defendant.²⁷⁷

- If the judge finds that there is not probable cause, the defendant is discharged²⁷⁸ (though the prosecutor may still seek an indictment from a grand jury, it is reported that the Santa Cruz prosecutors do not take cases to a grand jury).
- If the judge finds probable cause, the judge enters an order holding the defendant to answer to the charge,²⁷⁹ and the prosecutor is required to file an information within 15 days.²⁸⁰ The appointed attorney representing an indigent defendant at the preliminary examination must continue representing that defendant until the date set for arraignment on the information, unless otherwise relieved.²⁸¹

In Santa Cruz County, a preliminary examination is held in nearly every indigent felony defendant's case, unless a plea agreement is reached. Appointed attorneys treat preliminary examinations as a serious opportunity to review evidence and hear witness testimony. It is not uncommon for a preliminary examination to last three to four days on a serious felony, and even in a low-level felony the preliminary examination may take a full day for the hearing.

²⁷⁶ CAL. PENAL CODE §§ 864, 865, 866, 866.5, 868, 868.7 (West 2019).

²⁷⁷ CAL. PENAL CODE § 871 (West 2019).

²⁷⁸ CAL. PENAL CODE § 871 (West 2019).

²⁷⁹ CAL. PENAL CODE § 872 (West 2019).

²⁸⁰ CAL. PENAL CODE § 857 (West 2019).

²⁸¹ CAL. PENAL CODE § 987.1 (West 2019).

CHAPTER VI

SUFFICIENT TIME & CASELOADS

The U.S. Supreme Court in *Powell v. Alabama* noted that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel.²⁸² As one state supreme court observed over a quarter-century ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”²⁸³

Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob,” the *Powell* Court explained.²⁸⁴ The lack of sufficient time may be caused by any number of things, including but not limited to excessive workload or payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

A. Caseloads & workloads of the indigent representation system in Santa Cruz County

There are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Regardless of case complexity and other factors, in each case the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;

²⁸² *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

²⁸³ *Louisiana v. Wigley*, 624 So.2d 425, 428 (La. 1993).

²⁸⁴ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein the attorney must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes and collateral consequences that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while, prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).²⁸⁵

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant's case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of "caseloads" or "workloads."

Caseloads of individual attorneys. Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. A lawyer's total annual caseload is the count of all indigent representation system cases in which the lawyer provided representation during a given year, starting with the number of cases the attorney had open at the beginning of the year and adding to that the number of cases appointed to the attorney during the year.

The most reliable data in Santa Cruz County about the number of appointments made to the indigent representation system derives from the reports filed quarterly by each contract law firm and annually by the CDCP of the number of cases to which they have been newly appointed. The law firms do not report the number of cases assigned to the individual attorneys. The table on page 101 shows the number of new appointments reported by each of the four providers, broken down by type of case,²⁸⁶ during the fiscal year ending on June 30, 2019.

²⁸⁵ See STATE BAR OF CALIFORNIA, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS § II (standards of representation) (2006); NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

²⁸⁶ The four providers do not use the same case types in their reports, nor do their case types match those of the court's data management system. Tables depicting the case type designations used by each of the providers and the superior court, showing how they correspond to the broad case number categories used by the court and to each other, are contained in Appendix B - E. The Sixth Amendment Center obtained from each provider and the superior court the definitions they use for each case type and then grouped the data reported by the providers into the case types shown in this table.

**Number of new appointments made July 1, 2018 through June 30, 2019
(from provider reports)**

	all case types	Crim Felony	Crim Misd	Juv Delinq	Crim App	Crim Post-Conv	“Clean Slate” project	Family	Mental Health	Other
BC&M	9,939	2,479	6,259	276	0	165	574	31	155	0
PS&D	599	234	235	62	0	7	0	0	2	59
W&A	539	212	260	44	0	0	0	0	5	18
CDCP	89	43	15	11	14	1	2	0	0	3
All providers	11,166	2,968	6,769	393	14	173	576	31	162	80

The case types of Crim Felony, Crim Misd, and Juv Delinq include both new cases and probation revocations.

Workloads of individual attorneys. In addition to considering the raw number of cases of each type that an attorney handles, the U.S. Department of Justice has advised, and national standards agree, that “caseload limits are no replacement for a careful analysis of a public defender’s *workload* . . .”²⁸⁷ Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public representation cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.²⁸⁸ Further, national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”²⁸⁹

²⁸⁷ Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. filed Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, *available at* <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. *See e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

²⁸⁸ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt. (2002).

²⁸⁹ Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. c-11-1100RSL (W.D. Wash. filed Dec. 4, 2013), ECF No. 322, *available at* <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. *See e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

B. Measuring whether attorneys have sufficient time to provide effective representation to each indigent person

Lawyers owe certain fundamental duties to every client in every case. To ensure that lawyers can fulfill these duties to every client, national standards summarized in the *ABA Ten Principles of a Public Defense Delivery System* provide that an indigent representation system must control attorneys' workload.²⁹⁰

The first national standards for caseloads of attorneys appointed to represent indigent defendants were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, as part of an initiative funded by the U.S. Department of Justice.²⁹¹ NAC *Standard 13.12* prescribes that a single attorney should not handle in a year any more than the absolute maximum numerical caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.²⁹²

It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload standards be exceeded.²⁹³

The NAC caseload limits assume the lawyer does not have any other duties, such as management or supervisory responsibilities, and the limits contemplate that a full

²⁹⁰ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 & cmt. (2002).

²⁹¹ Building on the work and findings of the 1967 President's Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC's report sets the standards for the defense function. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

²⁹² NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), std. 13.12 (1973). This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with the NAC caseload standards.

²⁹³ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt. (2002) (stating “National caseload standards should in no event be exceeded”).

contingent of support is available to the defense attorney.²⁹⁴ That support includes: one supervisor for every ten attorneys; one investigator for every three attorneys;²⁹⁵ one social service caseworker for every three attorneys; one paralegal for every four felony attorneys;²⁹⁶ and one secretary for every four felony attorneys.²⁹⁷ Lack of assistance, for example in discovery review and investigation, increases the amount of time it takes attorneys to adequately prepare for cases.

The NAC caseload limits were established and remain as absolute maximums. Yet increased complexity in forensic sciences and criminal justice technology make correspondingly increased demands on the time attorneys must devote to each case in order to provide effective assistance of counsel. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.²⁹⁸

Policymakers in many states have recognized the need to set localized standards. Localized standards are able to consider unique demands made on appointed attorneys in the local jurisdiction, such as the travel distance between the court and the local jail, or the prosecution's charging practices. Localized standards are also able to address types of cases for which a state provides a right to counsel, but that are not contemplated by the NAC standards.

There does not appear to be any California state law, regulation, or court rule imposing caseload limits for public counsel. Instead, the State Bar of California's *Guidelines on Indigent Defense Services Delivery Systems* call for indigent representation systems in each jurisdiction to "establish reasonable maximum caseload goals . . . after evaluating the workload that each type of case represents in the context of the criminal practices and procedures unique to that jurisdiction" and place responsibility with system administrators "for assuring that workloads are not excessive in volume."²⁹⁹

²⁹⁴ See NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) ("Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.").

²⁹⁵ NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) ("Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.").

²⁹⁶ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

²⁹⁷ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

²⁹⁸ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) ("In many jurisdictions, caseload limits should be lower than the NAC standards.").

²⁹⁹ See STATE BAR OF CALIFORNIA, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS § VII (workload) (2006), https://www.calbar.ca.gov/Portals/0/documents/ethics/Indigent_Defense_Guidelines_2006.pdf.

Santa Cruz County and the indigent representation system it has established do not have any caseload limits or guidelines. The contracts with the three law firms require those law firms to accept an unlimited number of cases, and the contracts do not impose any limits on the number of cases that are assigned to any individual attorney.

In the absence of more localized standards, the NAC standards are the best tool available against which to measure the workloads of the attorneys in the Santa Cruz County indigent representation system. The NAC standards were developed to address the adult and juvenile cases at trial and appeal for which an indigent defendant is entitled to appointed counsel under the Sixth Amendment, and there are no national standards readily applicable to the other broad case types for which California provides a right to counsel. The Sixth Amendment Center applies the mid-level NAC standard of 200 cases per attorney per year to the “criminal post-conviction,” “Clean Slate project,” and “family” cases reported by the indigent defense providers, and the NAC standard of 400 cases per attorney per year to the “other” cases.

The following table shows the NAC standards applied to the number of new appointments as reported by the indigent representation system providers during the fiscal year ending June 30, 2019.

**NAC standards applied to
number of new appointments made July 1, 2018 through June 30, 2019
(from provider reports)**

	all case types	Crim Felony	Crim Misd	Juv Delinq	Crim App	Crim Post- Conv	“Clean Slate” project	Family	Mental Health	Other
BC&M	9,939	2,479	6,259	276	0	165	574	31	155	0
PS&D	599	234	235	62	0	7	0	0	2	59
W&A	539	212	260	44	0	0	0	0	5	18
CDCP	89	43	15	11	14	1	2	0	0	3
All providers	11,166	2,968	6,769	393	14	173	576	31	162	80
Std applied		NAC 150	NAC 400	NAC 200	NAC 25	200	200	200	NAC 200	400
FTE attorneys required	44.14	19.79	16.92	1.97	0.56	0.87	2.88	0.16	0.81	0.20

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.

The providers' caseload reports do not show the number of cases remaining open from previous years – the existing cases that lawyers were already handling at the beginning of the fiscal year, before adding newly assigned cases. To account for these additional open cases, more FTE attorneys are required.

Additionally, indigent representation system lawyers in Santa Cruz County do not have adequate support staff, such as secretaries, paralegals, and social workers. 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. For that reason, national caseload standards presume the lawyers have adequate support services. Where such resources are unavailable, the number of cases an attorney can handle in a given year should be adjusted downward and the total number of FTE attorneys should be increased.

The county's contracts with each of the three law firms expressly permit the firm to "handle private criminal cases" that do not conflict with their indigent representation duties.³⁰⁰ The law firms' quarterly reports do not show (and the firms are not required to submit) their individual attorneys' private caseloads. To whatever extent the attorneys handle private cases, the number of appointed cases they can handle is less, and the total number of FTE attorneys required to effectively represent indigent people in Santa Cruz County increases.

³⁰⁰ "Agreement for Public Defender Services" between the County of Santa Cruz and Lawrence P. Biggam, ¶ 9 (for the term of July 1, 2012 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022); "Agreement – Public Defender Conflict of Interest Services" between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley ¶ 8 (for the term of July 1, 2014 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); "Agreement – Public Defender Conflict of Interest Services" between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 8 (for the term of July 1, 2014 through June 30, 2018), *amended by* "Amendment to Agreement" between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

C. Applying the NAC standards to the known workloads of the attorneys

Although Santa Cruz County does not require the contract law firms to report the new appointments assigned to the individual attorneys,³⁰¹ there is quite a lot of available information about both their caseloads and their workloads based on the fiscal year ending June 30, 2019.

1. Page, Salisbury & Dudley

As of February 2020, the Page, Salisbury & Dudley (PSD) law firm has six full-time attorneys who all carry a caseload. This is one more attorney than the law firm is required by its contract to have, and the newest associate began in January 2020 as Mr. Page is beginning to reduce his practice.

One associate attorney handles all of the PSD firm's 62 juvenile delinquency cases.

The two partners and other three associates do not divide the rest of the cases exactly evenly, but on average these five attorneys each handle 46.8 felonies and 47.0 misdemeanors, or about 94 cases per lawyer per year. Mr. Dudley's caseload is the extremes of the homicides and most serious felonies on one end and misdemeanors on the other, without much in the middle. For the other lawyers, they typically have approximately 30 to 50 active cases at any given time and about two trials each during a year.

Mr. Page believes his law firm does more private work than the other two contract firms, but it is still a relatively small amount – perhaps 5% to 10% – of mostly DUI cases and divorce cases.

2. Wallraff & Associates

As of February 2020, the Wallraff law firm has four full-time attorneys and one part-time attorney who all carry a caseload.

The one part-time associate handles all of the Wallraff firm's 44 juvenile delinquency cases. This attorney estimates having about 25 open cases at any one time.

³⁰¹ The CDCP provided to the Sixth Amendment Center a detailed report of the individual appointments made to each CDCP attorney during the preceding three fiscal years. Because comparable information was not ultimately available for the law firm attorneys, the CDCP assignments to individual attorneys are not included in this report.

The four full-time attorneys do not divide the rest of the cases exactly evenly, but on average each attorney handles 53 felonies and 65 misdemeanors, or about 118 cases per lawyer per year. One associate explains that he works about 40 to 60 hours every week and that goes up to 70 or more hours when in trial. The partner handles all of the firm's five mental health cases and about 90% of the serious felonies.

3. Biggam, Christensen & Minsloff

As of February 2020, the Biggam, Christensen & Minsloff (BCM) law firm has three partners and 24 associate attorneys, for a total of 27 attorneys. The table on page 108 shows the caseload responsibilities, as well as the additional responsibilities, of each of the BCM law firm attorneys at the time of this evaluation.

The partners. None of the three BCM partners carry a caseload, and one of them works part-time. The partners divide the administrative & ownership duties among themselves and all attend the weekly Monday all-staff meetings. All California law firm partners owe clients a duty to ensure their associate attorney employees perform at a minimally effective level.³⁰² Partner 1 has financial and real estate oversight. Partner 2 is responsible for all hiring, interfaces with county government and the courts on broad matters of criminal justice policy and the firm's contractual concerns, is the official misdemeanor supervisor who conducts the Thursday meetings of the misdemeanor attorneys and the investigators, and serves as the defense representative in the Behavioral Health Court that meets once a week on Thursday mornings. Part-time Partner 3: is the felony supervisor, meeting with each felony "quarterback" each day after arraignments and preliminary examinations to review the felony files and make assignments to the felony trial attorneys, and conducting the Wednesday meetings of the felony attorneys and the investigators; and serves as the defense representative in the Parole Re-entry Court.

The two associates without caseloads. Of the 24 associate attorneys, Associate 1 was out on maternity leave. Of the 23 available associates, Associate 2 does not handle any cases, but is responsible for legal research, provides a case law update at the Monday all-staff meetings, and shares responsibility for supervising the BCM law firm summer law clerks.

All attorneys carrying caseloads. The remaining 22 available associate attorneys handle the entirety of the 9,939 cases appointed to the BCM law firm. This is an average of 452 new cases per attorney per year, before considering the cases those attorneys already had open at the beginning of that year, and before considering their other work responsibilities.

³⁰² See generally CAL. R. PROF'L CONDUCT 5.1 (eff. Nov. 1, 2018) (obliging law firm managers to ensure law firm associates comply with state ethical rules).

Biggam, Christensen & Minsloff
attorney caseloads & additional responsibilities
as of February 2020

Attorney	Primary caseload responsibility	Collaborative courts & other case-related	Administration, supervision & training
Partner 1			financial oversight
Partner 2		Behavioral Health Court	hiring; misdemeanor supervisor
Partner 3 (part-time)		Parole Re-Entry Court	felony supervisor
Associate 1	<i>maternity leave</i>		
Associate 2		legal research	summer law clerk supervisor
Associate 3	Clean Slate	Immigration expert	
Associate 4	Mental health	“utility player”	summer law clerk supervisor; monthly CLE organizer
Associate 5	Dom viol - Dept 4	PACT; FIT; Mental Health Diversion Court; Restorative Justice Program	
Associate 6	Dom viol - Dept 4		
Associate 7	Felony QB - Dept 3		
Associate 8	Felony QB - Dept 6		
Associate 9	Felony QB - Dept 7		
Associate 10	Felony trial	Veterans Treatment Court	
Associate 11	Felony trial		
Associate 12	Felony trial		
Associate 13	Felony trial		
Associate 14	Felony trial		
Associate 15	Felony trial		
Associate 16	Felony trial		
Associate 17	Felony trial		
Associate 18	Felony trial		
Associate 19	Misd - Dept B; Juv just - Dept B		
Associate 20	Misd - Dept B; Juv just - Dept B		
Associate 21	Misd - Dept 1		
Associate 22	Misd - Dept 1		
Associate 23	Misd - Dept 2		“de facto” misdemeanor supervisor
Associate 24	Misd - Dept 2		

“Clean slate” caseload. Associate 3 handles all of the BCM law firm’s reported 574 “Clean Slate” cases³⁰³ and additionally serves as the in-house immigration expert. At the time of this evaluation, the BCM law firm has a backlog of approximately 2,000 “clean slate” cases. The raw number of “clean slate” cases does not adequately reflect the extensive work that is necessary to effectively represent indigent people in these cases. (See side bar on “clean slate” representation at pages 114-116.) Even so, at the conservative standard of 200 cases per attorney per year, Associate 3 is handling on a less than full-time basis a “clean slate” caseload that requires 2.87 FTE lawyers.

Mental health caseload. Associate 4 handles all of the BCM law firm’s reported 155 mental health cases,³⁰⁴ which are said by the attorney to take up very little time (about 10% of the workweek, the attorney estimates). National standards require this attorney to devote 78% of their time to this number of mental health cases. This attorney’s role at the law firm is self-described as “a lot of random stuff,” and the partners refer to Associate 4 as the “utility player.” Associate 4 plans the monthly CLE programs that the BCM firm presents in coordination with the county’s defense bar and shares responsibility for supervising the BCM law firm summer law clerks.

Felony, misdemeanor, and juvenile caseloads. All of the criminal felony, criminal misdemeanor, and juvenile delinquency cases appointed to the BCM law firm are handled by the remaining 20 associate attorneys: 2 assigned to domestic violence cases that can be either felonies or misdemeanors; 12 assigned to felonies; and 6 assigned to misdemeanors, but 2 of those attorneys also handle the firm’s entire juvenile justice caseload.

- *Domestic violence.* Associate 5 and Associate 6 split roughly evenly the criminal domestic violence cases appointed to the BCM law firm, and they handle the arraignment on the complaint for defendants appointed to any of the other three institutional providers who do not have an attorney in the domestic violence courtroom that day. Associate 5 also serves as the defense representative in four separate collaborative courts: PACT, FIT, the Mental Health Diversion Court, and the Restorative Justice Program. The law firm’s quarterly reports to the county do not break out domestic violence cases as a reporting category. Because these cases can be either felonies or misdemeanors, for purposes of this analysis we attribute one of the attorneys as a felony attorney and one as a misdemeanor attorney.

³⁰³ The “clean slate” cases are a grouping of seven different types of cases listed in the quarterly reports that the BCM law firm files to the county: Clean Slate new contacts/intakes; 1203.4 (contested); 1203.3 (contested); Prop 47 (contested); Prop 64 (contested); Modifications; Cert of Rehab & pardon.

³⁰⁴ The “mental health” cases are a grouping of six different types of cases listed in the quarterly reports that the BCM law firm files to the county: Mental Competency hearing; Competency hearing; Restoration of sanity; Probable Cause hrg; Extension of commitment; and LPS.

- *Felony.* Associate 7, Associate 8, and Associate 9 are the felony quarterbacks who appear every day of the week in the felony departments, where they handle the arraignment on the complaint for all felony defendants appointed to the BCM law firm and also the felony defendants appointed to any of the other three institutional providers who do not have an attorney in the courtroom that day. By default, these three attorneys handle lower-level felonies through conclusion of the preliminary examination, and if a case is not disposed at that point then it is transferred to a felony trial attorney. Associates 10 through 18 are those felony trial attorneys, and they additionally handle all higher-level felonies from arraignment on the complaint through disposition. In other words, Associates 10 through 18 by definition receive all of the most difficult felonies and the cases most likely to go to trial. Associate 10 also serves as the defense representative in the Veterans Treatment Court.

Altogether, the 12 felony attorneys, plus the one domestic violence attorney we are attributing to felony cases, handle all of the 2,479 felonies appointed to the BCM law firm. This is a caseload of over 206 felony cases per attorney per year, before considering the cases these attorneys already had open at the beginning of the year. National standards require an estimated 16.5 FTE attorneys.

- *Juvenile & misdemeanor.* Associate 19 and Associate 20 split roughly evenly the 276 juvenile justice cases appointed to the BCM law firm, meaning each of these attorneys handle a caseload of 138 juvenile delinquency cases. But these same two attorneys also share evenly in the misdemeanor caseload arising out of the Watsonville courthouse.
- *Misdemeanor.* The law firm’s quarterly reports to the county do not distinguish between Watsonville misdemeanors and Dept 1 and Dept 2 misdemeanors as a reporting category. Associates 21 through 24 split roughly evenly the misdemeanor caseload arising out of departments 1 and 2. Associate 23 is considered by many attorneys in the firm to be the “de facto” misdemeanor supervisor, on top of carrying a full caseload. National standards call for public defender supervisors to carry a reduced caseload – if carrying any caseload at all – to ensure the supervisor has sufficient time to provide minimally effective representation to clients in addition to monitoring attorney performance.³⁰⁵

It does not matter what percentage of all BCM law firm misdemeanors are actually attributable to Watsonville versus Santa Cruz, because altogether the

³⁰⁵ See NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Proper attorney supervision in a defender office requires one full time supervisor for every ten staff lawyers, or one part time supervisor for every five lawyers.”)

six misdemeanor attorneys, plus the one domestic violence attorney we are attributing to misdemeanor cases, handle all of the 6,259 misdemeanor cases appointed to the BCM law firm. This is a caseload of over 894 misdemeanor cases per attorney per year, before considering the cases these attorneys already had open at the beginning of the year. National standards require more than 15.6 FTE attorneys to handle this caseload carried by just seven BCM attorneys on top of the full juvenile caseload.

Unaccounted for cases. This still leaves unaccounted for 165 criminal post-conviction cases and 31 family cases that together require another FTE attorney under national standards.

D. Dangers of excessive workloads

Each and every defendant has a right to effective representation that is free from conflicts of interest.³⁰⁶ The U.S. Supreme Court cautions in *Strickland v. Washington* that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense”³⁰⁷ and that an attorney can “deprive a defendant of the right to effective assistance” by virtue of an actual conflict of interest.³⁰⁸ When the indigent representation system established by the government creates a conflict of interest between appointed attorneys and their clients, this interferes with an indigent person’s right to receive effective representation.

The *California Rules of Professional Conduct* expressly prohibit all lawyers from representing a client whenever a conflict of interest exists,³⁰⁹ because “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”³¹⁰ An attorney cannot represent two or more clients at the same time whose interests might be at odds with each other.³¹¹ If a lawyer simply has so many clients that the

³⁰⁶ See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942) (“[A]ssistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”).

³⁰⁷ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

³⁰⁸ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344, 345-350 (1980)).

³⁰⁹ CAL. R. PROF’L CONDUCT r. 1.7.

³¹⁰ CAL. R. PROF’L CONDUCT r. 1.7 cmt 1.

³¹¹ CAL. R. PROF’L CONDUCT r. 1.7(b) (“A lawyer shall not . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client . . .”).

lawyer no longer has sufficient time or sufficient funding to devote to the next client's case – a situation often referred to as “case overload” or “excessive workload” – then the attorney cannot represent the next new client.³¹²

For these reasons, national standards, as summarized in *ABA Principle 5*, require that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.”³¹³ Excessive workloads cause lawyers to proceed without sufficient time to adequately prepare for and zealously advocate on behalf of every client. For that reason, *ABA Principle 5* further clarifies that defense counsel should refuse new case appointments when those appointments would create a conflict of interest because the attorney would have insufficient time to dedicate to all cases given the workload.³¹⁴

Government too has a constitutional obligation to ensure the systems it establishes for providing right to counsel services are free from conflicts that interfere with counsel’s ability to render effective representation to each defendant. Citing national standards (including *ABA Principle 5*), the State Bar of California *Guidelines on Indigent Defense Services Delivery Systems* provide that indigent representation system administrators must actively monitor attorney workloads and “secure the additional resources necessary or decline to accept new cases to the extent that they exceed the capacity of the defense delivery system.”³¹⁵

Prior to March 2020, the BCM law firm had no social workers. One attorney explained that “a lot of time is spent on mental health and finding placement. We need social workers.” With the increase in immigration consequences of convictions,³¹⁶ a number of felony attorneys said the BCM law firm needs a dedicated full-time immigration lawyer.

The associate attorneys at the BCM law firm carry known caseloads that are in excess of national standards, before considering: the additional number of cases the attorneys had open at the beginning of the year; the lack of support; and other professional demands on the attorneys’ time. There is a consensus among the majority of BCM

³¹² CAL. R. PROF’L CONDUCT r. 1.16(a)(2) (“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of these rules or of the State Bar Act . . .”).

³¹³ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 5 & cmt. (2002).

³¹⁴ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 5 & cmt. (2002).

³¹⁵ See STATE BAR OF CALIFORNIA, *GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS* § VII (2006).

³¹⁶ See generally *California Quick Reference Chart and Notes*, IMMIGRANT LEGAL RESOURCE CENTER, <https://www.ilrc.org/chart>; *Aggravated Felonies: An Overview*, AMERICAN IMMIGRATION COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies.pdf.

associate attorneys that they very much want to become county employees in large part because of the potential to have manageable caseloads. As one BCM lawyer put it, “We need an abrupt change now.”

The 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.”

The excessive caseload, and subsequent attorney turnover at BCM, is noticed by other members of the Santa Cruz County criminal justice system. For example, judges expressed frustration that the BCM law firm’s high caseloads cause a lot of continuances. The increased number of continuances has resulted in a backlog of cases for county probation officers. One judge said there is “a lot of waiting around as the attorneys get to all the defendants. More attorneys are needed at the front end.” Another judge agreed, saying it is insufficient to provide only one lawyer for every 30 clients appearing on a given court calendar. Stakeholders agree there are some inefficiencies in other aspects of the county justice system but conclude that “the basic problem is that there are not enough defense lawyers.”

Why “Clean Slate” representation creates a special problem requiring a special solution

California law permits persons with adult criminal convictions to file a petition to seal the record of their conviction from public disclosure in certain circumstances and/or for resentencing or early termination of probation in other circumstances.

- *Proposition 47*. Effective November 2014, Proposition 47 (the “Safe Neighborhoods and Schools Act”) made significant changes to felony sentencing laws. In addition to reclassifying certain theft and drug possession offenses from felonies to misdemeanors, Proposition 47 “authorizes defendants currently serving sentences for felony offenses that would have qualified as misdemeanors under the proposition to petition courts for resentencing under the new misdemeanor provisions,” and it “authorizes defendants who have completed their sentences for felony convictions that would have qualified as misdemeanors under the proposition to apply to reclassify those convictions to misdemeanors.”^a
- *Proposition 64*. Effective November 2016, Proposition 64 (the “Adult Use of Marijuana Act”) legalized the adult use and possession of marijuana and “authorizes resentencing or dismissal and sealing of prior, eligible marijuana-related convictions.”^b Eligible persons in Santa Cruz County can file petitions for resentencing or for record modification.
- *Early termination of probation*. California Penal Code section 1203.3 permits persons currently serving a probationary sentence to petition for early termination of probation in certain circumstances, such as to facilitate a move to another area or to facilitate obtaining a new job. If the district attorney objects to the person’s motion for early termination of probation, the matter

is set for a court hearing on the motion.

- *Expungement of criminal convictions*. California Penal Code section 1203.4 permits persons who have successfully completed a sentence of probation (felony or misdemeanor) to petition for expungement of criminal convictions in certain circumstances (e.g., did not serve a state prison sentence, or would have served the sentence in county jail under Proposition 47 had the crime been committed after November 2014). Eligible persons in Santa Cruz County can file a petition for expungement; if the district attorney objects, the matter is set for a court hearing on the petition.
- *Certificate of Rehabilitation and Pardon*. California Penal Code sections 4852.01-.22 provide that persons who are ineligible for expungement of their criminal convictions under Penal Code section 1203.4 still may seek relief by applying for a certificate of rehabilitation and pardon in certain circumstances. Although the certificate of rehabilitation does not expunge the person’s conviction from their criminal record, it does provide limited forms of relief from collateral consequences of the underlying criminal conviction (e.g., relieved of further duty to register as a sex offender under Penal Code section 290.5(a); permitted to obtain state board licenses under Penal Code section 4853). Eligible persons in Santa Cruz County can file a petition for a certificate of rehabilitation and pardon; if the district attorney objects, the matter is set for a court hearing on the petition.

Further changes to California law provide for resentencing reviews and youthful offender hearings for adults sentenced to lengthy prison sentences, long after their underlying convictions. These required proceedings can have a tremendous impact on an attorney’s caseload, as they are essentially resentencing proceedings for old cases, based on factors that may not have been

^a *Proposition 47: The Safe Neighborhoods and Schools Act*, CALIFORNIA COURTS, <https://www.courts.ca.gov/prop47.htm>.

^b *Proposition 64: The Adult Use of Marijuana Act*, CALIFORNIA COURTS, <https://www.courts.ca.gov/prop64.htm>.

researched at the time and may be very difficult to investigate now.

- Senate Bill 1437, effective January 2019, provides for retroactive application of California’s felony-murder rule and allows for re-sentencing reviews, in conformity with the U.S. Supreme Court’s decisions in *Miller v. Alabama*^c and *Montgomery v. Louisiana*,^d for persons serving life who were not the actual killer or major abettor in the murder, or who did not act with extreme indifference to human life.
- Similarly, *People v. Franklin* requires that a person who was sentenced to a lengthy prison sentence for a crime committed between the ages of 18 and 26 must have had the opportunity to present, during trial, the type of evidence that would be relevant to a future youthful offender hearing,^e although such a hearing might not take place for many years. Thus, “*Franklin Reports*” are intended to bring about more just sentencing, and shorter sentences, for prisoners whose adolescent brain development was not considered at the time of sentencing.

Indigent representation providers in Santa Cruz County group all of these types of petitions together as “clean slate” cases, along with a number of other California law provisions.^f Each of these “clean slate” cases provides an express^g or

implied^h right to counsel and requires a significant amount of additional work by the indigent representation providers – so much so that Santa Cruz County separately pays the Biggam, Christensen & Minsloff law firm to operate a “Clean Slate Program.”ⁱ The BCM firm now assigns one attorney to work on the “clean slate” cases, providing free legal services to indigent and low-income persons convicted of offenses in Santa Cruz County who are eligible for record clearance or sentence review. The BCM firm’s “clean slate” program attorney also handles any request for modification of a client’s probation.

BCM receives between 20 and 30 new “Clean Slate” cases each month and has a backlog of approximately 2,000 cases. The work involved in each case is significant. Often clients seek record clearance relief in multiple cases at the same time. At intake, the attorney conducts an initial interview and discusses with the client whether there is sufficient information available in each case to permit full legal analysis (e.g., reviewing each case on the court’s website portal, analyzing transcripts/minutes, verifying historical information) and explaining other mitigation documents the client should try to obtain. The attorney orders the client’s court file(s) (or pulls the firm’s old case file(s)) and reviews their contents, along with the additional mitigation information provided by the client, before drafting the petition to the court.

The work involved in each type of “clean slate” case – providing assistance and representation in record clearance and re-sentencing – stems from

^c 467 U.S. 460 (2012).

^d 577 U.S. ___, 136 S. Ct. 718, (2016).

^e 63 Cal. 4th 261, 269, 286-87 (2016) (finding that “[t]he criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the [Board of Parole Hearings] decision making . . . will be informed by youth-related factors, such as [the youthful offender’s] cognitive ability, character, and social and family background at the time of the offense” and directing the sentencing trial court to determine whether the youthful offender “was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801”).

^f See *Clean Your Record*, CALIFORNIA COURTS, <https://www.courts.ca.gov/1070.htm> (providing information for adults with California criminal convictions “about record cleaning options”).

^g See, e.g., CAL. PENAL CODE § 4852.08 (West 2019) (“During the proceedings upon the petition [for a certificate of rehabilitation and pardon], the petitioner may be represented by counsel of his or her own selection. If the petitioner does not have counsel, he or she shall be represented by the public defender, if there is one in the county, and if there is none, by

the adult probation officer of the county, or if in the opinion of the court the petitioner needs counsel, the court shall assign counsel to represent him or her.”)

^h See, e.g., J. Richard Couzens and Tricia A. Bigelow, PROPOSITION 64: “ADULT USE OF MARIJUANA ACT,” RESENTENCING PROCEDURES AND OTHER SELECTED PROVISIONS 45-46 (rev’d May 2017) (because the “resentencing” hearing provided under Proposition 64 is a “procedure . . . in which the petitioner’s substantial rights are at stake,” courts should infer that “there is a right to counsel” implied by Proposition 64), <https://www.courts.ca.gov/documents/prop64-Memo-20170522.pdf>.

ⁱ Under the most recent contract amendment Santa Cruz County pays the Biggam, Christensen & Minsloff firm \$207,000 in 2018-19; \$214,200 in 2019-20; \$222,800 in 2020-21; and \$224,900 in 2021-22 to “partially offset the costs of the Clean Slate Program.” See “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022).

an underlying criminal case. And indeed, some indigent representation providers in Santa Cruz County provide that assistance to their former clients without receiving any additional pay and without any mechanism to report the work in their caseload reports to the county.

Santa Cruz County should consider whether “clean slate” representation is in fact a continuation of the lawyer’s original appointment – i.e., all lawyers providing indigent representation services should actively represent former clients in re-sentencings and record clearances – and for which all lawyers should receive fair compensation and sufficient time to permit effective assistance in all proceedings on behalf of all clients. Alternatively, Santa Cruz County should consider whether to form a discrete group of attorneys assigned to work on nothing other than “clean slate” cases, providing to those attorneys sufficient time, compensation, and resources necessary to adequately investigate and compile all of the mitigation materials from all situations in the client’s past to present anew before the trial court.

CHAPTER VII

FINDINGS

In establishing that the Sixth Amendment right to counsel is an obligation of state governments by virtue of the Fourteenth Amendment, the U.S. Supreme Court in *Gideon v. Wainwright* declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”³¹⁷ As the U.S. Supreme Court has noted, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”³¹⁸

Government, therefore, has an affirmative duty to establish systems to fulfill the state’s obligations under *Gideon* and its progeny that ensure the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision – and to monitor the systems’ compliance with minimum constitutional commands. An indigent representation system’s effectiveness is measured by its ability to provide effective assistance to its clients. If whole categories of indigent people receive a level of advocacy that falls short of constitutional demands or if large categories of indigent people receive no representation at all, then the system itself is in default of its obligations.

The State of California has delegated to county governments its right to counsel responsibilities. The indigent representation system established by the County of Santa Cruz suffers from a lack of accountability and a lack of independence that, together, are the root cause of all other deficiencies identified in this evaluation. These two deficiencies – the lack of independence and the lack of accountability – may seem at first blush to be in tension with each other. After all, the contract firms have raised their own independent contractor status in defense of the county’s recent attempts at financial accountability. But only where the government establishes structures that

³¹⁷ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

³¹⁸ *United States v. Cronin*, 466 U.S. 648, 654 (1984). *See also Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

hold independence and accountability in harmony can the remaining hallmarks of a structurally sound indigent defense system be realized.

Finding 1: Santa Cruz County does not have an office or person charged with oversight of the entire indigent representation system (both primary and conflict). The county can not 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, the county is unable to determine how much the provision of indigent representation should cost or how to provide it effectively.

Without objective and reliable data, right to counsel funding and policy decisions are subject to speculation, anecdotes, and even bias. Yet the County of Santa Cruz has not established any office or person who is accountable for knowing how many people or cases, and of what case types, require appointed counsel.

In the existing Santa Cruz County indigent representation system:

- The only role that superior court judges have is to advise people of their right to appointed counsel if indigent, and if a person requests appointed counsel, to then determine whether that person is indigent and appoint one of the three contract law firms or the CDCP.
- The only role that the county has retained for itself is to provide the funding it has allocated to the contracts with the three law firms and the budget allocated to the CDCP.
- Each contract law firm and the CDCP decides for itself how to hire and retain attorneys, when and how to assign its cases to its individual attorneys, and how much to pay those attorneys for their work.

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. The county does not require any of the contract law firms to explain how they select the individual attorneys appointed to represent indigent people, how those individual attorneys are appointed to the cases of specific indigent people, nor how and how much the individual attorneys are paid for their work. The county leaves it to the providers to decide, and it does not require the providers to explain their decisions about, whether to establish any standards of attorney performance and whether to supervise and train lawyers against those standards. 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. The county does not require the contract law firms to report the actual number of cases being handled by each attorney at any point in time. In sum, Santa Cruz County has not created appropriate structures to know on an ongoing basis whether the providers have sufficient attorneys with sufficient time and sufficient resources to provide effective assistance of counsel.

Finding 2: Santa Cruz County’s indigent representation system lacks independence from potential undue political influence.

All four indigent representation system providers, meanwhile, are not sufficiently insulated from the possibility of undue political influence, whether conscious or unconscious. Undue political interference does not require malicious intent on the part of the Santa Cruz Board of Supervisors to negatively affect the providers’ independence.

The private law firms enter into contracts with county government that 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, based on the understood threat that the county might turn to low bid contracting – a threat that has been very real among California counties.³¹⁹ Knowing that low-bid contract law firms operate in California, and knowing there are no institutional protections preventing Santa Cruz County from moving to such a low-bid entity at the end of each subsequent contract period, 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.

³¹⁹ As Cal-Western Law Professor Laurence Benner explains, privatized indigent defense services in California are always at risk of being undercut by a different provider offering to provide services to counties at a significantly discounted rate. See Laurence A. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, CAL. WESTERN LAW REVIEW Vol. 45: No. 2, Article 2 (2009) (explaining that, in 2009, 24 of California’s 58 counties (or 41%) used flat fee contracting for primary indigent defense services, with several others employing this delivery method for conflict representation); Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, FACULTY SCHOLARSHIP 148 (2010) (noting that one for-profit law firm in California, which 6AC has never evaluated, was particularly notorious for advancing low-bid, flat fee contracting in the state and which Benner describes as being the “Wal-Mart” of indigent defense services, operates like “a sweatshop that relied on a revolving door of young, undertrained lawyers,” who are allowed to take private cases on the side to augment their low pay, and noting that, “[l]ike Wal-Mart, [the law firm] is all about generating volume and cutting costs in ways his government-based counterparts can’t and many private-sector competitors won’t”).

The CDCP is a function of county government, and it is a potential conflict of interest for an assistant county counsel to review and approve case-related expenses provided to indigent people.

Finding 3: 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 between each and every indigent person’s interest in their constitutionally guaranteed rights to effective representation and the financial interests of the private law firm attorneys and CDCP attorneys who are appointed to represent them.

Nearly 80 years ago, the United States Supreme Court stated in *Glasser v. United States*, “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”³²⁰ Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where their own financial interests conflict with those of the indigent people whom they are appointed to represent.³²¹

To prevent financial conflicts of interest between attorney and client, all national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”³²² As explained in chapter IV, there is a significant amount of state caselaw that requires states to pay attorneys a reasonable fee in addition to overhead expenses. Requiring that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each appointed client.

Private attorney compensation – by fixed fee per case or event. Fixed fee compensation schemes, in which lawyers earn the same pay no matter how many cases they are required to handle, create financial incentives for a lawyer to dispose of cases as

³²⁰ *Glasser v. United States*, 315 U.S. 60, 70 (1942). *See also* *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”).

³²¹ CAL. R. PROF’L CONDUCT r. 1.7(b) (“A lawyer shall not . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited . . . by the lawyer’s own interests.”), r. 1.7 cmt 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

³²² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

quickly as possible, rather than as effectively as possible for the client. Even where the defendant has a winnable case, the lawyer's incentive nevertheless is to resolve it by plea.

This is true in Santa Cruz County of the CDCP attorney compensation scheme where, in most types of cases, the individual CDCP attorneys are paid a fixed fee per event. To start, the attorney must pay for actual costs of overhead out of these flat fees, reducing the lawyer's pay in each case. But the attorney also is not rewarded with additional pay for the additional work involved in zealous advocacy. Instead, the attorney is hurt financially the more he does for his clients. Recognizing the ethically compromised position that results from inadequate forms of compensation, some private attorneys have removed themselves from accepting CDCP assignments in case types paying only a fixed fee.

Because of the conflicts of interest caused by fixed fee compensation methods, many states have banned these practices entirely, whether through caselaw, state statute, court rule, or rules of professional responsibility.³²³

Law firm fixed-fee contracts. The same national standards requiring counsel to be paid "a reasonable fee in addition to actual overhead and expenses" also apply to the three private contract law firms.³²⁴ "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services."³²⁵ The American Bar Association

³²³ In Idaho, county commissioners may provide representation by contracting with a defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney." IDAHO CODE § 19-859 (2018). The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide "[e]conomic disincentives or incentives that impair defense counsel's ability to provide effective representation." MICH. COMP. LAWS § 780-991(2)(b) (2017). Announcing that the "competent representation of indigents is vital to our system of justice," the Nevada Supreme Court banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for additional fees in extraordinary cases. Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev., filed July 23, 2015). In Washington state, the *Rules of Professional Conduct* decree that "A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel." WASH. R. PROF'L CONDUCT 1.8(m)(1).

³²⁴ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

³²⁵ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

Standards for Criminal Justice explain that attorneys must have adequate resources and support staff in order to render quality legal representation.³²⁶

The contracts currently used in Santa Cruz County create a conflict between the financial self-interests of each private law firm (and their associate attorneys' interests in their continued employment) and the legal interests of the indigent defendant. Each contract to provide indigent representation services lacks a standard of minimum performance by the private law firms, and each law firm contracts with Santa Cruz County to handle a potentially limitless number of cases each year. Although the contracts prescribe the minimum number of full-time attorneys each firm must employ (and, in the case of the BCM law firm, a minimum number of non-attorney support staff as well), without accurate data the county cannot know whether the total minimum staffing required of its three contract law firms is sufficient to handle the total volume of indigent cases each year. (See discussion of indigent representation provider caseloads, chapter VI.) Thus, the Santa Cruz County contracts do not account for minimum performance requirements nor the anticipated workload involved in providing minimally effective right to counsel services to all indigent persons in each case.

Further still, because each contract law firm is a private for-profit entity, the income of each law firm's partners is directly related to the amount of funding they dedicate to their firm's infrastructure and staff. The more associate attorneys the law firm partners employ and the greater each associate attorney's annual salary, the less the law firm partners' annual profits. This is not to suggest that trying to maximize profits is inherently unethical. Rather, the fixed annual contract for a potentially limitless number of cases creates incentives for law firm partners to reduce costs by hiring as few associates as possible, paying associate attorneys as little as possible, and foregoing investment in necessary infrastructure.

For example, despite a contract with Santa Cruz County requiring the firm to employ five full-time equivalent attorneys, the Wallraff law firm employs only 4.5 attorneys. Likewise, it is generally known within Santa Cruz County that the annual pay of the BCM law firm associate attorneys is inadequate, and the general secrecy around the topic of attorney pay results in speculation and accusation by some that the BCM law firm partners maximize their own profits to the detriment of their associate employees (by underpaying the lawyers) and the clients they represent (by hiring an insufficient number of staff). Because the partners at the BCM law firm are unwilling to disclose the amount of salaries and other forms of compensation that the law firm provides to associate attorneys for the reasons stated earlier, it is not possible to assess whether

³²⁶ AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Std. 5-1.4 cmt. (3d ed. 1992) (“Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.”).

these accusations are fair or not. Nevertheless, the accusations point to underlying incentives that are inherent in the flat fee contract model.

Finding 4: 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.

Excessive caseloads. The national caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards that take into consideration the additional demands made on defense attorneys in each case (such as the travel distance between the court and the local jail, or the prosecution’s charging practices, or increased complexity of forensic sciences and criminal justice technology). Demands of this type increase the amount of time, beyond that contemplated by the national caseload standards, that is necessary for the lawyer to provide effective representation. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC Standards are far too high and that the maximum caseloads allowed should be much lower.³²⁷

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. As demonstrated in chapter VI, the primary contract law firm has caseloads far above the national standards. 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.

Lack of continuous representation by the same attorney. 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. Time is especially important to develop a level of trust between counsel and the accused that the U.S. Supreme Court describes in *Powell v. Alabama* as partaking of the “inviolable character of the confessional.”³²⁸ Yet, early appointment of counsel will not result in effective representation if that trust is breached. For example, what good is it from the defendant’s perspective if the lawyer provided early in the case is taken away and

³²⁷ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

³²⁸ 287 U.S. 45, 61 (1932).

replaced with someone else? The “confessional” is not some article, like a sheet of paper, that can be passed from one attorney to another. For this reason, national standards as summarized in *ABA Principle 7* require that the same attorney initially appointed to a case must continuously represent the client until the completion of the client’s case,³²⁹ commonly referred to as “vertical representation.”³³⁰

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. As explained in chapter V, 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. Similarly, whether appointed to the PSD law firm or the Wallraff law firm, few felony defendants are continuously represented by the same attorney from their first appearance for arraignment on the complaint through disposition of the case. 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.”³³¹

In explaining why horizontal representation is so harmful to clients, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been “processed by the system.” This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.³³²

³²⁹ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 7 (2002).

³³⁰ AMERICAN BAR ASS’N, *ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES*, std. 5-6.2 cmt. (3d ed. 1992).

³³¹ AMERICAN BAR ASS’N, *ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES*, std. 5-6.2 (3d ed. 1992).

³³² AMERICAN BAR ASS’N, *ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES*, std. 5-6.2 cmt. (3d ed. 1992).

The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially then remains with that client's case through to completion is to ensure that the level of advocacy necessary to mount a meaningful defense commences as soon as possible. In systems relying on horizontal representation schemes, the delay in appointing the actual trial lawyer has negative consequences for the client as promising investigative leads can go cold, critical evidence can be destroyed if not timely preserved, witnesses can become harder and harder to track down, and memories can fade.

Finding 5: 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 failure to invest in indigent defense infrastructure results almost without exception in some sacrifice that harms clients' interests. Attorneys without appropriate support staff may not investigate a case or follow up with witnesses. They may not fully review discovery. They may cut short or completely fail to schedule client meetings that could prove critical to case preparation.

Attorneys without access to appropriate technologies to evaluate electronic discovery inevitably will overlook important evidence. Often, attorneys without proper support prioritize defendants' well-being over their own, sacrificing their own personal time, or own personal technologies, and suffering substantial personal stress. The end result of each of these consequences, alone or in unison, is a deficiency in services rendered to indigent defendants, who rely on these appointed attorneys to protect them from the power of the state.

When attorneys appointed to represent indigent defendants have little time to prepare, too many cases to defend, and too little time or inclination to keep challenging the state, they are less likely to push for trial and more apt to plead cases out for faster resolutions. This is a natural, and even understandable, reaction to overwhelming demand. Unfortunately, many indigent defendants are left saddled with the weight of the system, as their rights are not vindicated in the manner envisioned by the Sixth Amendment. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."³³³

³³³ United States v. Cronic, 466 U.S. 648, 657 (1984) (citing United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

Finding 6: 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.

Misdemeanors matter. For most people, misdemeanor courts are the place of initial contact with the Santa Cruz County justice system. Much of a citizenry's confidence in the courts as a whole – their faith in the county's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great.³³⁴ Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

The practices of the superior court, as explained at pages 83-85, create a risk of denying the right to counsel to indigent defendants in misdemeanor cases. First, a group colloquy is insufficient to ensure that defendants 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. Similarly, although the judge asks if anyone needs an interpreter, this is asked in English and so anyone who does not comprehend English will not understand the question. If the judge is aware of a Spanish-speaking defendant on the docket that day, the judge tries to get an interpreter into the courtroom to translate the group colloquy speech for that defendant while it is taking place.

³³⁴ Collateral consequences are those things that automatically happen to a defendant when he is convicted of a crime, even though they are not contained as part of the sentence that is publicly imposed on the defendant in court. In 2009, the American Bar Association attempted to compile, for the first time, an exhaustive listing of the collateral consequences of a felony conviction that arise under federal laws. AMERICAN BAR ASS'N, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (Jan. 2009). In explaining the limitations of that report, the ABA noted:

[I]t does not include the many collateral consequences contained in state laws and regulations, or in state-controlled federal benefit programs such as welfare, food stamps, and public housing. Moreover, it does not include court-imposed conditions of probation and parole that may have a collateral effect on travel, employment, and other family matters, or civil forfeiture provisions that are often triggered by an arrest. . . . People with criminal convictions who served time in prison may have significant difficulty due to gaps in work experience on a resume in a job application. More and more frequently potential employers and landlords are requesting and using background check information, including arrest and conviction records in their decisions regarding jobs and leases independent of statutory requirements.

Id. at 11.

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.³³⁵ 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.³³⁶ Yet announcing from the bench that invoking the right to counsel may cost money may chill the right to counsel, particularly if indigent persons do not understand that “[n]o defendant shall be denied the assistance of appointed counsel due solely to a failure to pay the registration fee.”³³⁷

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,³³⁸ some defendants can experience subtle pressure to do likewise without fully understanding all of the consequences. An individualized colloquy assuredly takes time and slows down the courtroom process, however that would be time well-spent in ensuring that waivers of counsel are knowing and intelligent, preventing against unnecessary appeals, post-conviction hearings, and retrials.³³⁹ This problem is compounded under California law by Santa Cruz County’s choice to provide representation to indigent people through private attorneys, because appointed

³³⁵ CAL. PENAL CODE § 987.5 (West 2019) (permitting assessment of a \$50 fee only if the county board of supervisors has adopted a resolution or ordinance so providing); Santa Cruz County Unified Fee Schedule, Registration Fee for Public Defender and Court Appointed Counsel Services (providing for a \$50 fee for appointed attorneys to be assessed in adult and juvenile justice cases).

³³⁶ CAL. PENAL CODE § 987.5 (West 2019).

³³⁷ CAL. PENAL CODE § 987.5 (West 2019).

³³⁸ See *Faretta v. California*, 422 U.S. 802 (1975) (holding that a defendant may exercise the Sixth Amendment right of self-representation so long as there is a knowing, voluntary, and intelligent waiver of the right to counsel).

³³⁹ *U.S. v. McDowell*, 814 F.2d 245, 252 (6th Cir. 1987) (Engel, Circuit Judge, concurring) (noting that a detailed colloquy is “consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided [I]t would probably be useful for a judge to inquire as to the extent of any defendant’s education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to represent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense.”)

private attorneys are prohibited from representing indigent persons prior to a court appointment; a public defender office lawyer has no such restrictions under state law.

CHAPTER VIII

RECOMMENDATIONS

The U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states – not local governments – under the due process clause of the Fourteenth Amendment.³⁴⁰ When a state chooses to delegate its right to counsel responsibilities to its counties, the state must guarantee not only that those local governments and local officials are capable of providing effective representation but also that they are in fact doing so.³⁴¹ Because the “responsibility to provide defense services rests with the state,” national standards unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”³⁴² California has no statewide structure to ensure that its Fourteenth Amendment obligation to provide effective Sixth Amendment public defense services is met at the trial level. Therefore, the State of California is responsible for the failure of Santa Cruz County to ensure that each and every indigent defendant in Santa Cruz County has an attorney with sufficient time, training, and resources to provide effective representation at every critical stage of a case.

³⁴⁰ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

³⁴¹ *Cf.* *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “‘ultimate responsibility’ . . . remains at the state level.”); *Osmunson v. Idaho*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”).

³⁴² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 cmt. (2002).

These recommendations, however, are about what Santa Cruz County policymakers must do to provide effective representation until such time as California meets its Fourteenth Amendment obligations.

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.³⁴³ Meanwhile, less affluent California counties often struggle to meet the state’s obligation to provide the effective right to counsel.³⁴⁴

American Bar Association standards call for state funding and state oversight of indigent representation services, and without state funding, local jurisdictions most in need of indigent representation services often are the ones least able to afford them. In many instances, the circumstances that limit a county’s revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high poverty, resulting in more people who are accused of crime being indigent and entitled to appointed counsel. Further, these counties typically spend more on social services such as public health needs, unemployment compensation, or housing assistance, leaving fewer resources available for protecting people’s rights under the Sixth Amendment.³⁴⁵ This dynamic becomes more pronounced in states like California that have imposed substantial revenue-raising restrictions on counties over the past 35 years.³⁴⁶ This, combined with

³⁴³ San Mateo County, for example, has been recognized as having institutionalized the American Bar Association’s *Ten Principles* and for providing consistent, zealous advocacy on behalf of the clients they serve. See NORMAN LEFSTEIN, *SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE* 217 (2011).

³⁴⁴ See generally Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009).

³⁴⁵ The number of counties turning to low-bid contracts is expanding throughout California. See Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009) (reporting that 24 of California’s 58 counties (or 41%) use flat fee contracting for primary indigent defense services, with several others employing this delivery method for conflict representation; attorneys working under fixed rate contracts are generally not reimbursed for overhead or for out-of-pocket case expenses, such as mileage, experts, investigators, etc.; and the more work an attorney does on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible).

³⁴⁶ See *County Structure & Powers*, CALIFORNIA STATE ASSOCIATION OF COUNTIES (“Counties lack broad powers of self-government that California cities have (e.g., cities have broad revenue generating authority and counties do not). . . . [County] Boards of Supervisors can raise local revenue by

the long list of county government responsibilities, makes it difficult for indigent representation services to rise to the top of the triage list in most California counties. The 2020 global coronavirus pandemic has only exacerbated these issues, leading to greater inequality between more affluent and less affluent counties and their citizens.

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,³⁴⁷ 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 particular, because the state requires its counties to bear the cost of providing representation to indigent people and at the same time “places strict limits on the ability of cities and counties to raise revenue,” “indigent defense services vary widely across the state, and some counties with the highest percentages of indigent defendants – like Fresno County – also have the lowest levels of per capita funding due to an impoverished tax base.”³⁴⁸ The lack of oversight and funding, according to the lawsuit, resulted in a severe shortage of attorneys and support to provide representation to the poor, meaning that attorneys do not “have adequate time and resources to meet with and counsel their clients, investigate, conduct legal research, file and litigate

imposing or increasing a tax, an assessment, or a fee. Each of these local revenue sources has its own constitutional and statutory authority and unique laws governing its use. A county can only impose those taxes, assessments, and fees which the Legislature or the Constitution allow the county to impose and which are approved by either a simple or two-thirds majority of local voters per Propositions 13 and 62.”). See also *Why County Revenues Vary: State Laws and Local Conditions Affecting County Finance*, LEGISLATIVE ANALYST’S OFFICE (May 7, 1998); J. Fred Silva and Elisa Barbour, *The State-Local Fiscal Relationship in California: A Changing Balance of Power*, PUB. POL. INST. OF CAL. (1999); *Understanding the Basics of County and City Revenues*, CALIFORNIA STATE ASSOCIATION OF COUNTIES INSTITUTE FOR LOCAL GOVERNMENT (2013).

³⁴⁷ Complaint, Phillips v. California, No. 15CECG02201 (Cal. Super. Ct. Fresno County filed Jul. 14, 2015).

³⁴⁸ Complaint, Phillips v. California, No. 15CECG02201 (Cal. Super. Ct. Fresno County filed Jul. 14, 2015).

appropriate motions, and take cases to trial when their clients wish to contest the charges.”³⁴⁹

In April 2016, the trial court denied the state and Fresno County’s requests to dismiss the lawsuit.³⁵⁰ In its ruling, the court first found that “[t]he State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities . . . [n]or can the State evade its constitutional obligation by passing statutes” – “the State remains responsible, even if it delegated this responsibility to political subdivisions.” Then, the court held that “[s]ystemic violations of the right to counsel can be remedied through prospective relief,” noting that the lawsuit does not challenge individual convictions, but instead “claim[s] that the State systematically deprives Fresno County indigent defendants of the right to counsel,” and the court agreed with the plaintiffs that “mere token appointment of counsel does not satisfy the Sixth Amendment right to counsel.” Therefore, “plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action” for prospective relief.

In January 2020, the plaintiffs entered into a settlement agreement with the State of California.³⁵¹ 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.”³⁵² Although the expansion of OSPD’s mission is contingent on legislative approval and appropriation of necessary funding, the agreement binds the Office of the Governor to a good faith effort to advocate for these policies.³⁵³

³⁴⁹ Complaint, *Phillips v. California*, No. 15CECG02201 (Cal. Super. Ct. Fresno County filed Jul. 14, 2015).

³⁵⁰ Order, *Phillips v. California*, No. 15CECG02201 (Cal. Super. Ct. Fresno County Apr. 12, 2016) (denying in part defendant state and county’s demurrer).

³⁵¹ Settlement Agreement, *Phillips v. California*, No. 15CECG02201 (Cal. Super. Ct. Fresno County entered Jan. 7, 2020).

³⁵² Settlement Agreement, *Phillips v. California*, No. 15CECG02201 (Cal. Super. Ct. Fresno County entered Jan. 7, 2020).

³⁵³ Although it does not have statewide implications, the plaintiffs also entered into a separate no-fault settlement agreement with Fresno County on January 8, 2020. Fresno County commits to a minimum budget for the county public defender office of \$23,285,662 for fiscal year 2019-2020 and an increase in the two subsequent years to \$23,500,000 (FY 2020-21) and \$24,000,000 (FY 2021-22). The county must thereafter maintain the FY 2021-22 public defender budget as a minimum for the remaining three years of the agreement thereafter. By comparison, the public defender budget for FY 2015-16 (the time period when the lawsuit was filed) was just \$14,586,433.

The new monies will be dedicated to lowering Fresno County public defender caseloads while increasing supervision. The agreement binds the county to ensuring that the public defender office promulgates written sets of standards and policies within six months of the signing that align with

To ensure effective representation for indigent people at the trial-court level, a state must have oversight of all of the systems that provide that representation. A state may establish an indigent representation services commission to provide that oversight, or it may assign responsibility for that oversight to a state agency or state officer. California is one of only seven states that do not have any state commission, state agency, or state officer with oversight of any aspect of trial-level indigent representation services in criminal and juvenile delinquency cases. The other six states are Arizona, Illinois, Nebraska, Pennsylvania, South Dakota, and Washington.

A useful first step for OSPD to take under the *Phillips* settlement agreement would be to simply document how the right to counsel is provided in each of California's 58 counties, collecting uniform data on caseloads and other effective representation indicators, determining which counties comply with national standards like those summarized in the *ABA Ten Principles* and which counties do not. Armed with this data, OSPD could begin to inform the California legislature about what should be done to rectify failing counties' indigent representation systems without harming those few counties that exceed the minimum requirements of federal and state case law and national standards. 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*.

prevailing American Bar Association norms and then monitors and enforces them thereafter. Agreed upon standards and policies include: attorney performance standards; use of resources for immigration consequences; workload standards; utilization of social workers and other non-lawyer staff policies; uniform case-management information policies; training policies; attorney advocacy policies regarding fines and fees imposed at sentencing; and attorney performance standards in death penalty cases. The county also agrees to quarterly, detailed uniform reports to the plaintiffs on open cases, new assignments, dispositions, motions, etc., by case-type. And, despite the status of the chief public defender as an at-will county employee, Fresno County recognizes the chief public defender's obligation to refuse cases above what can be ethically handled by the office without fear of reprisal. Finally, the county agreed to pay \$400,000 of the plaintiff's legal fees.

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.

The amount of work needed to be accomplished to restructure indigent representation services in Santa Cruz County before the current law firm contracts expire on June 30, 2022 dictates that the county must immediately hire a chief public defender.

The U.S. Supreme Court has consistently required that the defense function must be independent, commenting that the independence of counsel is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense”;³⁵⁴ “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation”;³⁵⁵ and governments have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”³⁵⁶

The flat fee contracts that Santa Cruz County has used for decades to provide attorneys for indigent people does not adhere to the constitutional obligation to protect the independence of the defense function and contribute to the under-resourcing and excessive caseloads of the county’s indigent representation system. But merely eliminating flat fee contracts or establishing a governmental public defender office will not alone rectify these issues.

If the chief public defender is an at-will employee of Santa Cruz County, subject to removal by the board of supervisors at any time with or without reason, this will replace one form of political interference with another. To be clear, we do not imply that the current or any future board of supervisors would consciously or maliciously interfere with the independence of the defense function. To the contrary, institutionalizing independence now protects against future boards of supervisors (who have not been involved in this evaluation and may not understand the full parameters of effective Sixth Amendment representation) inadvertently interfering in the independence of the chief public defender and the indigent representation system down the road.

³⁵⁴ Strickland v. Washington, 466 U.S. 668, 686 (1984).

³⁵⁵ Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

³⁵⁶ Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

For an example of direct interference with a chief public defender's independence, we offer one example from New Mexico. When a chief public defender is appointed and serves as an at-will employee of government, as was the case in New Mexico, the chief public defender must keep the government administration happy to keep the job. The attorneys in an indigent representation system *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 appointment of counsel at public expense. Yet if an executive or legislative body puts forth a budget that is inadequate to provide effective assistance of counsel to all indigent persons in every case, the chief public defender must either accept the inadequate budget (thereby agreeing to violate their duty to indigent clients) or take a public position in opposition to the person who can terminate their employment. This very scenario took place in February 2011 when then-chief public defender of New Mexico, Hugh Dangler, was terminated by the New Mexico Governor in the middle of the legislative session for suggesting that the New Mexico Public Defender Department was underfunded.³⁵⁷ Mr. Dangler recounted his dismissal in the *Santa Fe Reporter*, stating:

“I fear that I was not taking positions that the Governor liked in various obligations for the [Chief] Public Defender,” Dangler says. “We have a very, very bad budget crisis, and I was testifying last week in front of the various committees. In fact it’s kind of interesting that my firing comes the week after my testimony. And I basically said, ‘We can’t make it with the budget we’ve been offered by either the [Legislative Finance Committee] or the Governor. And I think you’re supposed to say that, ‘Of course, we support the Governor’s option.’”³⁵⁸

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 the chief public defender, without the fear of dismissal for telling the county what a particular decision will mean to people of limited means.

Selection of the chief public defender. Guideline 2.12 of the *Guidelines for Legal Defense Systems in the United States* explains that the chief public defender should “be

³⁵⁷ The undue political interference on the right to counsel in New Mexico is not a partisan issue as Governors from both the Republican and Democratic parties have seen fit to replace sitting public defenders. In fact, former Governor Bill Richardson, a democrat, vetoed a bill passed on an overwhelmingly bi-partisan basis that would have created an independent statewide public defender commission, as required under national criminal justice standards.

On April 5, 2013, Governor Susana Martinez signed into law the public defender commission bill that the voters of New Mexico had demanded when they passed a constitutional amendment requiring the independence of the defense function during the November 6, 2012 election.

³⁵⁸ Wren Abbott, *Chief Public Defender dismissed, Testimony at state Legislature a possible trigger*, SANTA FE REPORTER (Feb. 17, 2011).

selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.”³⁵⁹

National standards agree that the best way to protect defense counsel independence is to establish an oversight commission, whose members are appointed by diverse authorities,³⁶⁰ and to vest that commission with responsibility for hiring a chief public defender. Although an independent oversight commission is the “best practice” that Santa Cruz County should strive for, an independent oversight commission for indigent representation services functions most effectively at a statewide level, and California statutes do not explicitly allow for counties to establish a county-level oversight commission.³⁶¹ Meanwhile, the work of restructuring indigent representation services in Santa Cruz County needs to begin immediately.

As authorized by existing California statutes, we recommend that the board of supervisors immediately hire a chief public defender. The board of supervisors should form an advisory group to assist the board in recruiting, interviewing, and selecting the county’s chief public defender. The Santa Cruz County board of supervisors should heed to the national standards on oversight commissions in creating the advisory hiring group.³⁶²

³⁵⁹ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976). The NSC *Guidelines* were created in 1976 in consultation with the United States Department of Justice under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

³⁶⁰ The first of the ABA *Ten Principles of a Public Defense Delivery System* explains that in a properly constituted system “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent,” and that in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002).

³⁶¹ Santa Cruz County policymakers should advocate that the state establish a statewide commission to oversee the provision of the right to counsel in every county, or alternatively that the state authorize each county to establish its own commission with authority to select future chief public defenders.

³⁶² NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976). The NSC *Guidelines* were created in 1976 in consultation with the United States Department of Justice under a DOJ Law Enforcement Assistance Administration (LEAA). The relevant sections explain:

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the

- The advisory hiring group should consist of from nine to thirteen members;
- The members of the advisory hiring group should represent diverse factions in order to ensure insulation from partisan politics;
- Organizations concerned with the problems of the client community should be represented on the advisory hiring group; and
- A majority of the advisory hiring group should consist of practicing attorneys.

Importantly, national standards on oversight commissions state that the commission should not include sitting judges, prosecutors, or law enforcement officials,³⁶³ while many jurisdictions find *former* judges, prosecutors, and law enforcement officials to make very good commission members. Additionally, more and more jurisdictions have found it a conflict to have any member who stands to benefit financially from the policies of the commission, so many jurisdictions prohibit attorneys who earn income from handling public cases from serving on such commissions. The Santa Cruz County Board of Supervisors should implement these additional considerations in forming an advisory hiring group.

Term of office and removal of the chief public defender. In order to protect the chief public defender, and through that chief the entirety of the indigent representation system, against undue political or judicial interference, Guideline 2.12 of the *Guidelines for Legal Defense Systems in the United States* provides that a chief public defender’s “term of office should be from four to six years in duration and should be subject to renewal,” and the chief public defender “should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.”³⁶⁴ Because the district attorney for Santa Cruz County is elected countywide to a four-year term,³⁶⁵ we recommend that the chief public defender also be a full-time appointment for a four-year term with termination for just cause only.

Commission.

(d) Organizations concerned with the problems of the client community should be represented on the Commission.

(e) A majority of the Commission should consist of practicing attorneys.

(f) The Commission should not include judges, prosecutors, or law enforcement officials.

³⁶³ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

³⁶⁴ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976).

³⁶⁵ CAL. CONST. art. XI, §§ 1, 4; CAL. GOV. CODE §§ 24000, 24009, 24200 (West 2019). In each county, there is an elected district attorney, who must be a registered voter of the county and admitted to practice before the California Supreme Court. CAL. CONST. art. XI, §§ 1, 4; CAL. GOV. CODE §§ 24000, 24001, 24002, 24009, 24200 (West 2019). While in office, the district attorney cannot represent any person charged with a crime in any county and cannot represent any private plaintiff against any city, district, or political subdivision of the state. CAL. GOV. CODE §§ 26540, 26543 (West 2019).

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

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.

Information technology. The lack of investment in technology – both by previous county administrations and by the private contract law firms – has rendered Santa Cruz County incapable of effectively and transparently overseeing the delivery of indigent representation services. For example, without available data, it is impossible to know the number of *pro per* misdemeanor defendants each year who would qualify financially for the assistance of public counsel if given the opportunity in a noncoercive manner (let alone what percentage of those that would still opt to validly waive their right to counsel), and thus it is impossible to project to future years the full number of additional misdemeanor cases the Santa Cruz County indigent representation system should be handling but currently is not.

Similarly, the long-term impact of the ongoing coronavirus pandemic on the indigent representation system’s workload remains unknown. In the short-term, Santa Cruz County – like all of California – has experienced a large drop in crime and arrests as a result of the coronavirus,³⁶⁶ which almost certainly has temporarily lessened the workloads of the prosecution, court, and indigent representation system as a whole. Time will tell whether such changes are temporary or permanent.³⁶⁷

³⁶⁶ Preliminary data indicated that the overall “incidences of crime—property as well as violent—have dropped considerably since shelter-in-place orders went into effect.” Alexandria Gumbs and Joseph Hayes, *How Will COVID-19 Affect Arrests in California?*, PUB. POL. INST. OF CAL. (Apr. 16, 2020). Likewise, in the weeks following institution of shelter-in-place orders, law enforcement agencies throughout California adopted “new arrest strategies to ensure public safety, to protect officers as well as to minimize jail crowding,” such as opting to “issue warnings or citations rather than make arrests.” *Id.* Santa Cruz County also has experienced reduced crime and corresponding changes in local law enforcement practices as a result of the coronavirus pandemic. Email from Assistant County Administrative Officer Nicole Coburn, Santa Cruz County, to Sixth Amendment Center (Apr. 22, 2020).

³⁶⁷ For example, at the time of this report’s drafting, it was not known whether local criminal activity would dramatically increase once state and local governments eased their shelter-in-place restrictions; whether local law enforcement agencies indefinitely would prioritize issuing warnings and citations over arrests; and so forth.

The indigent representation system, and Santa Cruz County policymakers, must have data collection and analysis procedures that allow the system to address shifts in criminal justice priorities and practices in coming years. For example, for many years crime rates across California have trended downward, spurred onward most recently by the impact of Proposition 47, which reclassified certain low-level felonies as misdemeanors.³⁶⁸ Yet in future years, the California legislature (or voters through referendum) could alter course by criminalizing entire categories of criminal conduct; an increase in local police funding could lead to increased arrests; or the district attorney could prioritize prosecutions of certain offenses or offer defendants less favorable plea deals – all of which would increase the indigent representation system’s workload. In sum, because attorneys in the indigent representation system do not generate or control the amount of their own work, the size of the indigent representation system must expand and contract as demand for right to counsel services rises and falls.

By implementing proper processes for data collection and analysis (*see* Appendix G), 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.³⁶⁹ Securing and adapting technology to the needs of the Santa Cruz County indigent representation system will require the expertise of an information technology professional.

Finance. There is currently no transparency when it comes to how Santa Cruz County taxpayer funds are spent on indigent representation services. The indigent representation system requires accounting, budgeting, and finance services, administered by a finance professional who can assist the chief public defender in developing and presenting accurate, timely, and transparent budgets to the county for review and approval.

³⁶⁸ Alexandria Gumbs and Joseph Hayes, *How Will COVID-19 Affect Arrests in California?*, PUB. POL. INST. OF CAL. (Apr. 16, 2020) (the overall reduction in crime rates statewide – down 58% from 1989 to 2016 – were precipitated most recently by “the 2014 implementation of Proposition 47, which reclassified many lower-level property and drug offenses from felonies to misdemeanors, and the corresponding changes in law enforcement agencies’ priorities regarding the mix of offenses likely to be prosecuted”).

³⁶⁹ *See* Appendix G for a list of the types of data Santa Cruz County should be collecting.

Training. Santa Cruz County must provide adequate funding to the indigent representation system to ensure that lawyers are appointed only to cases that they are qualified to handle. Because ongoing training is an active part of the job of being an attorney, the indigent representation system must have a full-time training professional who is an attorney to provide all indigent representation system attorneys with ongoing, mandatory training,³⁷⁰ tailored to the types and levels of cases to which each attorney is appointed.³⁷¹ The county must also fund the indigent representation system to have an adequate number of lawyers, so that every attorney has sufficient time to attend training in addition to fulfilling their case-related obligations to all of their clients.

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

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 these standards as soon as is practicable.

Louisiana's statewide public defense commission is required by statute to promulgate a series of standards that serve as a good example of the types of standards the Santa Cruz County chief public defender should develop. These include attorney

³⁷⁰ See generally NATIONAL LEGAL AID & DEFENDER ASS'N, DEFENDER TRAINING AND DEVELOPMENT STANDARDS (1997). See also NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS, Chapter 13, The Defense (1973), std. 13.16; NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976), guidelines 2.4(4), 5.7-5.8.

³⁷¹ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. See AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed.) ("Counsel defending in specialized subject areas should receive training in those specialized areas."). See also AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992): "Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty."

qualification standards,³⁷² attorney performance guidelines,³⁷³ attorney supervision protocols,³⁷⁴ time sufficiency standards,³⁷⁵ continuity of services standards whereby the same attorney provides representation from appointment through disposition,³⁷⁶ client communication protocols,³⁷⁷ and data collection standards.³⁷⁸

³⁷² LA. REV. STAT. § 15:148(B)(2) (2019) (“Creating mandatory qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Those standards shall ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types such as juvenile delinquency, capital, appellate, and other case types in order to provide effective assistance of counsel. Qualification standards shall include all of the following: (a) The specific training programs that must be completed to qualify for each type of case. (b) The number of years the public defender has spent in the practice of law in good standing with the Louisiana State Bar Association.”).

³⁷³ LA. REV. STAT. § 15:148(B)(1)(e) (2019) (“Performance of public defenders in all assigned public defense cases. The board shall adopt general standards and guidelines that alert defense counsel to courses of action that may be necessary, advisable, or appropriate to a competent defense including performance standards in the nature of job descriptions.” Louisiana Revised Statutes, §§ 15:148(B)(10): “Creating separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board.”).

³⁷⁴ LA. REV. STAT. § 15:148(B)(1)(d) (2019) (“Performance supervision protocols. The board shall adopt standards and guidelines to ensure that all defense attorneys providing public defender services undergo periodic review of their work against the performance standards and guidelines in a fair and consistent manner throughout the state, including creating a uniform evaluation protocol.”).

³⁷⁵ LA. REV. STAT. § 15:148(B)(1)(a) (2019) (“Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions. (ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff. (iii) Client enhancers specific to each client such as the presence of mental illness.”).

³⁷⁶ LA. REV. STAT. § 15:148(B)(1)(b) (2019) (“Continuity of representation. The board shall adopt standards and guidelines which ensure that each district devises a plan to provide that, to the extent feasible and practicable, the same attorney handles a case from appointment contact through completion at the district level in all cases.”).

³⁷⁷ LA. REV. STAT. § 15:148(B)(1)(c) (2019) (“Documentation of communication. The board shall adopt standards and guidelines to ensure that defense attorneys providing public defender services provide documentation of communications with clients regarding the frequency of attorney client communications as required by rules adopted by the board.”).

³⁷⁸ LA. REV. STAT. § 15:148(B)(11) (2019) (“Ensuring data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs.”).

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.

Santa Cruz County must ensure that its indigent representation system has sufficient people and resources to provide constitutionally effective representation to each indigent person in each case. 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.

Rather than providing direct services to any indigent person, the chief public defender's primary role is to be the outward face of the indigent representation system in Santa Cruz County, advocating with other criminal justice stakeholders, the county administration and board of supervisors, and the communities most in need of indigent representation services. Because of this, it is possible for the chief public defender's indigent representation system to oversee both a public defender office division and a conflicts counsel division without conflicts of interest, so long as the chief public defender creates ethical screens between those two silos.³⁷⁹

Estimated attorney and non-attorney staff needed to provide direct representation. Each fiscal year, Santa Cruz County must allocate the necessary funds to hire or retain a sufficient number of lawyers, with adequate resources, to provide direct representation to all indigent people who are entitled to an appointed attorney. The beginning point for determining the amount of necessary funding is the county's anticipated indigent representation system caseload. The caseload reports submitted to the county by the three contract law firms, combined with the data collected internally by the CDCP, provide the best current understanding of the indigent representation system's caseload as a whole.³⁸⁰ Santa Cruz County's total reported indigent representation system new cases for fiscal year 2018-19, measured against national caseload standards, shows that Santa Cruz County requires an estimated total of 89 full-time equivalent positions (including attorneys and non-attorneys) to provide direct representation to indigent people.

³⁷⁹ See STATE BAR OF CALIFORNIA, STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT, Formal Opinion No. 2002-158 ("The creation of a physically separate firm within a public office charged with indigent criminal defense, so that different firms represent different defendants, can avoid conflicts arising from the representation of multiple defendants, but only with adequate safeguards including maintaining the separateness of the two firms.").

³⁸⁰ See Appendix A for full discussion and explanation of the existing indigent representation system data.

Compliance with national caseload standards should provide a sufficient number of attorneys to ensure that each appointed client can be continuously represented by a single attorney from appointment through disposition of the case. The current practice in Santa Cruz County of providing non-continuous or “horizontal” representation, explained in chapter V, raises serious ethical concerns and is prohibited under national standards. As explained in chapter VI, Santa Cruz County’s total reported indigent representation system new cases in fiscal year 2018-19, measured against national caseload standards, shows that Santa Cruz County requires an estimated total of 44.14 full-time equivalent attorneys to handle the total number of new cases appointed during a single year.

The national caseload standards further contemplate that a full contingent of supervision and support is available to the appointed attorney,³⁸¹ including: one supervisor for every ten attorneys; one investigator for every three attorneys;³⁸² one social service caseworker for every three attorneys;³⁸³ one paralegal for every four felony attorneys;³⁸⁴ and one secretary for every four felony attorneys.³⁸⁵ Based on the estimated total of 44.14 FTE attorneys necessary under national caseload standards to provide direct representation to clients, Santa Cruz County’s indigent representation system requires an estimated additional 44.86 full-time equivalent positions: 4.41 attorney supervisors,³⁸⁶ 14.71 investigators,³⁸⁷ 14.71 social workers,³⁸⁸ and 11.03 paralegals.³⁸⁹

³⁸¹ See NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”).

³⁸² NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.”).

³⁸³ See NATIONAL LEGAL AID & DEFENDER ASSOCIATION, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES § VII (f) (2000) (requiring “One full time social service case worker for every 450 Felony Cases; One full time social service case worker for every 600 Felony Cases; One full time social service case worker for every 1200 Misdemeanor Cases,” which when applied against national caseload standards equates to one social worker for every three attorneys).

³⁸⁴ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

³⁸⁵ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

³⁸⁶ One full time supervising attorney for every ten trial attorneys (or $44.14 \div 10 = 4.41$).

³⁸⁷ One full time investigator for every three trial attorneys (or $44.14 \div 3 = 14.71$).

³⁸⁸ One full time social worker for every three trial attorneys (or $44.14 \div 3 = 14.71$).

³⁸⁹ One full time paralegal for every four trial attorneys (or $44.14 \div 4 = 11.03$).

Creation of public defender office division and conflicts counsel division. The next thing that must occur in creating a system to provide effective assistance of counsel is to select the attorneys who will be available to provide that representation. National standards, as compiled in the *ABA Ten Principles*, require that, “[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.”³⁹⁰ The commentary clarifies that the “appointment process” of both government public defender employees and private attorneys “should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.”³⁹¹

National experience shows that a jurisdiction with an annual criminal caseload greater than 2,000 felonies and 6,000 misdemeanors, such as Santa Cruz County, is large enough to support establishing a county public defender office division staffed by full-time government employees.³⁹² Conflict of interest rules require generally that a public defender office only provide one attorney in a given case.³⁹³ Therefore, Santa Cruz County must always have ample numbers of private attorneys to represent, for example, co-defendants in the same case. The chief public defender should develop a comprehensive indigent representation system plan to properly and timely identify conflicts of interest.

Santa Cruz County’s chief public defender must determine: how many of the estimated 89 overall direct representation FTE positions should be government employees in the public defender office division and how many should be in the conflicts counsel division; and how the workload should be allocated between the two divisions. (*See* Appendix F illustrating one possible structure for the new indigent representation system, demonstrating how the total indigent representation system workload could be distributed between the public defender office division and the conflicts counsel division, with both under the auspices of the chief public defender.)

³⁹⁰ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 (2002).

³⁹¹ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 (2002).

³⁹² These recommendations presume Santa Cruz County will decide to establish only one public defender office. The county also could establish multiple public defender offices, if that would serve taxpayers best: one larger “primary” public defender office, and one smaller “conflict” public defender office; or one “adult criminal” public defender office, and one “juvenile offender” public defender office.

³⁹³ CAL. R. PROF’L CONDUCT 1.10(a) (eff. Nov. 1, 2018) (providing that, unless an exception applies, “[w]hile lawyers are associated in a firm, *none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9”). *See also* CAL. R. PROF’L CONDUCT 1.0.1(c) (defining the terms “firm” or “law firm” within the meaning of the Rules as “a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.”). Any newly created county public defender office is a new “firm” within the meaning of California ethical rules. *See* CAL. R. PROF’L CONDUCT 1.0.1(c).

In addition to a sufficient number of attorneys, supervisors, and support staff, Santa Cruz County must provide necessary funding for adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) and for case-related expenses (such as experts and interpreters) in order to ensure effective assistance of counsel, as explained in the American Bar Association's *Standards for Criminal Justice*.³⁹⁴

Public defender office division. The chief public defender should build, and Santa Cruz County should fund, a public defender office division with the following in mind:

- *Day-to-day administration.* A deputy chief public defender should report directly to the chief public defender and administer the day-to-day functions of the public defender office division.
- *Parity.* The county should ensure that all employees (both attorneys and non-attorneys) in the public defender office division have salary and benefits parity with their counterparts in the offices of the district attorney and the county counsel.
- *Early representation of indigent people.* Because California law allows public defender offices (but not contract or individually appointed attorneys) to begin representing a person in a criminal or delinquency case before that person has been determined by a court to be entitled to appointed counsel,³⁹⁵ creating a public defender office division should make the existing “hallway speech” unnecessary. For example, the public defender office division lawyers could immediately advise misdemeanor defendants who might otherwise enter into a plea agreement without a lawyer.
- *Specialized juvenile representation.* The representation of children in delinquency cases has evolved into a specialized area of legal practice,³⁹⁶ requiring that Santa Cruz County entirely reconsiders the manner in which representation is provided to alleged juvenile offenders. The U.S. Supreme Court has noted that a child's right to zealous advocacy “is not a formality.

³⁹⁴ AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

³⁹⁵ CAL. GOV. CODE § 27707 (West 2019). That public defender office representation must cease, however, if a court makes a contrary determination and finds a defendant is not indigent and entitled to appointed representation.

³⁹⁶ See Statement of Interest of the United States at 11, *N.P. v. Georgia*, No. 2014-CV-241025 (Fulton Cnty. Super. Ct. Mar. 13, 2015) (“Indeed, the unique qualities of youth demand special training, experience and skill for their advocates. For example, although the need to develop an attorney-client relationship is the same whether an attorney is representing an adult or a child, the juvenile defense advocate's approach to developing the necessary trust-based relationship differs when the client is a child.”).

It is not a grudging gesture to a ritualistic requirement. It is the essence of justice.”³⁹⁷ In the 53 years since the U.S. Supreme Court held that children require the “guiding hand of counsel” at each step in the proceedings against them,³⁹⁸ modern U.S. Supreme Court case law further clarifies what that “guiding hand” entails in the juvenile context.³⁹⁹ For example, finding that “the features that distinguish juveniles from adults also put them at a significant disadvantage,” the Supreme Court has increased protections afforded to children charged as adults in criminal court.⁴⁰⁰ Many of the same disadvantages exist where children are prosecuted in the juvenile system, because children accused of wrongdoing are unlikely to trust adults, and their understandings of the justice system’s formalities and the “roles of the institutional actors within it” are limited.⁴⁰¹ These characteristics make it likely that children will struggle to “work effectively with their lawyers to aid in their defense” in juvenile court proceedings, impairing the quality of the representation they are provided.⁴⁰² For these reasons, the National Juvenile Defender Center’s standards provide that specialization in communication with children, and child mental health or psychological development, among others issues, is necessary to render minimally effective representation in delinquency matters.⁴⁰³ Therefore, the

³⁹⁷ *Kent v. United States*, 383 U.S. 541, 561 (1966).

³⁹⁸ *In re Gault*, 387 U.S. 1, 36 (1967) (internal citations omitted).

³⁹⁹ While the juvenile courts were founded in part upon the notion that children are different from adults, *see In re Gault*, 387 U.S. 1, 14-16 (1967) (recounting the history and theory underpinning the juvenile justice system from its inception in 1899), our modern understanding of those differences has accelerated in recent years. *See Graham v. Florida*, 560 U.S. 48, 68 (2010) (discussing developments in child psychology and brain science). “Time and again,” the U.S. Supreme Court has concluded that children “generally are less mature and responsible than adults”, do not have “the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and usually are “more vulnerable or susceptible to . . . outside pressures than adults”. *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (internal citations omitted). *See also J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (“The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”); *Graham v. Florida*, 560 U.S. 48, 78 (2010) (requiring special consideration for children in the context of *Miranda* waivers); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (banning capital punishment for juvenile offenders); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (forbidding mandatory life without parole sentencing schemes for juvenile offenders). Because age is “far more than a chronological fact”, *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011), the law must continually evolve as regards the protections afforded children. Statement of Interest of the United States at 9, *N.P. v. Georgia*, No. 2014-CV-241025 (Fulton Cnty. Super. Ct. filed Mar. 13, 2015).

⁴⁰⁰ *Graham v. Florida*, 560 U.S. 48, 78 (2010) (internal citations omitted).

⁴⁰¹ *Graham v. Florida*, 560 U.S. 48, 78 (2010) (internal citations omitted).

⁴⁰² *Graham v. Florida*, 560 U.S. 48, 78 (2010) (internal citations omitted).

⁴⁰³ *See generally* NATIONAL JUVENILE DEF. CTR., NATIONAL JUVENILE DEF. STANDARDS (2012). *See also* NATIONAL JUVENILE DEF. CTR., *Specialization in Juvenile Defense*; Adrienne Winney, *Juvenile Defense Attorneys Badly Need Specialized Training, Higher Fees*, JUV. J. INFORMATION EXCHANGE (Oct. 28, 2015) (other competencies of delinquency representation include: “collateral consequences of adjudication; child welfare and entitlements; special education; immigration; drug addiction and substance abuse; adolescent psychological development; racial, ethnic and cultural competence; special ethical considerations when working with children; competency and capacity; the role of parents or guardians;

chief public defender should consider creating a specialized juvenile unit within the public defender office division (i.e., specialized lawyers reporting to a dedicated supervising attorney for juvenile services).⁴⁰⁴

Conflicts counsel division. Because of the potential conflicts of interest and/or potential undue political interference inherent in the county counsel's office administering the CDCP, the conflict representation now provided by the CDCP should be transitioned from the county counsel's office to the oversight of the chief public defender. The chief public defender should build, and Santa Cruz County should fund, the conflicts counsel division with the following in mind:

- *Day-to-day administration.* A deputy chief public defender should report directly to the chief public defender and administer the day-to-day functions of the conflicts counsel division, with the assistance of a billing coordinator and a social worker outreach coordinator.
- *Eliminating financial conflicts between appointed attorneys and their clients.* Because of the financial conflicts of interest between attorney and client that result from the CDCP's existing compensation method, the chief public defender should abolish fixed fee compensation of private attorneys who are appointed to represent indigent persons. Attorneys appointed through the conflicts counsel division should be paid at an hourly rate that accounts for both actual overhead and a reasonable fee (or alternatively they should be county employees). All national standards require that "counsel should be paid a reasonable fee in addition to actual overhead and expenses."⁴⁰⁵

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

sexual orientation and gender identity awareness; transfer to adult court and certification hearings; and school discipline policies and procedures.").

⁴⁰⁴ See NATIONAL JUVENILE DEF. CTR., NATIONAL JUVENILE DEF. STANDARDS, stds. 9.1-9.7 (2012),.

⁴⁰⁵ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (Feb. 2002).

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 (requires cooperation of the Santa Cruz County Superior Court).**

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 (requires cooperation of the Santa Cruz County Superior Court).**

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 (requires cooperation of the Santa Cruz County District Attorney).**

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. For the record, 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.

APPENDIX

Appendix A. The scope of the existing Santa Cruz County indigent representation system

At the outset of this evaluation, the Sixth Amendment Center asked the county to provide the total number of cases, in which the right to counsel is guaranteed in California, that were filed during each of the five preceding fiscal years in Santa Cruz County, broken down by type of case and showing those handled by private counsel, by appointed counsel, or pro per. The county did not have the answer to this question, but the county assisted the Sixth Amendment Center in obtaining the data available to the county for the three fiscal years beginning July 1, 2016 and ending June 30, 2019.

The county has two sources of information about the number of people and cases who require appointed counsel:

- the court's data on each person's case, showing whether and when counsel is appointed;ⁱ and
- the reports filed quarterly by each contract law firm and annually by the CDCP of the number of times and in what types of cases they have been newly appointed.

Although all three of the law firms and the CDCP provide information about appointments broken down by case types, the four providers do not use the same case types in their reports, nor do the case types used in the provider reports match the case types used in the court's data management system. (Tables depicting the case type designations used by each of the providers and the superior court, showing how they correspond to the broad case number categories used by the court and to each other, are contained in Appendix B-E.)

It is important to distinguish between cases and appointments. A "case" in the court's data management system is a single case number relating to a single defendant.ⁱⁱ There can be more than one appointment of counsel within a single case number in the court's data (for example, in a single criminal case number, an attorney may be appointed when the case is newly filed and represent the defendant through disposition of the case, but if that defendant is placed on

ⁱ The superior court has a case management data system that tracks the events that occur in each case. Effective October 13, 2015, the court switched from an old system to the system they currently use. It is possible to look up each individual case in the court's data to see each event that occurred, including appointment of counsel. On a systemic level, though, it is not possible within the court's data management system to generate a report of the total number of cases in which counsel is appointed, or the number of cases of a given case type in which counsel is appointed, or the number of cases appointed to a given law firm/CDCP or to a specific attorney.

The county made available to the Sixth Amendment Center two batches of data for the three fiscal years ending June 30 of 2017, 2018, and 2019:

- one data batch shows every case filed from July 1, 2016 through June 30, 2019, in which an appointed attorney was listed as the active attorney as of February 5, 2020; and
- the other data batch shows every instance in which an attorney was appointed in any case on any date from July 1, 2016 through June 30, 2019.

The county also provided the total number of cases filed during each of those three fiscal years, broken down by the categories that the court's data management system uses for assigning case numbers.

ⁱⁱ Each case number contains one or more counts/charges against a single defendant.

probation and is subsequently accused of violating that probation, an attorney may be appointed in the probation violation proceeding).

1. Data from the superior court

The following table shows the total number of cases (of case number categories relevant to this evaluationⁱⁱⁱ) that were filed in the Santa Cruz County superior court during calendar years 2017 and 2018^{iv} – this is *all* cases: those handled by private attorneys; those handled by appointed attorneys; and those in which the defendant waived their right to counsel and were *pro per*. The table also shows the number and percentage of those cases in which counsel was appointed at any time and at any stage of the case between January 1, 2017 and June 30, 2019, according to the court’s data management system. Importantly, an attorney may have been appointed at any time after June 30, 2019 in other of the filed cases, so *this table shows the minimum but not the maximum percentage of all filed cases that have historically required an appointed attorney at any stage of the case*. The county can use this table to estimate the absolute minimum percentage of cases filed in future years that are likely to require appointed counsel, however the county cannot use this table to determine the number of attorneys needed in its indigent representation system.

ⁱⁱⁱ Beginning October 13, 2015 through the present, the court’s case numbers begin with a two-digit number that indicates the year the case is filed, followed by a letter that indicates the type of case, followed by a five-digit number assigned sequentially to each case when it is filed. The letter designators for each relevant type of case, beginning October 13, 2015, are:

AP =	appeal
CR =	criminal (includes both felonies and misdemeanors; includes trial, probation revocation, and “clean slate” proceedings)
FL =	family law
JU =	juvenile (includes new filings, subsequent filings, 777 placement filings, and administrative petitions)
MH =	mental health
PR =	probate
TR =	traffic (includes felonies, misdemeanors, and non-jailable infractions)

There is a twist in the case numbering system for juvenile cases. If a new case is brought against a juvenile, it receives a new case number. But if a juvenile is already a ward of the court and is alleged either to have violated a court order or probation or to have committed new criminal acts, then the case does not receive a wholly new case number and instead a letter suffix is added to the JU case number previously assigned to that juvenile, beginning with “A” and continuing alphabetically each time a new allegation or set of allegations is instituted.

^{iv} After extensive discussion, the data the Sixth Amendment Center requested and which the superior court provided covers the time period beginning July 1, 2016 and ending June 30, 2019. As a result, calendar years 2017 and 2018 are the only two calendar years for which we have complete data from the court’s data management system.

Number and percentage of total filed cases in which counsel was appointed
(from superior court's data management system)

Case number category	Cases filed in calendar year 2017			Cases filed in calendar year 2018			Two-year average percentage
	Total number cases filed	Number of cases appointed	Percentage of cases appointed	Total number cases filed	Number of cases appointed	Percentage of cases appointed	
AP = appeal	59	24	40.68%	30	12	40.00%	40.34%
CR = criminal	8,305	5,947	71.61%	8,022	5,579	69.55%	70.58%
FL = family law	1,817	0	0.00%	1,691	2	0.12%	0.06%
JU = juvenile (excl admin cases)	333	315	94.59%	272	255	93.75%	94.17%
MH = mental health	75	10	13.33%	178	16	8.99%	11.16%
PR = probate	535	7	1.31%	592	2	0.34%	0.82%
TR = traffic	26,709	8	0.03%	31,179	10	0.03%	0.03%

As previously mentioned, in the court's data management system, there can be more than one appointment of counsel within a single case number. In criminal cases, for example, within a single case number, the court's data management system may show an individual appointment when:

- a case is newly filed and one of the law firms or the CDCP is appointed;
- the appointed provider assigns a specific attorney to the case;
- the originally appointed provider determines it has a conflict of interest and a different provider must be appointed;
- a different attorney within a given provider enrolls in the case (as a result of the system the providers use to assign attorneys to cases, or because of turnover among provider attorneys);
- a case has been disposed but then a probation revocation is initiated; and/or
- a case has been disposed but then some sort of "clean slate" proceeding is initiated.

Some of these sequential appointments should in fact be counted as separate case appointments that the indigent representation system is required to carry out. Some of these sequential appointments, though, are a result of the way in which the court's data management system is organized or the manner in which the indigent representation system in Santa Cruz County has developed to accommodate the way that court proceedings are carried out in superior court. These largely unnecessary sequential appointments could be eliminated, but to do so would require the cooperation of the judges and the prosecutors.

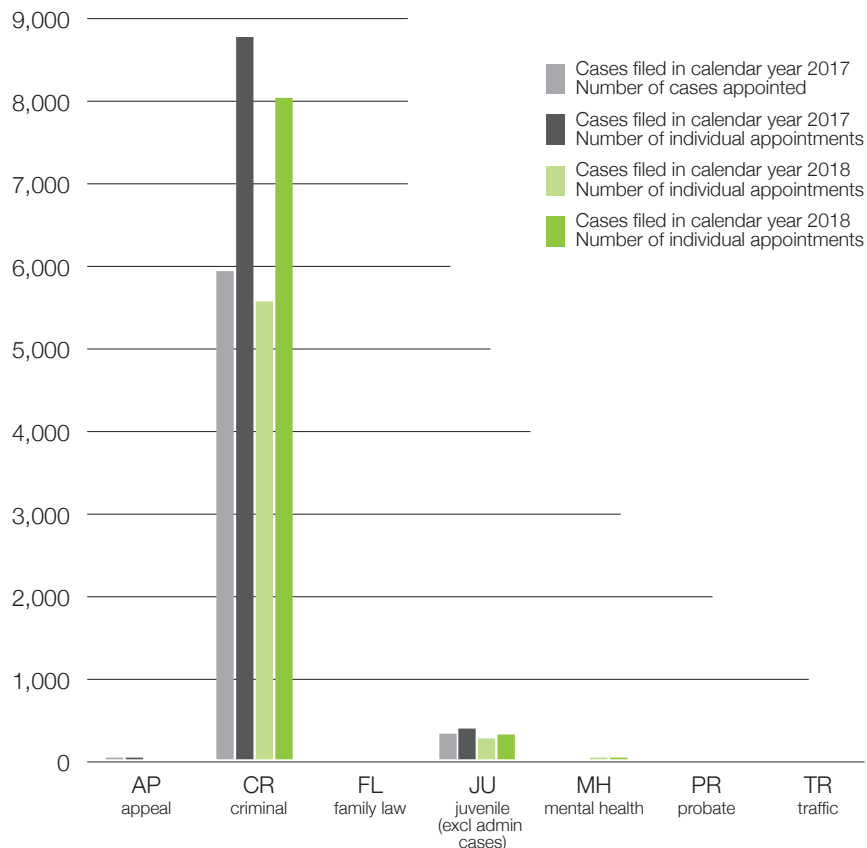
Unless and until changes are made to Santa Cruz County's indigent representation system, there is no choice but to presume that appointment of counsel to represent indigent people will continue to occur in the way it has been done historically. The following table shows the total number of times that counsel was appointed between July 1, 2016 and June 30, 2019, in those cases filed during calendar years 2017 and 2018 and in which an attorney was appointed at all, according to the court's data management system. Importantly, an attorney may have been

appointed at any time after June 30, 2019 in any of these cases. The indigent representation system attorneys in Santa Cruz County do not have any control over the number of individual appointments that are reported in the court’s data management system.

Number of appointments made July 1, 2016 through June 30, 2019, in cases filed in calendar years 2017 and 2018 (from superior court’s data management system)

Case number category	Cases filed in calendar year 2017		Cases filed in calendar year 2018	
	Number of cases appointed	Number of individual appointments	Number of cases appointed	Number of individual appointments
AP = appeal	24	24	12	12
CR = criminal	5,947	8,801	5,579	8,076
FL = family law	0	0	2	2
JU = juvenile (excl admin cases)	315	375	255	306
MH = mental health	10	11	16	16
PR = probate	7	7	2	2
TR = traffic	8	9	10	11

It is easier to see the disparity between the number of cases appointed and the number of individual appointments with the following bar chart.



In addition to appointments made in cases filed in calendar years 2017 and 2018, indigent representation system attorneys were also appointed between July 1, 2016 and June 30, 2019 in cases filed in earlier and later calendar years. The following table shows the total number of times that counsel was appointed between July 1, 2016 and June 30, 2019, in a case filed at any time, with appointments shown by the fiscal year during which the appointment was made, all according to the court's data management system. Again, an attorney may have been appointed at any time after June 30, 2019 in any case. And again, the indigent representation system attorneys in Santa Cruz County do not have any control over the number of individual appointments that are reported in the court's data management system. The county can use this table to estimate the number of individual appointments likely to be made in future years if nothing about the indigent representation system changes, however the county cannot use this table to determine the number of attorneys needed in its indigent representation system.

**Number of appointments made July 1, 2016 through June 30, 2019
(from superior court's data management system)**

Case number category	During FY ending June 30, 2017	During FY ending June 30, 2018	During FY ending June 30, 2019	Three-year average
AP = appeal	14	19	15	16
CR = criminal	5,431	9,595	10,396	8,474
FL = family law	3	20	22	15
JU = juvenile (excl admin cases)	392	318	328	346
MH = mental health	10	12	26	16
PR = probate	8	3	3	5
TR = traffic	6	13	6	8

2. Data from the indigent representation system providers

The most reliable data presently available to the county to determine the actual number of appointments likely to be made in future years, and broken down by type of case (rather than merely by the court's case number categories), derives from the reports filed quarterly by each contract law firm and annually by the CDCP of the number of cases to which they have been newly appointed. (Chapter VI examines in detail the caseload appointments and the number of attorneys necessary to effectively handle those caseloads under national standards.)

The following table shows the cumulative number of new appointments for all four providers, broken down by type of case,^v during each of the fiscal years ending on June 30 in 2017, 2018, and 2019.

^v The four providers do not use the same case types in their reports, nor do their case types match those of the court's data management system. Tables depicting the case type designations used by each of the providers and the superior court, showing how they correspond to the broad case number categories used by the court and to each other, are contained in Appendix B-E. The Sixth Amendment Center obtained from each provider and the superior court the definitions they use for each case type and then grouped the data reported by the providers into the case types shown in these tables.

**Number of new appointments made July 1, 2016 through June 30, 2019
(from provider reports)**

	FY end June 30, 2017	FY end June 30, 2018	FY end June 30, 2019	3-year average
Crim Felony	2,632	2,784	2,968	2,795
Crim Misd	7,408	6,743	6,769	6,973
Crim Con-tempt	2	0	0	1
Juv Delinq	542	419	393	451
Crim App	22	20	14	19
Crim Post-Conv	124	150	173	149
“Clean Slate” project	347	683	576	535
Family	42	30	31	34
Mental Health	154	147	162	154
Pro-bate	0	0	0	0
Other	59	50	80	63
all case types	11,332	11,026	11,166	11,175

Each of the providers dutifully report exactly what the county has requested of them.^{vi} Yet the county has failed to request of providers several things that are necessary to determine the full scope of the duties required of the county’s indigent representation system. For example:

- The law firm reports are filed quarterly and show the number of new appointments, by case type, that the law firm received during each of the three months of the quarter. The reports do not show when an appointment is concluded, so it is impossible to determine the actual number of cases being handled by any law firm at any given point in time (or even by year).
- The CDCP files an annual budget report that shows the total number of new appointments the CDCP received during the preceding fiscal year. The report does not show when those appointments are concluded, so it is impossible to determine the actual number of cases being handled by the CDCP at any given point in time (or even by year).
- The law firm reports show only the cumulative number of new appointments received by the law firm as a whole. The reports do not show the assignment of those cases to individual attorneys, so it is impossible to determine the actual number of cases being handled by any individual attorney.

^{vi} “Agreement for Public Defender Services” between the County of Santa Cruz and Lawrence P. Biggam, ¶ 3 (for the term of July 1, 2012 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Lawrence P. Biggam (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley, ¶ 4 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Page, Salisbury & Dudley (extending the term through June 30, 2022); “Agreement – Public Defender Conflict of Interest Services” between the County of Santa Cruz and the law firm of Wallraff & Associates, ¶ 4 (for the term of July 1, 2014 through June 30, 2018), *amended by* “Amendment to Agreement” between the County of Santa Cruz and the law firm of Wallraff & Associates (extending the term through June 30, 2022).

- The CDCP annual budget report shows the total number of cases for which panel attorneys were cumulatively paid and that number of cases broken down by case type. The CDCP report also shows the number of homicide cases and the number of non-homicide cases for which each individual attorney was paid. Nonetheless, the report does not show the assignment of non-homicide cases to individual attorneys, so it is impossible to determine the actual number of cases being handled by any individual attorney.^{vii}
- The law firm reports and the CDCP report do not contain case numbers for the appointments being reported, so it is impossible to determine whether a given appointment is being reported by more than one provider (as can occur when a law firm declares a conflict and the case must be re-assigned). The reports of the two conflict law firms contain entries that seem intended to show the reason that an appointment was made to their firm rather than to the primary law firm – the entries are: “co-defendant,” “conflict by other conflict firm,” and “conflict with private practice” – but it is unclear whether this is indicating the reason the conflict firm received an appointment or the reason the conflict firm rejected an appointment.
- The law firm reports show, for each month, the number of jury trials conducted by the law firm as a whole. The CDCP does not report jury trials conducted. The reports do not show the type of case in which a jury trial was conducted and do not show the individual attorney who conducted that jury trial, nor do they show whether the jury trial resulted in a verdict of guilty (as charged, or of a lesser included offense), a verdict of not guilty, or a mistrial.
- The reports do not show the number of cases (by type of case) dismissed, the number of guilty pleas, or the number of bench trials.

^{vii} The CDCP provided to the Sixth Amendment Center a detailed report of the individual appointments made to each CDCP attorney during the preceding three fiscal years. Because comparable information was not ultimately available for the law firm attorneys, the CDCP assignments to individual attorneys are not included in this report.

Appendix B. Criminal trial level case types

Superior Court Case Number Categories	Superior Court	BC&M	PS&D	W&A	CDCP
CR	Felony (new cases & probation violations)	Felonies – new appt (new cases)	Felonies (new cases)	Felonies (new cases)	Adult Crim - Class 5 – death penalty / special circumstances (new cases & probation violations)
		17(b) (new cases that are “wobblers,” i.e., felonies reduced to misdemeanors)			Adult Crim - Class 4 – homicides (new cases & probation violations)
		Felonies – prob viol (probation violations)	Probation violations – Fel (probation violations)	Probation violations – F (probation violations)	Adult Crim - Class 4 – complex serious (new cases & probation violations)
TR (can be felony, misdemeanor, or infraction)	Misdemeanor / Infraction (new cases & probation violations)	Misdemeanors – new appt	Misdemeanors	Misdemeanors	Adult Crim - Class 3 – serious (new cases & probation violations)
		Misdemeanors – prob viol	Probation violations - misd	Probation violations – M	Adult Crim - Class 2 – non-serious (new cases & probation violations)
TR (can be felony, misdemeanor, or infraction)	Traffic (can be felony, misdemeanor, or infraction)				
CR MH		Mental Competency hearing / Competency hearing (challenge to defendant’s competence to stand trial)			

The superior court has several more case types that it uses for criminal cases in which attorneys can be appointed:

- Felony Fugitive Complaint (a person arrested on a warrant from another state)
- Criminal Pre-Filing (setting bail before the prosecutor has filed a complaint)
- Criminal (criminal cases converted from the court’s old case management system)

During the 2016-17 fiscal year, BC&M also used a case type of Contempt of Court.

Appendix C. Juvenile justice trial level case types

Superior Court Case Number Categories	Superior Court	BC&M	PS&D	W&A	CDCP
JU	Delinquency Original (new cases)	Juveniles – new appt (new cases)	Juvenile cases (new cases)	Juvenile criminal cases – F (new cases)	Juvenile delinq – Class 4 – homicides (new cases & probation violations)
		Prop 57 contested (petition to transfer a juvenile to adult court)			Juvenile delinq – Class 4 – complex serious (new cases & probation violations)
					Juvenile delinq – Class 3 – serious (new cases & probation violations)
					Juvenile delinq – Class 1 – misdemeanors (new cases & probation violations)
Delinquency Subsequent (probation violations)	Juveniles – prob viol (probation violations)	Probation violations – juv (probation violations)	Probation violations – J (probation violations)		
Placement 777 Notice (probation violations)					

The superior court has several more case types that it uses for juvenile justice cases in which attorneys can be appointed:

- Juvenile Backloaded Cases (pre-electronic cases)
- Delinquency Miscellaneous Petition
- Delinquency AB12 Non-Minor, or Delinquency AB12 Non-Minor Dependent, or Dependency AB12 Non-Minor
- Request for Disclosure of Juvenile Case File

Appendix D. Criminal & juvenile justice appeal & post-conviction case types

Superior Court Case Number Categories		Superior Court	BC&M	PS&D	W&A	CDCP
Appeals						
AP	Criminal Appeal / Writ Misdemeanor		Reversal on appeal	Appeals		Misdemeanor appeal
	Criminal Appeal / Writ Infraction					
Post-conviction proceedings						
CR	Post Release Community Supervision		Pet for revoc of comm supervision	PARCS / PRCS		
	State Parole Revocation		Pet for revoc of parole			
	Criminal Habeas Corpus Petition		Criminal Habeas Corpus Petition			
JU	Delinquency Miscellaneous Petition					
Probate						
CR JU			Clean Slate new contacts/intakes			
			1203.4 contested			
	Administrative Petition		1203.3 contested			
	Miscellaneous Criminal Petition		Prop 47 contested			
	Delinquency Miscellaneous Petition		Prop 64 contested			
			Modifications			
			Cert of Rehab & pardon			

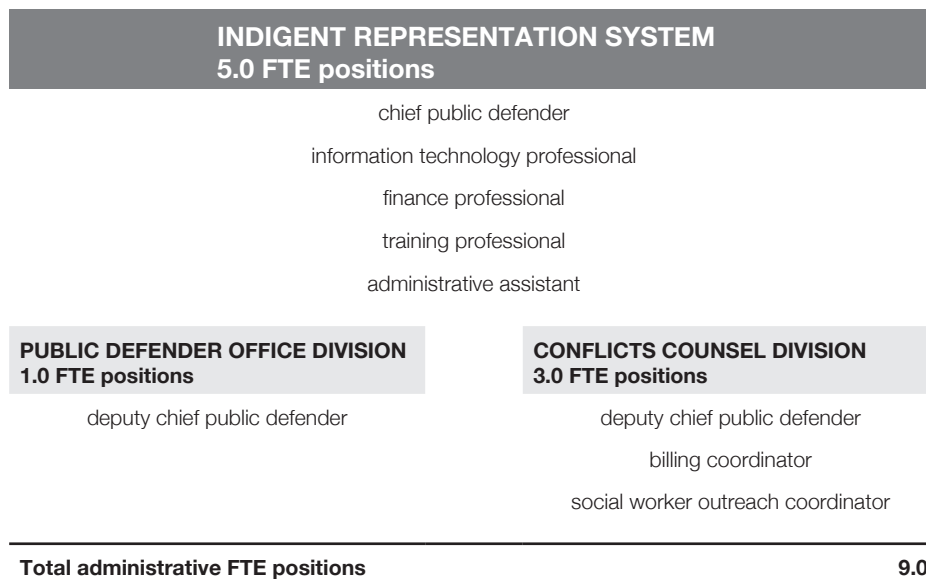
Appendix E. Civil case types

Superior Court Case Number Categories		Superior Court	BC&M	PS&D	W&A	CDCP
Family						
FA	Dissolution w/ Minor Children					
	Legal Separation w/ Minor Children					
	Legal Separation w/o Minor Children		OSC			OSC - contempt case
	DCSS – UIFSA					
	Dept of Child Support Services (DCSS)					
	Establish Parental Relationship		Paternity			
	Other Family Law					Adoption Freedom of Control
Mental health						
MH	LPS Conservatorship - W and I 5350					
	Postcertification Treatment – W and I 5300		LPS	LPS	LPS	LPS
	Civil Commitment - PC1026;2966;70;6300 WIC1800;3050;51;6600		Restoration of sanity			
	Not Guilty by Reason of Insanity – PC 1026		Probable Cause hrg			
	Mentally Disordered Sex Offender – WIC		Extension of commitment			
	Other Mental Health					
Probate						
PR	Conservatorship					
	Guardianship – Person Only					

Appendix F. One possible structure and workload distribution for the new indigent representation system

The following demonstration is offered solely to help Santa Cruz County policymakers better understand how the county’s total indigent representation system workload *could* be distributed between a public defender office division and a conflicts counsel division. Other scenarios are possible, and the county must provide the chief public defender with flexibility (both in terms of funding and authority) to meet future workload and policy requirements.

The Sixth Amendment Center recommends: that Santa Cruz County hire a chief public defender to administer all indigent representation services, and that those services be provided by a public defender office division and a conflicts counsel division. Based on national standards as applied to Santa Cruz County’s total reported indigent representation system new cases for fiscal year 2018-19, the Sixth Amendment Center recommends that Santa Cruz County’s indigent representation system have an estimated total of 98 full-time equivalent positions: 9 administrative positions, and 89 direct representation positions.



As explained in chapter VI, based on national standards as applied to Santa Cruz County’s total reported indigent representation system new cases for fiscal year 2018-19, the Santa Cruz County indigent representation system must have an estimated total of 89 full-time equivalent positions (including attorneys and non-attorneys) to provide direct representation to indigent people.

Direct Representation of Clients	
89.00 FTE positions	
line attorneys	44.14
supervising attorneys	4.41
investigators	14.71
social workers	14.71
paralegals	11.03
Total direct representation FTE positions	89.00

The number of attorneys and non-attorneys needed in each division depends on the allocation of the total workload. As the county's overall indigent representation system workload increases and decreases over time, the type of cases and/or the percentage of cases handled by each of the divisions can be adjusted as needed.^{viii}

One possible allocation of the direct representation workload between the two divisions is:

- **Public Defender Office Division –**
all adult criminal and juvenile delinquency trial cases in which it does not have a conflict of interest (including conflicts caused by excessive caseload); and
all criminal or civil matters deriving from those cases (e.g., probation revocations, criminal appeals, criminal post-convictions, criminal mental competency hearings, and “Clean Slate” petitions arising out of the trial representation);
- **Conflicts Counsel Division –**
all adult criminal and juvenile delinquency cases that the public defender office division cannot handle because of a conflict of interest (including conflicts caused by excessive caseload); and
all other case categories (e.g., criminal contempt, family cases, civil mental health petitions, probate matters, “Clean Slate” petitions provided by statute where original trial counsel is unavailable, and all other non-criminal matters).

During fiscal year 2018-19, approximately 90% of adult criminal and juvenile delinquency trial cases were allocated to the primary contract law firms and 10% were allocated to the CPCD. Applying that allocation of cases to the number of new cases reported in fiscal year 2018-19, the table below shows the share of total cases by case type to be handled by the public defender office division and by the conflicts counsel division.

^{viii} In some jurisdictions (such as Massachusetts), the private bar component is the primary indigent defense provider while the public defender office component handles less than 50% of the total caseload statewide. In other jurisdictions, the public defender office component is the primary provider, and fewer total indigent defense cases are handled by appointed private attorneys.

	all case types	Crim Felony	Crim Misd	Crim Contempt	Juv Delinq	Crim App	Crim Post-Conv	"Clean Slate" project	Family	Mental health	Probate	Other
public defender office division	9,117	2,671	6,092	0	354	0	0	0	0	0	0	0
conflicts counsel division	2,049	297	677	0	39	14	173	576	31	162	0	80
all providers	11,166	2,968	6,769	0	393	14	173	576	31	162	0	80

To provide direct representation in accordance with national caseload standards:

- the public defender office division would require an estimated total of 70.2 full-time equivalent positions (attorneys and non-attorneys), distributed across three units (felony unit, misdemeanor unit, and juvenile unit) as shown in the table below; and
- the conflicts counsel division would require an estimated total of 18.8 full-time equivalent positions (attorneys and non-attorneys) to handle all cases not assigned to the public defender office division. (Both attorneys and non-attorneys needed to provide representation in conflict cases can be selected on a case-by-case basis, or under contract, or made county employees, or any combination of the three.)

Public Defender Office Division direct representation

Position type	Number of new cases reported in FY 2018-19	FTE positions
Felony Unit	2,671	35.9
supervising attorneys (1:10)		1.8
line attorneys (NAC std. 150)		17.8
investigators (1:3)		5.9
social workers (1:3)		5.9
paralegals (1:4)		4.5
Misdemeanor Unit	6,092	30.7
supervising attorneys (1:10)		1.5
line attorneys (NAC std. 400)		15.2
investigators (1:3)		5.1
social workers (1:3)		5.1
paralegals (1:4)		3.8
Juvenile Unit	354	3.6
supervising attorneys (1:10)		0.2
line attorneys (NAC std. 200)		1.8
investigators (1:3)		0.6
social workers (1:3)		0.6
paralegals (1:4)		0.4
Total Public Defender Office Division direct representation FTE positions		70.2

Appendix G. Types of data the indigent representation system should collect on an ongoing basis

The Santa Cruz County indigent representation system should collect and evaluate on an ongoing basis all information necessary to ensure that each person who is entitled to public counsel under federal and state law:

- receives a qualified appointed attorney as early as possible following citation or arrest (or in civil proceedings, the filing of a petition or triggering of the right to file a petition), but in any event immediately (within 24 hours) following the right to counsel having attached and additionally during any critical stage preceding attachment of the right to counsel; and
- is immediately (within 24 hours) and continually represented by the same attorney, barring that attorney identifying a conflict of interest, from appointment of counsel through disposition of the trial level proceedings, specifically including at all critical stages.

The Santa Cruz County indigent representation system should also collect and evaluate on an ongoing basis all information necessary to ensure that a sufficient number of qualified attorneys are available to be appointed and that adequate resources are available (overhead including support staff, training, supervision, and technology; and case-related needs including social workers, investigators, and experts) to ensure effective assistance of counsel can be provided to each person who is entitled to public counsel under federal and state law.

The chief public defender should define the information to be collected and evaluated and with what frequency.

Some of this data necessarily comes from other components of the justice system, including law enforcement, prosecution, and the court. Santa Cruz County, and the indigent representation system, should coordinate with all justice components to gather information without imposing duplicative, undue, or onerous administrative or fiscal burdens and to do so in a way that protects the privacy and attorney-client privilege of individuals and the privileged work product of prosecutors and defense attorneys.

For any collected data to be useful, all data reporters must apply the same definitions to terms and should use the same reporting forms.

Criminal and juvenile delinquency (trial court level - new offenses and probation violations). All criminal and juvenile data should be tracked by the court's case number, once it is assigned.

Arrest & citation

The number of people arrested for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of arrest. Of these:

The number of people released before appearing in front of a magistrate, including the date of release.

The number of people appearing before a magistrate, including the date of appearance, and of these:

The number of people ordered detained without bail;

The number of people for whom bail / conditions of release are ordered, and of these:

The number of people subsequently released, including the date of release; and

The number of people continuing in detention.

The number of people cited for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of citation.

Arraignment on the complaint

The number of people appearing in court for arraignment on the complaint on any offense that carries a possible sentence of incarceration (grouped by type of case), including the date of appearance, and showing whether the person is in custody or out of custody at the time of appearance. Of these:

The number of people who are represented by privately-secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people who waive their right to counsel and self-represent (proceed *pro per*).

The number of people who request appointed counsel. Of these:

The number of people determined by the court to be not indigent. Of these:

The number who waive their right to counsel and self-represent (proceed *pro per*); and

The number who are represented by privately-secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people determined by the court to be indigent (including the number of separate case file numbers for each person), and the name of the attorney appointed to represent each person in each case number. Of these:

The number of people ordered to pay a \$50 application fee; and

The number of people for whom the \$50 application fee is waived.

Effective assistance of counsel – systemwide caseloads

At the beginning of each month, the number of separate case file numbers being represented by an appointed attorney (grouped by type of case and by appointed attorney). Of these:

The number in which a bench warrant has been issued and the person's appearance has not yet been secured, including the date the bench warrant was issued; and

The number that are not active because the prosecution is suspended in some fashion, such as defendants receiving mental health treatment to restore competency and/or sanity, including the date prosecution was suspended; and

The number that are in active prosecution.

During each month, the number of separate case file numbers to which a court appointed an attorney (grouped by type of case and by appointed attorney).

During each month, the number of separate case file numbers returned to active status after having been disposed (such as remand from a collaborative court) or having been suspended (such as an arrest on a bench warrant or a person whose competency / sanity has been restored).

During each month, the number of separate case file numbers that were disposed or suspended or reappointed to a different attorney (including the number of for each person) (grouped by type of case and by appointed attorney). Of these:

Reappointment to different attorney:

The number of separate case file numbers reappointed from one attorney to another. Of these, showing the reason for the reappointment:

Attorney change of case type assignment or left the indigent representation system;

Attorney personal conflict of interest that does not conflict out the attorney's law firm / public defender office;

Attorney conflict of interest that conflicts out the attorney's law firm / public defender office. Of these, whether a multi-defendant case (co-defendants), or other conflict.

Juvenile transfers to adult court:

The number of juvenile case file numbers that were transferred from juvenile court to adult criminal court.

Disposed cases:

The number of separate case file numbers that were dismissed, including the date of dismissal, and whether by prosecutorial action or as the result of a preliminary examination.

The number of separate case file numbers that resulted in acquittal, and whether by bench trial or jury trial, including the date of acquittal.

The number of separate case file numbers that resulted in conviction / adjudication, and whether by plea, bench trial, or jury trial, including the date of conviction / adjudication. Of these:

The number convicted as charged, and the number convicted of a lesser offense (responsive verdict).

The number receiving deferred entry of judgment, including the date the court announced deferred judgment. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and

The number required to serve any period of incarceration, including but not limited to work release.

The sentence / disposition imposed, including the date of imposition of sentence / disposition. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and

The number required to serve any period of incarceration (usefully broken down into ranges of sentence imposed), including but not limited to work release, and remanded to:

County jail;

Juvenile hall;

State prison - adults;

State prison – juveniles.

Suspended cases:

The number of separate case file numbers in which a bench warrant has been issued and the person's appearance has not yet been secured, including the date the bench warrant was issued; and

The number of separate case file numbers that are not active because the prosecution is suspended in some fashion, such as defendants receiving mental health treatment to restore competency and/or sanity, including the date prosecution was suspended.

At the end of each month, the number of separate case file numbers that are in active prosecution status.

Effective assistance of counsel – systemwide resources.

Available resources:

At the beginning of each month, and showing change at end of month:

The number of managers (such as chief public defender, chief assigned counsel administrator, financial officer, human resources officer, IT officer);

The number of supervisors (grouped by type of case responsibility);

The number of qualified attorneys (grouped by type of case responsibility);

- The number of paralegals;
- The number of secretaries / administrative assistants;
- The number of staff social workers;
- The number of staff investigators;
- The number of staff interpreters;
- The number of any additional support staff not included in the above categories, with description.
- The amount of funding available for reimbursement of out-of-pocket expenditures of all attorneys and for fees of non-staff attorneys (including reasonable reimbursement of proportionate overhead plus reasonable compensation);
- The amount of funding available for costs of translating orally and/or in writing and for fees of non-staff interpreters;
- The amount of funding available for costs of investigations and for fees of non-staff investigators; and
- The amount of funding available for costs and fees of expert.

Use of resources:

During each month, the number of separate case file numbers (grouped by type of case and by appointed attorney) and amount of expenditure for:

- Reimbursement of out-of-pocket expenditures of attorneys;
- Fees of non-staff attorneys (including reasonable reimbursement of proportionate overhead plus reasonable compensation);
- Costs of translating orally and/or in writing;
- Fees of non-staff interpreters;
- Costs of investigations;
- Fees of non-staff investigators;
- Costs of experts; and
- Fees of expert.

Criminal and juvenile delinquency (after disposition at the trial court level). Data similar to that shown above for the trial court level should also be collected and analyzed for all types of proceedings in which a right to counsel is guaranteed in writs, appeals, and collateral proceedings related to adult criminal and juvenile delinquency cases. These include habitual offender proceedings, parole violations, community supervision violations, writs from misdemeanor convictions, appeals from felony convictions, state post-conviction and/or federal habeas proceedings, record modifications and/or record clearances (generally considered to be “clean slate” matters), and representation in any collaborative courts.

Civil & quasi-civil proceedings. Data similar to that shown above for the trial court level should also be collected and analyzed for all types of proceedings in which a right to counsel is guaranteed in civil & quasi-civil cases. These include emancipation of a minor, paternity,

child support enforcement, involuntary treatment and/or commitment, and involuntary conservatorship.

Assessing the effectiveness of the right to counsel provided. Once Santa Cruz County has established and implemented an indigent representation system and is collecting and analyzing the basic data discussed above, then the indigent representation system can determine how best to measure system compliance with adopted performance standards and also how best to measure outcomes achieved for indigent people and outcomes achieved for the justice system at large (such as reduced criminality, reduced recidivism, reduced need for pre-trial detention, reduced need for incarceration, reduced removal of children from parents, reduced truancy, increased employment and resulting payment of taxes).

