THE RIGHT TO COUNSEL IN UTAH

AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES

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The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services
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PREPARED BY

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

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

DISCLAIMER

The Utah Judicial Council Study Committee on the Representation of Indigent Criminal Defendants commissioned this report. The U.S. Department of Justice (DOJ) generously funded the work through two sources. The DOJ Bureau of Justice Assistance (BJA), National Training and Technical Assistance Center (NTTAC), enabled work to begin regarding preliminary research on state statutes, case law, and criminal justice procedures. Site visits in two counties (Tooele and Uintah) were conducted under the NTTAC funding. A second major BJA grant funded the balance of the work: *Answering Gideon's Call: National Assistance To Improve the Effectiveness of Right to Counsel Services*. (DOJ Office of Justice Programs Grant Award #: 2013-MU-BX-k002.)

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

THE RIGHT TO COUNSEL IN UTAH

AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES

"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. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

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

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

Specifically:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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PREFACE

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state'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. 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 U.S. Supreme Court requires states to provide an attorney to an indigent person accused of a misdemeanor offense that carries the potential of jail as a penalty, regardless of how remote the possibility of jail-time may be. Despite this, people of limited means accused of misdemeanors in Utah's justice courts, more regularly than not, have no legal representation at all.

The absence of counsel is detailed in this report through a combination of data analysis and the retelling of defendants' stories directly observed in various Utah justice courts. Members of the Utah Judicial Council Study Committee on the Representation of Indigent Criminal Defendants ("Study Committee") questioned this approach, inquiring whether only the most inflammatory stories were selected for the report. They were not. The accounts detailed in the pages that follow are demonstrative of the various reasons why the actual denial of counsel exists in Utah's justice courts. Any number of other observations could have been told in their place.

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

The degree to which constructive denial of counsel impacts district court services varies a great deal from jurisdiction to jurisdiction in Utah. For example, Utah County and

Salt Lake County have many structural safeguards to prevent constructive denial of counsel. Yet, the systemic safeguards in both counties do not extend to the secondary systems for providing representation in conflict cases. The Constitution requires the same minimum level of effectiveness for each and every indigent accused, regardless of whether a person is deemed co-defendant #1 or #2.

Despite the fact that actual and constructive denials of counsel occur in Utah courts, it is wrong to conclude that Utah's criminal justice system and its stakeholders hold ill intent toward the indigent accused. Indeed, the very opposite appears true. In every jurisdiction visited, we met conscientious people striving to do well by both victims of crime and the accused – an attitude that also resulted in local criminal justice stakeholders giving generously of their time for interviews before, during, and after site visits.

Nevertheless, even the most well-meaning local stakeholders will, at times, fail to meet the dictates of right to counsel case law without appropriate guidance and supervision. The state of Utah currently sets only very general standards for the proper implementation of the right to counsel and has only limited statewide means for holding local government accountable to those standards. Therefore, this report is about the failure of the state of Utah to guarantee that each and every person eligible for public counsel receives effective representation, as is its constitutional obligation under the Sixth and Fourteenth Amendments. It is not a condemnation of the local people working to fill the gap left by the state.

And therein lies the good news. Even as right to counsel deficiencies were discovered and preliminarily reported, the Study Committee began working to rectify those issues that could be addressed immediately (e.g., providing judicial training on the right to counsel for justice court judges). Other criminal justice changes occurred contemporaneously with our work that are also reflective of Utah criminal justice stakeholders' willingness to improve practices when deficiencies are identified. Here are two such examples:

1. During the Salt Lake County site visit, the county had a program that sought to resolve criminal cases quickly. However, this early case resolution program prevented the public defenders from conducting the necessary consultation, thoroughgoing investigation, and preparation to be effective. Local stakeholders independently terminated the program without us having to document our concerns.

2. Court observations revealed that indigent people charged with traffic violations carrying jail terms often were denied counsel in Utah justice courts. Last legislative session, Utah policymakers independently passed a reclassi-

fication bill that converted many of these traffic violations into infractions carrying a monetary fine, but no jail time. Without jail as a possible sanction, the right to counsel is no longer required in these cases.

Finally, the citizenry of Utah should know that, when presented with an early draft of the report, the Study Committee confronted the report earnestly, challenged it where they disagreed, and ultimately resolved to work over the summer of 2015 to devise Utah-specific answers to the problems identified herein. Such actions bode well for the future of the right to counsel in Utah.

David Carroll, Executive Director
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Authored by the Sixth Amendment Center &
The Defender Initiative at Seattle University School of Law

Prepared on behalf of the Utah Judicial Council
Study Committee on the Representation of Indigent Criminal Defendants

"An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'"

United States v. Cronic, 466 U.S. 648, 653-54 (1984)
[internal citations omitted]

CHAPTER 1
INTRODUCTION

The Utah Judicial Council is a 14-member body[1] of the judicial branch of government, charged with the promulgation of uniform rules and standards to ensure the proper administration of justice across the state.[2] In 2008, the Judicial Council created the Study Committee on Appellate Representation of Indigent Criminal Defendants to examine the delivery of appellate right to counsel services. Its January 2011 report determined, among other things, that the prevailing use of flat fee contracts[3] created significant financial and ethical hurdles to quality appellate representation. Specifically, most appellate contracts "lack any limitations on caseloads."[4] And, where attorneys are paid a single flat rate for services, "such contracts may create a natural incentive for attorneys to devote less time to indigent defense cases."[5]

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[1] Article VIII, section 12, of the Utah Constitution establishes the Utah Judicial Council. UTAH CODE ANN. §78A-2-104(1) requires the Council to "be composed of: a) the chief justice of the Supreme Court; b) one member elected by the justices of the Supreme Court; c) one member elected by the judges of the Court of Appeals; d) five members elected by the judges of the district courts; e) two members elected by the judges of the juvenile courts; f) three members elected by the justice court judges; and, g) a member or *ex officio* member of the Board of Commissioners of the Utah State Bar who is an active member and in good standing at the time of election by the Board of Commissioners."

[2] UTAH CODE ANN. §78A-2-104(4) determines that the Utah Judicial Council is "responsible for the development of uniform administrative policy for the courts throughout the state. The presiding officer of the Judicial Council is responsible for the implementation of the policies developed by the council and for the general management of the courts, with the aid of the administrator. The council has authority and responsibility to: a) establish and assure compliance with policies for the operation of the courts, including uniform rules and forms; and b) publish and submit to the governor, the chief justice of the Supreme Court, and the Legislature an annual report of the operations of the courts, which shall include financial and statistical data and may include suggestions and recommendations for legislation."

[3] Rather than hiring private lawyers on a per-case or hourly basis, it is common for county governments in Utah to contract with indigent defense providers on an annual basis. The phrase "flat fee contracting" is used throughout this report to connote indigent defense services in which an attorney, consortia of attorneys, law firm, or non-profit defender office is paid a single fixed fee to provide services in an undefined number of cases, such that the defense provider(s) have negative financial incentives to dispose of cases quickly, rather than effectively.

[4] UTAH JUDICIAL COUNCIL STUDY COMMITTEE ON APPELLATE REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS, FINAL REPORT 9 (2011).

[5] *Id.* The Utah Judicial Council Study Committee on Appellate Representation of Indigent Criminal Defendants made a number of recommendations to overcome these issues, including incorporating a model contract that: a) separates trial and appellate representation; b) avoids attorney compensation disincentives; and, c) does not punish attorneys that declare conflicts.

Recognizing that some of the identified appellate issues may be exacerbated by similar contracts at the trial level, the Judicial Council reconstituted the appellate committee as the Study Committee on the Representation of Indigent Criminal Defendants (hereinafter "Study Committee")[6] in 2011 to examine the delivery of trial-level indigent defense services in criminal courts.[7] At the outset, members of the Study Committee held varying opinions regarding potential trial-level problems and how best to evaluate services. Additionally, with trial-level services constituting the bulk of the criminal justice workload, the Study Committee acknowledged that a review of those services would require significantly more time and resources than its appellate review.

The Study Committee therefore sought outside assistance at no cost to the taxpayers of Utah.[8] Subsequently, the Study Committee devised a statewide evaluation based on a sample of ten counties that reflect diversity of population size, indigent defense delivery service model, and geographic region, among others.[9] (See side bar, next page.)

I.
METHODOLOGY

Site work in the ten sample counties began in October 2013 and finished in August 2014. The site work was carried out through three basic components:

> *Data collection*: Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents, from statistical information to policies and procedures. All relevant hard copy or electronic information, including copies of indigent defense contracts, policies, and procedures, were obtained at the local level and reviewed. Additionally, the state of Utah has a unified court data collection system that houses a significant amount of information on indigent defense services.[10]

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[6] The Study Committee membership includes representatives from the judiciary, the executive branch, the legislature, the attorney general's office, the prosecuting attorneys' association, the criminal defense bar, and the association of counties, among others.

[7] Though the federal right to counsel extends to cases of indigent juveniles accused of delinquent acts, delinquency representation is not a focus of this report. In many instances in Utah, however, the same organization or group of attorneys responsible for providing representation to adults is also charged with providing juvenile representation. Where this is the case, the time and money expended by those attorneys on juvenile representation does affect the time and money available for the representation of indigent adults.

[8] *See* inside cover of this report for information on the authors and funding source.

[9] In any statewide report, it is important that the sample counties used for the evaluation be representative of the state. The ten counties (Cache, Davis, Salt Lake, San Juan, Sanpete, Tooele, Uintah, Utah, Washington, and Weber) represent all eight felony-level trial court districts. Based on 2010 U.S. Census data, population in the ten counties (2,468,077) is 89.3% of the state total (2,763,885).

[10] In more populated regions of the states – generally those employing a legal defender model or a

THE STATEWIDE SAMPLE OF COUNTIES

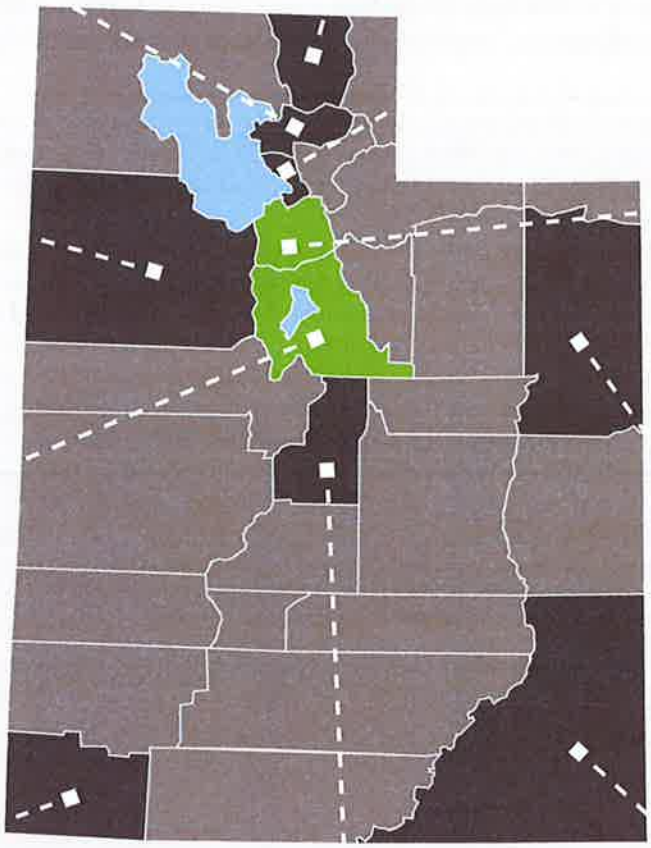
In any statewide report, it is important that the sample counties used for the evaluation be representative of the state. The Study Committee, therefore, devised a statewide evaluation based on a sample of ten counties that reflect diversity of population size, indigent defense delivery service model, and geographic region.

The Study Committee selected Cache, Davis, Salt Lake, San Juan, Sanpete, Tooele, Uintah, Utah, Washington, and Weber counties. The counties, shown below, encompass nearly 90 percent of the state's population and represent all eight felony-level trial court districts. Based on 2010 U.S. Census data, population in the ten counties (2,468,077) is 89.3% of the state total (2,763,885).

Weber County
Pop: 231,236
Model: coordinated contract panel

Cache County
Pop: 112,656
Model: individual private attorneys

Davis County
Pop: 306,479
Model: coordinated contract panel



Tooele County
Pop: 58,218
Model: individual private attorneys

Salt Lake County
Pop: 1,029,655
Model: defender office & contract attys

Utah County
Pop: 516,564
Model: defender office & contract attys

Uintah County
Pop: 32,588
Model: individual private attorneys

Washington County
Pop: 138,115
Model: coordinated contract panel

Sanpete County
Pop: 27,822
Model: individual private attorneys

San Juan County
Pop: 14,746
Model: individual private attorneys

Court observations: Understanding how the right to counsel works in any jurisdiction requires an understanding of two critical processes: (a) the process the individual defendant experiences as a case is processed from arrest through to disposition; and, (b) the process the attorney experiences while representing that individual at the various stages of the defendant's case. Courtroom observations were conducted in the respective district courts of each sample county. Court observations were also conducted in 29 justice courts – approximately a third of the 91 various justice courts in the sample counties.[11]

Interviews: No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily impact another. Because of this, interviews were conducted with a broad cross-section of stakeholder groups during each site visit. In addition to speaking with indigent defense attorneys, interviews were conducted with district and justice court judges, county administrators, prosecutors, sheriffs, court clerks, probation officers, and law enforcement. More than 175 interviews were conducted across the state.[12]

While the majority of states have an independent statewide public defense commission authorized to promulgate and enforce indigent defense standards,[13] Utah has no such

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more coordinated assigned counsel model – local caseload data was available in addition to the statewide data collected by the Administrative Office of Courts (AOC). At times, the caseload numbers collected locally differed from the statewide information provided. This report acknowledges and explains those differences, but generally relies on the AOC data.

[11] This is a conservative statement. Particularly in less populated counties, it is often the case that the same public defense attorney(s) practice in front of the same judge(s) in multiple justice courts throughout the jurisdiction. Therefore, it is possible to have observed all of the judges and attorneys involved in the provision of indigent defense in less populated counties even where less than 100% of the justice courts were visited. The justice courts visited are: Cache County (Hyrum Justice, Logan Justice, North Logan/Hyde Park Justice); Davis County (Clearfield Justice; Davis County Justice); Weber County (Harrisville Justice; Ogden Justice; Pleasant View Justice); Salt Lake County (Salt Lake City Justice; Salt Lake County Justice; Taylorsville Justice; West Valley Justice); San Juan County (Blanding Justice; Monticello Justice; San Juan County Justice); Sanpete County (Mt. Pleasant Justice; Sanpete County Justice); Tooele County (Grantsville, Tooele County Justice); Uintah County (Uintah County Justice); Utah County (American Fork District; Genola Justice; Goshen Justice; Provo City Justice; Santaquin Justice; Utah County Justice); and, Washington County (Santa Clara Justice; Washington City Justice; Washington County Justice).

[12] Sample questions from interviews are available at page 9. Interviews with policymakers and criminal justice stakeholders were not uniform. Rather, questions were specific to the interviewee's area of expertise. That is, questions to sheriffs may involve issues related to pretrial detention or the impact of drug courts on jail populations. Similarly, questions to county commissioners were generally about fiscal policies and selection of attorneys, whereas prosecutors, judges, and defense practitioners were questioned about the adversarial process, workload, government interference, etc.

[13] Thirty-three states (or, 66% of all states) currently have some form of a statewide indigent defense commission.

Twenty-one (21) of these have commissions that oversee all aspects of indigent defense services. For

agency. However, the lack of state oversight is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel services provided by county and municipal governments are constitutionally inadequate.

To aid the assessment, the Study Committee developed seven criteria[14] by which to gauge the efficacy of right to counsel services. It is these seven criteria that formed the basis of the interviews and courtroom observations. (Although each criterion is explained throughout the report, a quick reference table is provided on page 9.)

The Study Committee's seven criteria are interdependent. That is, even if the Study Committee desired a "pass/fail" grade assessed to each county for each criterion (which the Study Committee expressly did *not* want), it is impossible to apply each standard in isolation. This is because the right to counsel is an absolute right of the defendant. It matters not to the defendant, for example, that an attorney experiences no financial conflict of interest if excessive caseload still forces the attorney to triage the quality of services delivered. All criteria must be met for the services to be deemed structurally sound.[15] The Study Committee Standards are not aspirational, i.e., standards set to achieve some "best practice" level of representation. Instead, they represent the constitutional minimum of effective representation, as discussed below.

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ease of explanation, we include in this group both Colorado and Michigan. Each of those states has two statewide commissions. Colorado has one commission over the primary system and a second overseeing conflict representation, while Michigan has one commission overseeing appellate services and a second overseeing trial level representation. The 21 states are Arkansas, Colorado, Connecticut, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Virginia, West Virginia, and Wisconsin.

Twelve (12) states have commissions with limited authority. Six of these cover only part of the state's indigent defense system: Idaho (trial-level only); Illinois (appellate only); Kansas (felony and appellate representation only); Nebraska (capital trials/appeals, and limited non-capital felonies); Oklahoma (rural jurisdictions only); and Tennessee (capital post-conviction only). Six have commissions that offer state support to county-based systems: Georgia; Indiana; New York; Ohio; South Carolina; and, Texas.

[14] Derek P. Pullan, THE CONSTITUTIONAL RIGHT TO COUNSEL: EVALUATING THE HEALTH OF UTAH'S INDIGENT DEFENSE SYSTEM, 1 UTAH J. CRIM. L. 5 (2014) (hereinafter "Study Committee Standards"), *infra* at Appendix A.

[15] Rather than conducting individual assessments of each of the ten counties' services in isolation, the Study Committee directed the authors of the report to look broadly to determine what deficiencies (if any) exist across counties that prohibit effective and efficient services, while noting best practices that could be imported from one county to another.

II.
ASSESSMENT CRITERIA

Two principal U.S. Supreme Court cases, heard on the same day and then decided on the same day, are employed to determine the constitutional effectiveness of right to counsel services: *United States v. Cronic*[16] and *Strickland v. Washington.*[17] These two landmark cases create a continuum whereby each successive criterion must be satisfied before moving on to the next. *Strickland's* two-prong criteria, in which a defendant seeking to overturn a conviction based on the ineffectiveness of her court-appointed lawyer must prove that the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case, is at the far end of the continuum. At the initial end of the continuum exists *Cronic.*

Cronic states that, if certain systemic factors are present at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. The Study Committee Standards mirror *Cronic's* end of the continuum. (See chart, page 10.)

For example, the first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused at the "critical stages" of a case, as defined by the U.S. Supreme Court. Over the decades, the Supreme Court has inch-by-inch delineated many criminal case events as being *critical stages*, though it has never purported to have capped the list of events that might potentially fall into this category. For example, both arraignments[18] and sentencing hearings[19] are critical stages of a case. Therefore, Study Committee Standard #4 (requiring representation at all critical stages) is the first prong of *Cronic.*

Next, the U.S. Supreme Court explains in *Cronic* that there are systemic deficiencies that make any lawyer – even the best attorney – perform in a non-adversarial way. As opposed to the "actual" denial of counsel of *Cronic's* first prong, the Court calls this a "constructive" denial of counsel.[20] The overarching principle in *Cronic* is that the process must be a "fair fight" (Study Committee Standard #5). *Cronic* notes that the "fair fight" standard does not necessitate one-for-one parity between the prosecution and the defense (Study Committee Standard #6a). Ensuring that both functions have the resources they need, at a level their respective roles demand, is all the adversarial process

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16 466 U.S. 648 (1984).

17 466 U.S. 668 (1984).

18 Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

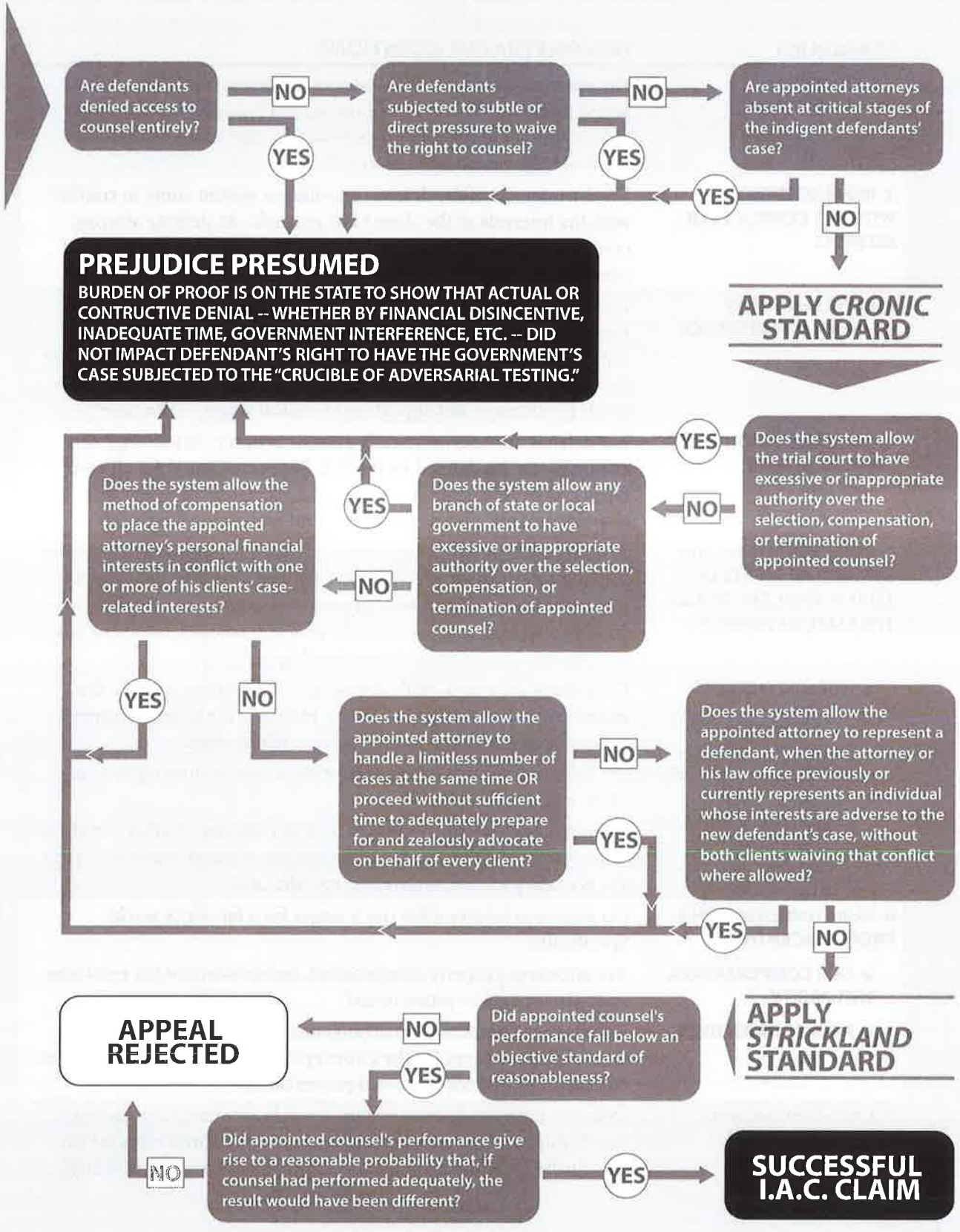
19 Lafler v. Cooper, 132 S.Ct. 1376, 1386 (2012); *see also* Wiggins v. Smith, 539 U.S. 510, 538 (2003); Glover v. United States, 531 U.S. 198, 203-04 (2001); Mempa v. Rhay, 389 U.S. 128 (1967).

20 *Strickland*, 466 U.S. at 683 ("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 *Cronic*)).

USING THE STUDY COMMITTEE STANDARDS

STANDARD	DEMONSTRATIVE QUESTIONS
1. INDEPENDENT REPRESENTATION	Are defense providers free to zealously advocate for their clients' stated interests without fear of personal financial retaliation (e.g., termination of employment) or systemic reprisals (e.g., undue reduction in government resources)?
2. REPRESENTATION WITHOUT CONFLICTS OF INTEREST	Do the interests of the defense provider or system come in conflict with the interests of the client? For example, do defense attorney contracts create financial incentives or disincentives to dispose of cases prematurely?
3. REPRESENTATION WITHOUT INTERFERENCE	Does the state or local government unduly interfere with the representation in any way? For example, are there court processes, statutes, or local policies that lead to non-zealous representation, or produce conflicts between the defense attorney and the accused, or result in attorneys not appearing at critical stages of the case?
4. REPRESENTATION AT ALL CRITICAL STAGES	Is a defense attorney physically present at every critical stage of a criminal case (as defined by the U.S. Supreme Court) for all case types and in all courts? For example, are defense attorneys provided at arraignments, plea negotiations, and sentencing hearings?
5. REPRESENTATION THAT ENSURES MEANINGFUL ADVERSARIAL TESTING OF THE STATE'S EVIDENCE	Are defense attorneys equipped to adequately represent defendants' stated interests in an effective way? Recognizing that this does not mean one-to-one parity with prosecutors' resources, are public defenders overwhelmed because of a lack of resources, too many cases, or their own professional limitations? Specifically:
a. QUALIFIED COUNSEL	Do defense attorneys' skills, training, and experience match the complexity of appointed cases? For example, are young attorneys just out of law school handling serious felony cases?
b. DEFENSE RESOURCES	Do defense attorneys have appropriate access to investigators, experts, and social workers?
c. REASONABLE CASELOADS	Do attorneys have the necessary time to consider whether certain actions (motions, crime scene investigations, witness interviews, etc.) are necessary and appropriate in specific cases?
6. FAIR COMPENSATION & PROPER INCENTIVES	Do attorneys receive a fair day's wages for a fair day's work? Specifically:
a. FAIR COMPENSATION, NOT PARITY	Are attorneys properly compensated, independent of the resources and salaries paid to prosecutors?
b. PROPER INCENTIVES	Do attorney compensation arrangements produce financial incentives or disincentives for the attorney to fulfill his ethical duty to the defendant to provide zealous representation?
7. CASE-SPECIFIC AND SYSTEMIC QUALITY CONTROL	Does the indigent defense system provide accountability through supervision and the monitoring of attorney performance against standards? Does the system collect data to ensure accountability?

THE CRONIC-STRICKLAND CONTINUUM



requires (Study Committee Standard #5b). As the U.S. Supreme Court notes: "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."[21]

Cronic's necessity of a fair fight requires the defense function to put the prosecution's case to the "crucible of meaningful adversarial testing."[22] If a defense attorney is either incapable of challenging the state's case or barred from doing so because of a structural impediment, a constructive denial of counsel occurs. The Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants (Study Committee Standards #1 and #3) or places the lawyer in a conflict of interest (Study Committee Standard #2) is a cause of constructive denial of counsel.

In *Cronic*, the Court points to the deficient representation received by the so-called "Scottsboro Boys" and detailed in the U.S. Supreme Court case, *Powell v. Alabama*,[23] as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys' case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.[24] The *Powell* Court concluded that defendants require the "guiding hand"[25] of counsel – i.e., attorneys must be qualified and trained to help the defendants advocate for their stated interests (Study Committee Standard #5a).

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[21] *Cronic*, 466 U.S. at 657 (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

[22] *Id.* at 656-57 ("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.")

[23] In 1931, nine young men of color stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the "Scottsboro Boys." The account of the Scottsboro Boys in this report is based on accounts provided in: the U.S. Supreme Court's opinion in Powell v. Alabama, 287 U.S. 45 (1932); WILLIAM BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 151-157 (1955); and, Douglas O. Linder, *The Trials of "The Scottsboro Boys," available at* http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.html (last visited Sept. 10, 2015).

[24] A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

[25] *Powell*, 287 U.S. at 68-69 ("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.")

Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day.[26] *Powell* notes 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, commenting that 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."[27] Insufficiency of time is, therefore, a hallmark of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload (Study Committee Standard #5c) or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly (Study Committee Standard #6b).

Perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from governmental interference, specifically from the judge presiding over the case. As noted in *Strickland*, "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."[28] In specific relation to judicial interference, the *Powell* Court stated:

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[29]

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer's representation, because the judge can never, for example, read the case file, question the defendant as to his stated interest, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just

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[26] Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest – only 13 years old – was instead sentenced to life in prison.

[27] 287 U.S. at 56-59. A recent U.S. Department of Justice Statement of Interest, filed in a systemic indigent defense challenge in New York, similarly notes that the lack of time to fulfill the lawyer's "basic obligations to their client" is a hallmark of constructive denial of counsel. Statement of Interest of the United States at 6, Hurrell-Harring v. New York, No. 8866-07 (N.Y. Sup. Ct. filed Sept. 25, 2014), *available at* www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf.

[28] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[29] *Powell*, 287 U.S. at 61.

that the judge's in-court observations of a defense attorney cannot comprise the totality of supervision (Study Committee Standard #7).[30]

While *Powell* focuses on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case, *Ferri v. Ackerman*,[31] the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation." Two years later, the Court observed in *Polk County v. Dodson*[32] that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." 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 notes in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."

The most common way governments interfere with zealous defense is to, albeit inadvertently, create a series of conflicts of interest (Study Committee Standard #3). Consider, for example, a public defense system funded and administered at the state level where a state chief defender is a direct gubernatorial appointee who can be terminated at the will of the governor. The chief defender will feel the pressure of undue political interference if, for example, the governor calls for all executive departments to take a ten percent budget cut. Since the bulk of an indigent defense system's expenditures are in personnel, the cut must come at the expense of staff. Unlike other aspects of the criminal justice system, defense practitioners have no control over the number of new cases requiring their services.[33] Therefore, a ten percent budget cut will cause excessive caseloads unless it is met by a ten percent cut in public defender workload. If the public defender objects, the governor could replace him with someone willing to do what the executive says.[34] In short, any structure of services that places the attorney's personal

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[30] This report notes at page 50 that the same issues preventing a judge from overseeing the quality of defense services apply equally, if not more so, to having prosecutors oversee defender representation.

[31] 444 U.S. 193, 204 (1979).

[32] 454 U.S. 312, 321-22 (1981).

[33] A defender cannot control the number of defendants requiring public defense services. Those decisions are made elsewhere: the legislature could increase the number of statutory offenses in which jail time is a potential sentence; an increase in the number of police positions will correspondingly increase the number of arrests being made; and, prosecutors may choose to file charges rather than dismissing marginal cases. All of these choices are outside of the control of the indigent defense systems and the lawyers providing direct services, but all such choices will increase the number of clients the system must represent.

[34] Indeed, this scenario took place in New Mexico prior to the electorate amending their state constitution to require independence of the defense function. In February 2011, the New Mexico Governor terminated the state's chief public defender, in the middle of the legislative session, for suggesting that the state public defender department was underfunded. "'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

financial wellbeing in direct competition with the stated interest of a defendant is a constructive denial of counsel.

Cronic determines that the presence of such a clear conflict of interest makes the defense lawyer presumptively ineffective. The burden of overcoming such a presumption is inverted. The government may argue that, despite such conflicts, the defense lawyer in a specific case was not ineffective, but it is the government's burden to establish this on appeal. As the Seventh Circuit Court of Appeals noted in *Wahlberg v. Israel*, "if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] 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.'"[35]

Strickland, therefore, should be reserved for retrospectively measuring the ineffectiveness of specific attorneys who work within structurally sound indigent defense systems (as defined and prospectively determined by a *Cronic* and *Powell* analysis).

The balance of this report follows *Cronic*, by first studying questions pertaining to actual denial of counsel focusing on the justice courts, before delving into issues of constructive denial of counsel with a focus on district court representation. (To give context to the *Cronic* discussion, consider a set of observations from a rural justice court. Side bar, next page.)

I think you're supposed to say that, "Of course, we support the Governor's option."'" Wren Abbot, *Chief Public Defender Dismissed: Testimony at State Legislature a Possible Trigger*, SANTA FE REPORTER, Feb. 17, 2011, *available at* http://www.sfreporter.com/santafe/blog-2687-breaking-chief-public-defender-dismissed.html.

Although the termination of then-Chief Public Defender Hugh Dangler occurred under a Republican administration, undue political interference with the right to counsel in New Mexico is not a partisan issue. Governors from both the Republican and Democratic parties have seen fit to replace sitting public defenders. In fact, former New Mexico 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. Bill Richardson, Governor Richardson Vetoes Legislation Creating New Public Defender Commission (Feb. 28, 2008), *available at* http://votesmart.org/public-statement/323912/governor-richardson-vetoes-legislation-creating-new-public-defender-commission#.VRApiVxHHds.

[35] 766 F.2d 1071, No. 84-2435, ¶27 (7th Cir. 1985).

APPLYING CRONIC

AN EXAMPLE OF ACTUAL AND CONSTRUCTIVE DENIAL OF COUNSEL

For some, understanding the U.S. Supreme Court's *Cronic* decision can be difficult without context. Both actual and constructive denial of counsel are best demonstrated by bringing the reader into the courtroom. The following court observation shows both prongs of *Cronic*.

Prior to the judge taking the bench in a rural justice court, a law enforcement officer walked into the courtroom and stated: "There are a lot of things you need to understand in this video. So pay attention." The law enforcement officer then played a video on the defendants' rights and court procedures, while people walked in and out of the courtroom. At the conclusion of the video, the officer asked if anyone had any questions. "I have a question," one woman said, but the officer did not hear her and left the courtroom to call for the judge to begin the calendar. No public defense attorney or prosecutor appeared in court that day.

The first defendant called forward was appearing for his arraignment on three separate charges – two class B misdemeanors and one class C misdemeanor. As with all misdemeanors in Utah, these charges carry a potential jail term. Asked by the judge how he wanted to plea, the defendant stated that he wanted an attorney. The judge then instructed him to fill out an indigency determination form and moved on to the next case. The second defendant, facing a class B misdemeanor charge, also asked for a public defender, and he too was directed to fill out the form. By this time, the first defendant had finished filling out his application form, and so the judge called him back to the podium to be appointed a defender.

"You will be given a piece of paper with the public defender's contact information," the judge explained. "It is your responsibility to call him. However, don't be surprised if you cannot reach him. He is very busy. You should not assume, just because he does not call you before your next court date, that he is not doing anything to help you. You can assume that he is going over the discovery, or talking to the city prosecutor, or doing something on your behalf. Just make your next court date, and he will be there to tell you what has been decided."

The second defendant likewise finished his paperwork and appeared before the judge to be appointed counsel. "I know you were filling out your paperwork," said the judge, "but you heard what I just said to [the first defendant], right? You get a public defender, but he probably won't return your call. Just so you know."

Another defendant appeared for his arraignment that day. He was charged with driving with a suspended license, a class C misdemeanor. The judge asked how he wished to plead, to which the defendant said he was "interested in making a deal."

"What did you have in mind?" the judge asked.

The defendant began: "I know I did wrong, but at the same time I feel like I did right."

"I am not sure what you mean," said the judge. "Can you tell me what happened that night?"

"I was at a party and people needed a ride," the defendant began. "I was the only sober one. I know I am not supposed to drive, but at the same time I felt good that I wasn't letting them drive, you know?"

"I do see …" the judge began. But the defendant interrupted, continuing with his explanation.

"Judge, I am trying to get on the right track," the defendant said. "I got out of prison last year, but I have a serious medical issue and I can't see a doctor. Something is wrong inside of me. It's a bad time for me. I have a medical condition where I can't figure out my emotions. I have a battle going on in my head; just trying to get by every day … just trying … just trying to do what I am supposed to do. But my head is wrong and I can't control my emotions. I felt good not letting people drive drunk, and then I am pulled over. I can't do anything right, but I want to. In jail I got my GED, but I don't feel well enough medically or emotionally to work. I need help. I want help. I know something is eating at me and that makes my emotions more uncontrollable."

"Your fine is likely to be $340," the judge explained. "Perhaps we can give you credit if you get a psychiatric evaluation at [a local community health agency]. If we can arrange that, and you stay in treatment, I can work with you on your fine."

The defendant proceeded to go on a long, outwardly apparent delusional tangent, about his inability to focus and his paranoid anxieties. "I feel bad," he concluded. "I can't deal with any of this. I don't want to feel bad any more."

"I am so proud of you for saying all of this in a room filled with people," said the judge. "That means a lot. You need to call [the mental health counseling center]. What I will do for you is give you a 30-day suspended sentence and nine-months probation. No fine. If you are unable or incapable of setting up an evaluation, at your next hearing I will send you to jail where you will get the help you need. So how do you want to plead?"

"Guilty," the defendant replied.

"You watched the video right? You know what rights you are giving up?"

"Yes," he said.

Study Committee criterion #4 states that the accused is entitled to legal counsel at all "critical stages" of the proceeding. As explained above (page 8), the U.S.

Supreme Court has determined critical stages to include, among others, the arraignment and sentencing hearings. This third defendant, if indigent, was entitled to counsel during the arraignment and sentencing because jail was a possibility (indeed, a likelihood, given the stated intentions of the judge).

Under U.S. Supreme Court case law, a defendant may choose to waive his Sixth Amendment right to counsel. However, in doing so, the court must determine that the defendant made that choice knowingly, voluntarily, and intelligently.[i] Though informative, showing a group video at the start of court, particularly without knowing whether each defendant was able to and actually did see and hear that video, does not replace the need for an individualized determination by the judge that each defendant wanting to waive counsel is doing so intelligently. In sentencing the third defendant, the court clearly recognized the danger that the defendant might suffer from a mental impairment that would affect his judgment and understanding. Yet the court arraigned and sentenced this defendant without providing him an attorney and without making an individualized determination that this defendant understood the rights he was waiving. This is an *actual* denial of counsel.[ii]

The likelihood that the first and second defendants will receive a *constructive* denial of counsel is high. For example, the municipality relies on the city prosecutor to select defense counsel, to enter into contracts with defense counsel, to set the compensation rate, and to decide whether to renew defense contracts each year. As will be discussed in Chapter 3, it is a conflict of interest to have one courtroom adversary financially controlling the other. This is because the defense attorney must take into account what he needs to do to please the prosecutor to secure future contracts, rather than advocating solely in the interests of the indigent accused. This violates the Study Committee's criteria #1 and #2.

For the court in question, the indigent defense contract pays the misdemeanor attorney a flat $600 per month to handle the representation of everyone determined to be indigent. The contracted private attorney for this courtroom estimated that he handles approximately 20 cases per month.[iii] This means he is compensated at approximately $30 per case, which produces financial incentives for the attorney to dispose of the case as soon as possible (in violation of Study Committee #6b). And indeed, the defender meets with the city prosecutor to begin plea negotiations before talking with the defendant, as the judge told the defendant will happen.

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[i] Waivers of counsel are discussed in depth at page 27.

[ii] Although on a case-by-case basis this could be considered an example of a judicial error, observations in this court show that it exemplifies a much broader indigent defense deficiency. This particular justice court only appointed an attorney in 24 percent of cases of people charged with a class B or class C misdemeanor (all carrying potential jail time if convicted) in 2013.

[iii] The 6AC confirmed this estimate through the data obtained through the Administrative Office of Courts (AOC). In 2013, this attorney was appointed to 246 justice court cases. This is an average of 20.5 assignments per month.

Because there is no independent supervision of this attorney (in violation of Study Committee #7), the misdemeanor lawyer in question is allowed to seek contracts from other jurisdictions too. In addition to his contracted justice court work described above, the attorney in question handles representation in the county district court and conflict representation in the county juvenile court. In total, this attorney handled 423 cases on behalf of indigent defendants in 2013, including 101 felonies. As will be demonstrated in Chapter 5, this is an unreasonable caseload (in violation of Study Committee #5c).

Including all contracts, the attorney is paid $37,200 annually.[iv] That means, on average, he is compensated just $87.94 for each and every case, regardless of the complexity of his felony and delinquency cases. To put it another way, if the attorney in question works 40 hours every single week of the year (or 2,080 hours annually),[v] the attorney is paid $17.88 per hour.[vi]

Though $18 per hour may sound like a lot of money to the average person trying to scrape by in hard economic times in rural Utah, it is not a lot of money given the parameters of what is required of a practicing attorney. The maintenance costs to operate a law practice in Utah – commonly referred to as "overhead expenses" – are many. Overhead costs must be paid each month in order to stay open for business, and so the lawyer's take home pay is whatever amount remains after providing for office rent, telecommunications, utilities, accounting, bar dues, business travel, and professional liability insurance.

As a means of comparison, the Mississippi Supreme Court determined, in a case challenging that state's assigned counsel compensation rate, that indigent defense attorneys are entitled to a reasonable hourly fee *in addition* to overhead expenses. Although that case is now nearly 25 years old, the Mississippi Court heard testimony from the Mississippi State Bar Association that the average overhead rate in that state was $34.86 per hour at that time (or nearly twice the 2014 hourly rate paid to this attorney in rural Utah without taking into account overhead costs).[vii] As will be discussed in Chapter 4, this is unfair compensation (in violation of Study Committee #6a).

[iv] The attorney stated that, because of workload concerns, he does not carry any privately retained cases.

[v] This equates to working five eight-hour days without ever taking a sick day, vacation day, or a holiday.

[vi] If the attorney spends more time on his indigent defense cases (i.e., if he works more than 40 hours per week, on average), then his hourly rate will further decrease.

[vii] Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1990) (determined that indigent defense attorneys are entitled to "reimbursement of actual expenses," in addition to a reasonable sum, and defined "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case."). Though the appellant in *Wilson* urged the court to adopt a figure of $34.86 per hour for overhead, derived from a survey conducted by the Mississippi State Bar in 1988, the court chose rather to adopt a $25.00 per hour overhead rate. *Id.* at 1340-41. Obviously, this is still more than the rural Utah attorney earns per hour today.

CHAPTER 2
ACTUAL DENIAL OF COUNSEL

More people accused of misdemeanors are processed through Utah's justice courts without a lawyer than are represented by counsel – upwards of 62 percent of defendants statewide, according to Administrative Office of Courts' data.[36] In fact, the data suggests that, in most justice courts, the number of misdemeanor defendants proceeding without representation is closer to 75 percent.[37]

Courtroom observations confirm that a majority of misdemeanor defendants in Utah's justice courts plead without a lawyer for two main reasons:[38]

A. A misapplication of Sixth Amendment case law related to: i) the early appointment of counsel; ii) the right to counsel in misdemeanor cases, especially those with suspended sentences; and, iii) waivers of counsel.
B. Prosecutors directly entering into plea agreements with uncounselled defendants, or, in the absence of prosecutors at arraignment, judges advising defendants and negotiating pleas.

Utah's appellate system is not set up to rectify actual denial of counsel in justice courts. This chapter details each of these issues.

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[36] In a letter dated June 18, 2015, Deputy Washington County Attorney Eric Clarke suggests that the list of reasons for actual denial of counsel in justice courts may be missing a third item: a greater percentage of those charged in justice courts may be deemed not indigent than those charged in district courts. Utah's courts are not currently required to track the information necessary to conclusively determine whether or not this is true.

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I.
MISAPPLICATION OF SIXTH AMENDMENT CASE LAW

A. EARLY APPOINTMENT OF COUNSEL

In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when "formal judicial proceedings have begun."[39] The Court carefully explained, however, 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.[40]

"Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . .".[41] In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment that the right to counsel attaches, but from that moment forward, no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

If the event that triggers attachment of counsel is not itself a critical stage, then that event can theoretically occur without counsel being appointed or being present; attachment of the right to counsel triggers the need to appoint counsel to represent the defendant at *future* critical stages. On the other hand, if the event that triggers attachment of counsel is itself a critical stage, then that event cannot occur unless the defendant is represented by counsel *during* the critical stage or has waived the right to counsel.[42]

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[39] 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).

[40] *Id.*

[41] *Id.*

[42] If it were always the case that the right to counsel attached before any critical stage occurred, then it would be a fairly simple and straight-forward matter for the magistrate before whom a defendant appears to appoint counsel for an indigent defendant and that counsel could then be prepared for and present at the first critical stage following. But things are not so clearly ordered in our criminal justice systems and there are wide variations among jurisdictions in the procedures they follow.

A defendant may be arrested before or after the formal institution of prosecution. A defendant may be in custody or may be at liberty at the time of the first appearance before a magistrate. Law enforcement may arrest a defendant and wish to interrogate him, giving rise to the critical stage of custodial interrogation, before he is brought before a magistrate for the first appearance. A prosecutor may desire to offer a plea bargain to a defendant who is under investigation prior to that defendant ever being arrested or brought before a magistrate for the first appearance. The events in a criminal case proceeding can and do occur in almost any order at all.

The right to counsel *attaches*, according to the Supreme Court, 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."[43] The event triggering the attachment of the right to counsel may be the custodial appearance of the defendant before a magistrate who informs him of the charges upon which he has been arrested and determines the conditions of his liberty, without regard to whether a prosecutor is aware of the arrest;[44] or it may be the institution of prosecution, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," without regard to whether the defendant is in jail or at liberty.[45]

Over the decades, the Supreme Court has inch-by-inch delineated many criminal case events as being *critical stages*, though it has never purported to have capped the list of events that might potentially fall into this category.[46] Events that are definitely critical stages are: custodial interrogations both before and after institution of prosecution;[47] preliminary hearings prior to institution of prosecution where "potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation;"[48] lineups and show-ups at or after initiation of prosecution;[49] during plea negotiations and at the entry of a guilty plea;[50] arraignments;[51] during the pre-trial period between arraignment until the beginning of trial;[52] trials;[53] during sentencing;[54] direct appeals as of right;[55] probation revocation proceedings to some extent;[56] and parole revocation proceedings to some extent.[57]

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43 *Rothgery*, 554 U.S. at 213.

44 *Id.* at 202.

45 Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also* United States v. Gouveia, 467 U.S. 180, 188 (1984) (plurality opinion).

46 The moments in which the defendant has to make choices are called the "critical stages" in a case. And by virtue of being "critical stages," none of these proceedings can occur unless counsel is present or has been waived. Why? Because as the Supreme Court has noted, "the right to be represented by counsel is by far the most pervasive for it affects [an accused person's] ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (citing Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

47 Brewer v. Williams, 430 U.S. 387, 399 (1977); Miranda v. Arizona, 384 U.S. 436, 444-45 (1966); Massiah v. United States, 377 U.S. 201 (1964).

48 Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

49 Moore v. Illinois, 434 U.S. 220, 231 (1977); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972); United States v. Wade, 388 U.S. 218, 236-38 (1967).

50 Lafler v. Cooper, 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).

51 Hamilton v. Alabama, 368 U.S. 52 (1961).

52 Brewer v. Williams, 430 U.S. 387, 398-399 (1977); Powell v. Alabama, 387 U.S. 45, 57 (1932).

53 Alabama v. Shelton, 535 U.S. 654, 662 (2002); Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972); In re Gault, 387 U.S. 1, 36-37 (1967); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

54 Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012); Wiggins v. Smith, 539 U.S. 510, 538 (2003); Glover v. United States, 531 U.S. 198, 203-204 (2001); Mempa v. Rhay, 389 U.S. 128 (1967).

55 Halbert v. Michigan, 545 U.S. 605, 621 (2005); Douglas v. California, 372 U.S. 353, 357 (1963).

56 Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

57 *Id.*; *cf.* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (leaving open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent").

A CLOSER LOOK
THE UNCOUNSELED DEFENDANT

Most misdemeanor defendants in Utah's justice courts do not have lawyers representing them. (See page 19.) The following courtroom observation is not an outlier, but is rather demonstrative of how the actual denial of counsel occurs with such routine.

A young woman appeared in a rural justice court for a status hearing. She had pled guilty to issuing a bad check (a class C misdemeanor) sometime prior and had been sentenced to attend Alcoholics Anonymous (AA) classes and to pay $334 in fines and $1,079 in restitution.

As she stood before the court that day, the judge applauded the defendant for regularly attending the AA classes, but noted that she had yet to put any money toward her fines and restitution. "Are you prepared to pay anything today?" the judge asked.

"Judge, I am here to turn myself in," the woman replied. "I am ready to have this whole thing over with." Somewhat incredulously, the judge asked her point blank if she was seeking to go to jail. Acknowledging that she had no money and no job, she stated, "I see no prospect of paying, so I want to go to jail."

"Ms. [Smith]," said the judge, "I am worried about your sense of hopelessness."

"I am okay with it. I don't want to keep coming here acting like I can pay it when I know I can't. I am trying to take responsibility for my actions."

"I appreciate that," the judge replied. "But I am a little concerned. You seem depressed."

"I just want to have this behind me."

"If I put you in jail, you understand that they are going to do a urine screen. What are they going to find?"

"Probably THC, pot, alcohol," said the defendant.

"I appreciate your candor. Do you think your drug use is why you are depressed?"

"I don't know anything about that. I have never been tested for depression."

"Hmm … Let me think." The judge continued: "Here is what I can do for you. I will put you in jail. I will tell them that you will test dirty, but that will just give us a base line to gauge how well treatment works. I am going to have [the clinical representative from the local mental health agency] give you a screen. Maybe … you probably have something wrong mentally – well I don't mean to assume that, but you appear to me to

be depressed. Perhaps he can find you a bed somewhere to get you the help you need."

"Thank you, judge," said the young woman. And then she was taken into custody.

In an interview upon conclusion of the docket, the judge admitted that at her original arraignment where a plea was taken, no counsel was assigned to the defendant because she was only getting fines and restitution. "Without jail on the table," the judge stated, "there was no need for a lawyer." Therefore, when the woman appeared in court that January day, according to *Alabama v. Shelton* she could not legally be sent to jail.

When asked by what authority the judge put her in jail, the judge scratched his head and said it was a "tough question." Questioned if he thought the defendant knowingly and intelligently decided to go to jail with no counsel to advise her, the judge responded, "absolutely … we like to see people take responsibility for their actions."

He believed this despite his assumption that she was depressed and her admission that she was on drugs.

If the sentence available under statute involves potential incarceration for the accused, the arraignment proceeding cannot occur unless counsel is present or the right is intelligently waived.[58] However, in every justice court observed, with the exception of Salt Lake City and County justice courts, defendants were arraigned and subsequently sentenced (another critical stage) to jail time or suspended sentences without any defense attorney present.[59]

B. SUSPENDED SENTENCES

When a person pleads guilty to or is convicted of a misdemeanor, it is most often the case that they are placed on probation for some amount of time, during which they are required to make various payments and comply with other court-imposed conditions. Typically, the court suspends any jail or prison sentence during the time the person is on probation, and if the defendant successfully completes their probation they will never go to jail. If, however, there is an allegation that the defendant somehow violated the terms of probation, then the defendant may have to serve the full length of the jail sentence that had been suspended.

The U.S. Supreme Court noted in *Alabama v. Shelton*[60] that a "suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered,

[58] *Argersinger*, 407 U.S. at 37.

[59] States and counties have long established ways to provide counsel at misdemeanor arraignments. Indeed, many are providing counsel at bail hearings when formal arraignments take place further out from arrest. For example, in each of Florida's 20 judicial circuits (covering 67 counties), public defender offices staffed with full-time employees provide primary representation to indigent defendants. Each office is overseen by a popularly elected chief public defender to ensure independence from the judiciary and other government agencies. When a circuit public defender has a conflict – for example when there are multiple co-defendants or in instances of case overload – secondary representation is provided by five regional conflict defender offices covering each of the state's five appellate jurisdictions.

A defendant's first appearance in Florida occurs within 24 hours of arrest, at which time the court reads the charges for which the defendant was arrested and decides issues of bail or release prior to arraignment. In Florida, an arraignment for in-custody defendants generally does not occur until 21 days after the first appearance, with out-of-custody defendants generally being arraigned within 30 days. Because of this delay between initial appearance and arraignment, the defendant would suffer greatly if representation was delayed until the formal arraignment. Perhaps more importantly, because a defendant might otherwise linger in jail for three weeks, it is critical that representation initiate with the first court appearance.

Florida's 11th Judicial Circuit is a single-county district covering Miami-Dade County. There, the elected public defender created an early intervention unit which handles the case from initial appearance through arraignment, including any plea negotiations that may occur pre-arraignment (and particularly negotiations related to reduction or dismissal of charges all together). The attorneys in the early intervention unit are solely dedicated to this function and therefore staff the courtrooms as part of their duties. For cases that are not resolved by this unit, the office will assign attorneys based on the severity of the charge so that the attorney is appropriately skilled to handle the complexity of the case. These attorneys will provide continuous representation from arraignment through disposition of the case. Office policies require both the early representation and the post-arraignment attorneys to interview and consult with clients before their court hearings.

[60] 505 U.S. 654 (2002).

the defendant is incarcerated not for the probation violation, but for the underlying offense."[61] In other words, the lawyer representing a defendant in a probation revocation hearing cannot go back to the trial phase to challenge the government's case on the original accusations – the accusations, after all, that most misdemeanor defendants in Utah's justice courts had already faced without the assistance of counsel.

Shelton made clear that the right to counsel attaches to any case involving the potential for jail time, no matter how remote the possibility and no matter that the sentence is suspended.[62] Unless counsel is afforded to the defendant at the original trial or plea, then the judge is prohibited from ever imposing any amount of jail time. The Constitution further requires that defendants be advised of potential sanctions for each charge prior to being called upon to plead.[63]

Nevertheless, Utah's justice courts frequently deny counsel to defendants solely because the immediate threat of jail was lifted and a suspended sentence was imposed as a condition of probation.[64] In every justice court observed, defendants without counsel were given suspended sentences and probationary terms that, if revoked, would result in a loss of liberty,[65] and defendants appeared for probation revocation hearings on charges for which they had not originally been represented by counsel.

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[61] *Id.* at 662.

[62] The potential for time in jail includes misdemeanors with suspended sentences in which the defendant remains at liberty unless the defendant fails the probationary terms.

[63] The Constitution requires the judge to caution the defendant as to "the range of allowable punishments attendant upon the entry of a guilty plea" in order to ensure that the defendant's plea, and with it his waiver of constitutional rights, is a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances." Iowa v. Tovar, 541 US 77, 81 (2004) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). Without knowing the seriousness of the charge, and especially the potential for time in jail as established by statute, defendants may feel representation is unnecessary.

[64] Data is insufficient to determine the frequency with which this occurs across all justice courts, but interviews with judges suggest it occurs with regularity in many courts.

[65] Importantly, the offenses carrying potential jail time that are heard in justice courts are not ordinances established by local governments. Utah's cities and counties have no say over what types of conduct are punishable with incarceration. Rather, local governments are required to carry out criminal justice policies that are the choices of state government.

At the start of the site work, Utah law authorized a large portion of traffic offenses to be punished by jail sentences. As one district court judge noted, "We have vastly over-criminalized conduct in our state. Today, we're all criminal offenders. I drive down the road five miles-per-hour more than I should, I get a ticket, and I'm a criminal." The most serious traffic offenses carried the harshest punishments, as is the case in most states. But the state legislature attached potential jail sentences to a host of lesser traffic violations as well. While most traffic violations were and are classified as infractions (no imprisonment and fines up to $750), many minor traffic offenses, such as driving without a valid license, were considered class C misdemeanors and carried a maximum sentence of 90 days and fines up to $750. The most serious traffic offenses, such as drunk driving, qualified as class A misdemeanors and carried the possibility of up to one year in jail, and higher fines. Utah Code Ann. § 76-3-301 (prior to 2015 amendment).

On March 31, 2015, Utah Governor Gary Herbert signed into law HB 348 that decriminalized a significant number of non-violent acts and reclassified others to infractions carrying no jail time (e.g., traffic tickets carrying only a fine). The legislation came on the heels of a report that determined: "Sixty-two percent of offenders sent directly to prison from court in 2013 were sentenced for nonviolent crimes." Utah Commission on Criminal and Juvenile Justice, Justice Reinvestment Report 1 (Nov. 2014).

A CLOSER LOOK
SUSPENDED SENTENCES

One of the reasons for the actual denial of counsel across Utah's justice courts is the misapplication of U.S. Supreme Court case law involving suspended sentences. (See page 24 for discussion of *Alabama v. Shelton*.) The following courtroom observation provides context for how such misapplication can occur.

In an urban justice court, a judge called one defendant to the podium in the center of the courtroom. "Did you read the rights form?" the judge asked.[i]

"Yes," the defendant replied.

"Do you have any questions?" the judge asked. The defendant did not. The judge then explained that the defendant was being charged with driving with a suspended license,[ii] a class C misdemeanor, punishable under state statute by a $300 fine and up to 90 days in jail. "Do you have any questions?" Again, the defendant did not.

"You have the right to be represented by an attorney," the judge stated. "Would you like to exercise that right and have an attorney assist you on this matter?"

"Yes," responded the defendant.

"Can you afford an attorney?" the judge inquired. The defendant stated: "No."

"Okay. I'm not going to send you to jail for this," the judge explained. "So, if you're convicted, there is no possibility of jail time, and so I can't give you an attorney at taxpayer expense. Does that change anything about what you want to do today?"

In an interview, the judge later clarified his policy in relation to the right to counsel. "I'll explain that if there there's no possibility of jail time, regardless of what statute allows, I generally will not appoint counsel. In the past we were appointing counsel on cases when the city said it would not be seeking jail time. Ticky-tacky little cases – things like intoxication 1st offense – and even the public defenders were complaining."

Asked if months from now, should the defendant fail to adhere to the terms of the probation resulting from these types of "ticky-tacky" offenses, could he activate a suspended jail sentence at that time, the judge replied: "Yes, absolutely. I don't like to, but it happens."

But, as discussed on page 24, imposing a suspended jail sentence later on, after refusing to appoint a lawyer to the defendant at the original charge, is precisely what the U.S. Supreme Court determined in *Shelton* is not allowed.

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[i] As with just about every court visited, upon arriving that day each defendant was provided a standardized *Rights, Instructions, and Waiver Form*, which among other things served to inform defendants of their trial rights, including the right to appointed counsel.

[ii] Utah Code Ann. §53-3-227.

C. WAIVER OF COUNSEL

The U.S. Supreme Court is clear that an accused person has the constitutional right to represent himself, i.e. to proceed without the assistance of a lawyer.[66] But first, courts are required to ensure that a defendant fully understands what he is doing before he waives the right to be represented by an attorney.[67] For any such waiver to be valid, it must be knowingly, voluntarily, and intelligently made.[68]

The constitutional "knowing, voluntary, and intelligent" standard[69] exists, in large part, to protect the accused from the accused. Defendants may seek to waive counsel for any number of reasons. It is the court's burden to ensure such waivers are effectively made. Thus, a judge must ensure that the defendant possesses the information necessary "to make an intelligent election" depending on "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."[70]

Yet, most justice courts visited use a video recording created and distributed by the Administrative Office of Courts to advise defendants of their constitutional rights and to give an overview of the criminal court process. The video touches upon the presumption of innocence, the right to a jury trial, a speedy trial, the right to remain silent, confront and examine witnesses, the right to appeal, and the right to the assistance of counsel. That a defendant has seen the video recording, or worse yet merely been

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[66] Faretta v. California, 422 U.S. 806, 836 (1975). The *Faretta* Court held: "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (internal citations omitted).

[67] Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) ("The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." (Internal citations omitted)).

[68] Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see also* United States v. Ruiz, 536 U.S. 622, 629 (2002) ("[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances–even though the defendant may not know the *specific detailed* consequences of invoking it.").

[69] Iowa v. Tovar, 541 U.S. 77, 88 (2004).

[70] *Id.*

present in the room where that video was playing, however, does not mean she has *understood* the video.[71]

In fact, the reliance on the video in lieu of an individual colloquy by the judge is especially problematic. In one suburban justice courthouse, for example, defendants began arriving at 4:30pm for a calendar scheduled to start at 5:00pm. A law enforcement officer played the AOC's rights video once a critical mass of defendants was seated in the courtroom. Meanwhile, however, more and more defendants continued to arrive. None of those who arrived late saw the whole video.[72] A judge needs to make an individualized determination to ensure a waiver is being made knowingly and intelligently, regardless of whether the defendant saw the video or not.

As another example, at an urban justice court, defendants clear through security and then check in at a clerk's desk just beyond the metal detectors. From there, they are directed to go to a meeting room to one side (the courtroom is on the opposite side of the clerk's desk). Ten or so rows of folding chairs face a television screen at the front of the meeting room, on which the AOC's rights video is displayed in a continuous loop. Next to the television, a team of court interns sits at a desk where defendants check in and are handed a clipboard with forms to fill out and return.[73] In theory, defendants are supposed to fill out the paperwork while also listening to the advice of rights video. In reality, most defendants arrive in the meeting room mid-way through the video, and few defendants sit through its entirety. A defendant's failure to diligently watch the video from middle-to-end and then beginning-to-middle – in order to ensure they caught the whole thing – does not constitute a knowing, voluntary, and intelligent waiver.

The same holds true even if a defendant affixes his signature to a standardized court form explaining what a "knowing, voluntary and intelligent" waiver of the right to counsel is. (See side bar on advice of rights forms, page 32.) The court still needs an individualized, minimal examination into the defendant's "education or sophistication" to ensure that the defendant can read and understand the language and vocabulary in which the form is written.[74]

Even presuming that defendants watch and understand the video, or read and understand a standardized form, the dialogue between judge and defendant can often confuse matters further. In fact, sometimes justice courts present the right to counsel in

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[71] To be clear, the production of such videos is not in and of itself a bad thing. Indeed, information on rights should be widely disseminated by the AOC, including airing such videos before court. The point here is that a video cannot be the only thing a court does in regards to defendant's rights. As explained in the next paragraphs, a formal colloquy by a judge must be made of each defendant.

[72] Indeed, they were not tardy at all – court was not scheduled to commence until the top of the hour.

[73] The clipboard contains the city's *Rights, Instructions, and Waiver Form*, the justice court's *Contact and Current Information Form* (defendants provide their contact information to the court clerks for future correspondence) and additional forms regarding any enhanceable offenses involved.

[74] *Tovar*, 541 U.S. at 88.

A CLOSER LOOK
THE DEFENDANT'S PLEA MUST BE KNOWINGLY AND INTELLIGENTLY MADE

One of the reasons for the actual denial of counsel across Utah's justice courts is the misapplication of U.S. Supreme Court case law involving the defendant's waiver of constitutional rights. (See page 27.) The following courtroom observation demonstrates how the improper waiver of the right to counsel, for example, can result in a defendant entering a guilty plea without fully understanding the direct criminal consequences of his conviction.

A man in his mid-20s appeared at a rural justice court, where the judge informed him that he was being charged with failing to operate a vehicle within a single lane, a class C misdemeanor.[i] "You look like an educated young man," the judge said to the defendant. "I'm assuming you can read and understand the English language?"

"Yes," the defendant replied, and the judge handed him a piece of paper, explaining that the form was the advice of all of his rights. The defendant spent a minute or two reading the form, before signing it and returning it to the judge.

"You have the right to have an attorney to represent you at every proceeding in this court," the judge began. "Do you wish to have an attorney to represent you today?"

"Um . . . no," the defendant replied after a moment.

"Okay. I'm marking down 'not today,' because you can change your mind later," the judge continued. "How do you plead?"

"I feel terrible about it," the defendant began. He explained that he was driving down the two-lane state road and took a moment to look at his map – he was a bit lost, having recently moved to Utah – and, as he did, he drifted slightly over the yellow line. At that moment, a state trooper was driving in the opposite direction. "I scared the officer half to death, and I feel horrible about that. I'm not contesting what happened – so yeah, I'm pleading guilty – but I'm just looking to see if I can get the fine reduced and to maybe get the points off my driving record, as this is my first offense ever." The defendant explained that the officer had suggested that his $90 fine might be reduced and that he should talk to the judge about it. And that is why he opted to appear in court that day, rather than simply pay the ticket by mail.

"Okay," said the judge, who had listed patiently and intently to the defendant's explanation. "You're looking at what is called a 'plea in abeyance.' You'll need

[i] Utah Code Ann. §41-6a-710(1)(a); 41-6a-202(2).

to go next door and talk to the county attorney – he's not in today, but you can schedule a time to talk with him the next time he's in the office – and see if he'll be willing to offer you a plea in abeyance." The judge then explained the parameters of a plea in abeyance,[ii] and said that he would set another hearing on the matter to give the defendant time to speak with the county attorney.

"That seems like an awfully large waste of taxpayer resources," said the defendant.

The judge replied that he couldn't advise the defendant one way or another. "It's your choice. Do you want to talk to the county attorney, or do you want to go ahead and plead guilty?"

"I'd rather not waste the taxpayers' dollars," the defendant decided.

The judge accepted the defendant's guilty plea without ever advising the defendant of the range of penalties to which that plea would subject him. "Now, you have the right to be sentenced within two to 45 days of entering your guilty plea. Or you can waive that right and be sentenced today. Do you wish to waive that right?" The defendant appeared confused and so the judge explained: "Do you want to hear what the fine is?" The defendant responded affirmatively.

"Okay. Well, the cop got it wrong. The legislature recently changed the statute that sets the fines on these types of offenses," said the judge. "The fine is now $120 [not $90]. I'm also sentencing you to five days of time in jail, and suspending that for 36 months. What that means is, so long as you pay the fine and commit no similar offenses, then after 36 months the jail time goes away."

"Whoa," said the defendant. "That seems like a serious charge though." The judge explained that indeed it was and recounted a recent car accident resulting in deaths.

"Yeah, but now you're talking about jail time," the defendant protested. "It seems almost like it's a criminal charge."

"Well, in the state of Utah," the judge replied, "it is a criminal charge."

Later that day, while generally discussing the docket in his chambers, the judge explained that, even if the defendant were to pay his $120 fine in full before leaving the courthouse that day, his probation would remain in effect for the full 36 months. And were he to commit any similar traffic violations, the suspension could be rescinded and his jail time could be imposed. Meanwhile, the judge continued, had the defendant merely paid the traffic ticket, rather than coming to court that day, potential jail time would not have entered the equation.

[ii] Utah law allows for a defendant to enter a guilty plea, but hold that plea in abeyance. UTAH CODE ANN. §77-2a-1(1) ("'Plea in abeyance' means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no content from the defendant, but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement."). Importantly, Utah law expressly requires the assistance of counsel during plea in abeyance negotiations with the prosecution and that any waiver of the right to counsel must be knowing and intelligently made, in compliance with U.S. Supreme Court case law. UTAH CODE ANN. §77-2a-2(2). The failure to provide counsel both in the plea in abeyance negotiations and the entry of guilty pleas held in abeyance – common occurrences across the state – is, therefore, a violation of Utah statutes and the federal Constitution.

pre-*Gideon* terms.[75] That is, defendants are advised they have a right to the assistance of a lawyer should they hire one, but the assistance of *public* counsel is mentioned only if defendants affirmatively ask for it. If defendants do not ask for counsel, the court does not offer counsel.

In criminal cases, the trial court cannot leave it to the defendant to seek counsel on his own. As the Supreme Court notes, "it is settled that, where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."[76] Instead, the Court states that assistance of counsel must be affirmatively offered to the accused, and the offer must be made on the record: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[77]

Despite U.S. Supreme Court case law determining that a defendant may waive the right to counsel only if the court determines that the decision is being made "knowingly, voluntarily and intelligently," Utah justice courts regularly allow defendants to waive counsel without individualized inquiries into their decision to go without counsel.

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[75] Prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court's decision in *Betts v. Brady*, 316 U. S. 455 (1942), was the controlling law regarding the right to appointed counsel in state trial courts. In *Betts*, the diversity of right to counsel laws and statutes among state governments in that era was evidence to the Court "that, in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. . . . In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case." The Fourteenth Amendment may have established certain federal rights as obligations upon state governments, but to the *Betts* Court the right to publicly appointed counsel was not such an obligation. *Gideon* overturned *Betts* in 1963.

[76] Carnley v. Cochran, 369 U.S. 506, 513 (1962).

[77] *Id.* at 516.

A CLOSER LOOK
THE WRITTEN ADVICE-OF-RIGHTS FORMS SOMETIMES GET THE LAW WRONG

Each municipality and county justice court crafts its own advice-of-rights form (sometimes called a waiver form). Often, the language included is inaccurate and inconsistent with the law.

For example, some courts use a written form that incorrectly advises the accused persons that if they plead guilty, they give up the right to a lawyer. The form lists the rights available, including to be represented by counsel, and states: "If you enter a plea of Guilty to the charge(s), you will give up the rights just mentioned . . . ." While this is the reality in that court, as no defender is present for most hearings, the law does not permit it. The defendant retains the right to representation in entering her guilty plea, and likewise she has the right to the assistance of counsel at her sentencing hearing. (See discussion of critical stages, page 20.)

Other courts use advice of rights and waiver forms that inform defendants: "if you cannot afford an attorney, request a court-appointed attorney by filing an affidavit at least 10 days before the proceeding. Failure to [hire a private lawyer or file an affidavit] will be treated as an implied waiver of your right to counsel." This is also not consistent with the law. As the U.S. Supreme Court stated in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962): "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

And, while many forms have a place to sign for a waiver of counsel, they have no place to sign to request counsel. For example, one form provides:

> *I have read and I understand the foregoing rights and instructions. I understand the charge(s) and penalties. Any plea I enter is voluntary and of my own free will and choice. No force, threats, or unlawful influence have been made to get me to plead.*
>
> ____ *(Date)* _____ *(Defendant)*
>
> *I voluntarily, knowingly, and intelligently waive my right to an attorney. I do not want an attorney; I want to represent myself.*
>
> ____ *(Date)* _____ *(Defendant)*

Although it is surely unintentional, the language of the form presents the right to counsel not as a choice between the two options of self-representation or having an attorney, but indeed as if the only option is to forego representation.

The reliance on such forms with faulty language only compounds the issues discussed throughout this chapter.

II.
PROSECUTORIAL AND JUDICIAL INTERFERENCE IN PLEA NEGOTIATIONS

The U.S. Supreme Court cautioned in *Argersinger v. Hamlin*: "Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[78] The U.S. Supreme Court estimates that 94 percent of all criminal convictions in state courts are the result of plea negotiations,[79] noting without judgment "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[80]

In the face of so many plea arrangements, states are free to serve as laboratories of democracy to try new ideas.[81] However, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[82] And so, when Utah – like all of its sister states – seeks to resolve the overwhelming majority of its criminal cases through plea negotiations, it retains the original constitutional obligation to protect the rights of the accused.

Encouraging or otherwise directing unrepresented defendants to meet with prosecuting attorneys to discuss plea deals, before making appointed counsel available to them, is a violation of the right to counsel. As discussed earlier, the plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant's right to counsel has been knowingly, voluntarily, and intelligently waived.[83] Yet it is the practice of many justice courts to have prosecutors meet with unrepresented defendants to attempt to resolve the case prior to the defendant appearing before the judge. In others, the opportunity to meet with the prosecution is offered as though it is a chance to consult with an attorney who is looking out for the defendant's interests. Neither is acceptable.[84]

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78 Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

79 Missouri v. Frye, 132 S. Ct. 1399, No. 10-444, slip op. at 7 (2012).

80 Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

81 U.S. Supreme Court Justice Louis Brandeis famously asserted that a "State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

82 Evitts v. Lucey, 469 U.S. 387, 401 (1985).

83 Iowa v. Tovar, 541 U.S. 77, 88 (2004).

84 Prosecuting attorneys who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. Rule 3.8 of the *Utah Rules of Professional Conduct* states in part: "The prosecutor in a criminal case shall: … (b) Make reasonable efforts to ensure that the accused

As the report of the National Right to Counsel Committee, *Justice Denied*, notes: "Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel."[85] The National Right to Counsel Committee report notes further:[86]

> Beyond the court's role in making certain that a defendant's waiver of counsel is valid, prosecutors have a professional responsibility duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel."[87] Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel.[88] Prosecutors also are reproached by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.[89]

Prosecutors are not always present in justice courts. In the majority of justice courts observed in which prosecutors are present, defendants are encouraged, if not instructed, to meet with the prosecutor in advance of the judge taking the bench. For example, in one municipal justice court, before the judge appeared, the prosecutor made a general announcement to the dozen or so individuals seated in the courtroom. Introducing himself, he said, "I'm the prosecuting attorney. I don't represent you. You don't have to talk to me if you don't want to. The purpose today is to see if we can resolve the case, or if we will go to trial. So, do you want to try to resolve this today?" A prosecutor's offer to "resolve" the case right away cannot be a substitute for the effective waiver of rights. In fact, the criminal process cannot presume defendants are aware of the rights they are waiving by entering into uncounseled negotiations directly with the prosecutor.[90]

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has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."

[85] NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 8 (Apr. 2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.

[86] *Id.*, at 88.

[87] The National Right to Counsel Committee report, *supra* note 85, cites to ABA *Model Rules*, Rule 4.3. We note that Rule 4.3 of the Utah *Rules of Professional Conduct* is identical.

[88] ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-4.1(b), 3-3.10(a) (3d ed. 1993).

[89] *Id.* at 3-3.10(c).

[90] Unlike any other state, prior to 2013 Colorado statutorily required misdemeanor defendants to meet with a prosecutor to discuss plea deals prior to applying for a public defender. COLO. REV. STAT. §16-7-301(4) (prior to 2013 amendment). Because that practice violated *Rothgery's* clear edict that the right to counsel attaches 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," Rothgery v. Gillespie County, 554 U.S. 191, No. 07-440, slip op. at 20 (2008), a federal lawsuit was filed in December 2010. *Colorado Criminal Defense Bar v. John Hickenlooper*, No. 10-CV-02930-JLK-BNB (D. Colo.). The lawsuit was made moot when Governor Hickenlooper signed into law House Bill 13-1210 of the 2013 session, removing the requirement that misdemeanor defendants be made to confer with prosecutors without counsel.

The Office of the Colorado State Public Defender administers 21 regional defender offices across the state, each staffed with full time attorneys and substantive support staff. All administrative and support

In many justice courts, there are no prosecutors present and there are also no defense attorneys present. This leaves justice court judges responsible for all sides of the adjudicative process. Having judges judging, negotiating pleas, and advising defendants all at once creates a criminal process that is, in a word, non-adversarial.[91]

For example, in one suburban county's justice court, a woman appeared for her arraignment, accused of three separate animal control violations, each charge a class B misdemeanor.[92] "You have the right to have a lawyer," the judge began. "And, if you want, we can stop the proceeding until we can have a lawyer present. Would you like a lawyer or would you like to proceed today?" This presents the defendant with a "choice" that is in violation of the Supreme Court cases cited above on the right to counsel in plea negotiations and sentencing. The defendant responded that she would like to proceed, noting that it is "too stressful to come back."

This specific justice court holds "open court," which means defendants are required to appear in court within 14 days of the alleged incident, but the specific day they arrive in court is of their own selection. This policy choice is the justification for not having public counsel available at arraignment; the court has no way of knowing what defendants will show up, nor how many. Meanwhile, this county justice court has but one part-time private attorney to call upon as defense counsel, who is paid a flat annual fee for his services.[93]

Such policy choices, however, inevitably create additional, unfair pressures for the accused. "Most people will waive the public defender if they can't have representation immediately," observed one urban justice court judge. This strongly suggests that, were the opposite to be true – that if public defenders were available to advise clients at the first critical stage, as constitutionally required – defendants would seek the assistance of a lawyer with greater frequency. In the face of such additional pressure to forego an attorney, created by cost concerns of the justice courts, the defendants' failure to demand

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functions for these offices are handled by a central administrative office in Denver. An independent, five-member commission selects the system's chief attorney, the state public defender, who is therefore responsible for implementing and enforcing the commission's policies across the regional offices. In 2014, the State Public Defender received an additional $8 million to begin providing representation at all misdemeanor initial appearances.

91 As one senior official of the Administrative Office of Courts noted: "Putting the judge in the position of prosecuting, judging, and advising is a structurally weak position with respect to judicial independence."

92 UTAH CODE ANN. §76-9-301.

93 From this lawyer's perspective, is it fair if he is required to sit patiently in open court on a day in which no defendants choose to appear? He would get no extra pay for his time that day. Conversely, is it fair if he is required to represent each individual on a day in which 100 defendants choose to appear? Again, he receives the same flat fee no matter how many new clients he receives from the court on a given day. And so, open court serves to clear out a large number of his potential clients at their first appearance.

what should already have been provided to them does not constitute a valid waiver of that right.

Finally, many justice court judges expressed dislike for the reputation of the justice court system as being the "cash cow" of the local governments that established them.[94] But, by presenting the uncounselled defendant with the opportunity to reach a plea agreement with the prosecution or judge long before having the chance to consult with defense counsel, Utah's justice courts appear to place concerns of costs and efficiency above the minimum requirements of the Constitution.

III.
APPEALS FROM JUSTICE COURTS

Utah's appellate system is not set up to rectify any actual denial of counsel that occurs in justice courts. Although Utah's justice courts are now required to make an audio recording of proceedings, the justice courts are not courts of record – there is no official record from which cases can be appealed. Instead, defendants have a right to a "do over" in district court, known as a *de novo* review.[95]

But without counsel to advise them of this procedure, poor defendants simply do not know how to get a higher court to take a second look. In 2013, there were 79,730 total misdemeanors and misdemeanor DUI cases heard in all justice courts statewide. Only 711 of such cases were reviewed *de novo* in all district courts combined (an appellate rate of 0.89%). Further still, while a "do over" might change the outcome in a particular case, it can never change the underlying systemic flaws that resulted in the denial of the right to counsel in the first place.[96]

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[94] This position has been documented before. *See, e.g.*, Samuel P. Newton, et al, *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts*, Utah Law Review Online No. 1, 28 (2012), *available at* http://epubs.utah.edu/index.php/utahonlaw/article/viewArticle/762; Eric S. Peterson, *Nickeled and Dimed: Utah's Justice Courts Exact Their Pound of Flesh*, Salt Lake City Weekly 18, (May 27, 2010), *available at* http://e.cityweekly.net/cityweekly#2010/05/27/s1/?article=884757&z=49.

[95] *De novo* translated from Latin means: "from the new." When a district court hears a case de novo, it is not reviewing the justice court's decision for legal or procedural errors, like a direct appeal. Instead, it is essentially a new trial, whereby the district court is examining the same evidence previously presented in justice court.

[96] It is possible that other factors come into play as well. Consider the defendant who could have opted to pay his $90 traffic ticket, but who came to court to seek a better case outcome – only to leave with probation and a suspended jail sentence. (Side bar, page 29.) The lesson learned might be that the more he fights, the worse it will be for him. Defendants could be forgiven for thinking that a new hearing in district court – where even more serious crimes are adjudicated – would only make matters worse.

A CLOSER LOOK
CONSTRUCTIVE DENIAL OF COUNSEL IN JUSTICE COURT

Constructive denial of counsel can take many forms. One such form of structural interference is for appointed counsel to be provided in an assembly-line fashion, where one attorney handles one part of a case and then passes the client on to another attorney to handle the next court hearing, etc. Nationally referred to as "horizontal representation," this assembly-line method fosters long periods of time where defendants have representation in name only.

For example, the city of Ogden contracts with one private attorney to provide public defender services in its justice court. One judge explained, however, that the contract defender only appears in court one day per week, usually Fridays. For the remaining days – Mondays through Thursdays – the lawyer subcontracts with various other private attorneys to provide courtroom coverage.

All specifics, including the subcontracting attorneys' rate of pay, expectations, and responsibilities, are negotiated directly between the primary contract defender and the other private attorneys, and without input from the city or the justice court judges. And, there is no regularity with the public defender's scheduling arrangements, meaning judges often do not know which public defender will show up on a given day.

As a matter of practice, if the public defender assigns himself to Friday's court calendar for a given week, he calls around to other private attorneys to cover the remaining days that week. The coverage responsibilities, and even the attorneys selected, often change from one week to the next.

So, a defendant might appear for arraignment, enter a not-guilty plea, and be granted appointed counsel to assist her at her next court appearance – the pretrial conference. The judge explained that she used to have defendants talk to the public defender the morning of arraignment, but that it took too much time. Now the judge just enters a not-guilty plea and sets the case for pretrial. The attorney who will represent the defendant during the pretrial conference is whomever happens to have that calendar day.

This means, during the intervening three- to four-week period between arraignment and pretrial conference, the defendant has no way of knowing who her appointed lawyer will be. And so, no work will be done on her behalf. For appointed counsel, the pretrial is their entry point on the case, and the attorney who was present at arraignment has completed his work on behalf of the defendant.

Should that defendant choose to schedule her case for trial, rather than accept a plea offer at the pretrial stage, she will continue to have appointed counsel to assist her at that next hearing. But there is no guarantee that the same lawyer standing beside her at the pretrial will be standing beside her once more for her trial date. In fact, neither she nor any of the private lawyers have any idea who will be representing her on any future court date.

And so, during the intervening three or four weeks between her pretrial and trial date, the defendant who exercises the right to counsel and the right to trial is left entirely without an attorney. At the time when trial preparation is the most essential element in her defense, she is left with no lawyer to consult, no one interviewing witnesses or investigating the facts, no one filing motions, etc. At the day of trial, even if she is fortunate enough to be assigned the same private attorney to assist her for that court appearance, her lawyer is starting from scratch.

CHAPTER 3
CONSTRUCTIVE DENIAL OF COUNSEL
PART A: ACCOUNTABILITY & INDEPENDENCE

Determining whether a jurisdiction's indigent defense services satisfy the first prong of *Cronic* ("actual denial of counsel") is relatively straightforward: either the indigent accused has an attorney or not. Determining whether the jurisdiction's services satisfy *Cronic's* second prong ("constructive denial of counsel") is more complicated to assess and explain. This is because a public defense lawyer is indeed present in the courtroom, but systemic deficiencies prevent that lawyer from effectively advocating for the stated interests of each and every defendant assigned. Accordingly, the analysis of constructive denial of counsel is divided into three chapters explaining:

> *Chapter III*: How a lack of structural accountability and independence encourages constructive denials of counsel;
> *Chapter IV*: How systemic financial conflicts of interest encourage constructive denials of counsel; and,
> *Chapter V*: How systemic structures interfere with the sufficiency of time needed to effectively defend indigent defense cases.

This chapter explains governments' obligation to provide effective representation before detailing how indigent defense services are structured for district court in each of the ten sample counties. The chapter concludes with an assessment of whether each county's district court indigent defense services have the necessary independence and accountability to provide effective representation.

I.
THE RIGHT TO EFFECTIVE REPRESENTATION

In *Gideon v. Wainwright*, the U.S. Supreme Court declared it an "obvious truth" that anyone accused of a crime and who cannot afford the cost of a lawyer "cannot be assured a fair trial unless counsel is provided for him."[97] But what is often less obvious to state, county, and municipal policymakers is that the attorney provided must also be

[97] 372 U.S. 335, 344 (1963).

effective. Faced with competing financial priorities, government officials can incorrectly assume that so long as every defendant is provided with an attorney then the Sixth Amendment right to counsel is satisfied. That is not true.[98] Just as you would not go to a dermatologist for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot handle a complex felony case competently.[99]

In Utah, the practice of law is governed and regulated by the Utah Supreme Court. Failure to adhere to the state court's *Rules of Professional Conduct* may result in disciplinary action against the attorney – even loss of license to practice law.[100] Rule 1.1 of the Utah *Rules of Professional Conduct* requires all lawyers to be "competent" in carrying out their duties to clients.[101] Importantly, there is no exception to this rule. Attorneys must know what legal tasks need to be considered in each and every case, and then how to do them.

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.[102] Such specialties must be developed.

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[98] As the U.S. Supreme Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), a lawyer needs to offer the accused something more than a warm body: "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

[99] As Chief Justice Christine Durham said in her 2012 State of the Judiciary Address: "Most citizens are as knowledgeable about the laws and the rules as I am about the inner workings of my automobile. When my car breaks, I need an expert."

[100] While 49 of 50 states have adopted model rules for the legal profession, the state of Utah was early to do so in 1987. According to the Utah State Bar Office of Professional Conduct: "The practice of law in the State of Utah is regulated by the Utah Supreme Court. The Supreme Court has delegated to the Office of Professional Conduct ("OPC") the responsibility of investigating allegations that an attorney has violated the Rules of Professional Conduct and of prosecuting those allegations in accordance with the Rules of Lawyer Discipline and Disability." Utah State Bar Office of Professional Conduct, http://www.utahbar.org/opc/ (last visited Sept. 10, 2015).

[101] Utah Judicial Council, Rules of Judicial Administration, C. 13: Rules of Professional Conduct Rule 1.1. (Competence) (hereinafter "RPC"), *available at* http://www.utcourts.gov/resources/rules/ucja/ch13/1_1.htm ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[102] 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) ("The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because 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.").

The specialization of the legal profession, once thought of as cause for concern,[103] has been embraced in recent decades.[104] Now, in large part, it is accepted as a necessary fact.[105] Criminal defense is an especially complex specialty area of law.[106] As such, Utah's *Rules of Professional Conduct* require that public defense lawyers be minimally qualified to handle any case to which they are assigned. The attorney's ability to provide minimally effective representation is dependent upon his familiarity with the "substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction."[107]

Rules of Professional Conduct, Rule 1.1 suggests that longevity alone is no substitute for ability.[108] The most senior lawyer may be the least qualified to handle the most serious case. Attorneys may feel that they know how to interview the client, draft motions, and advocate at sentencing, and that they have all the tools they need from years gone by. But without constant honing, those tools lose their edge. For this reason, Rule 1.1 requires attorneys to maintain their competence.[109] Ongoing training, therefore, is an active part of the job of being a public defense provider.

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[103] Gary A. Munneke, *Why Specialize?* ABA J., Jan. 2009 ("The term 'specialization' has a checkered past. Traditionally, upon being licensed to practice law, lawyers were presumed to be qualified to provide services to clients in any substantive legal field. Specialization was viewed as a form of attracting new clients, which was prohibited under ethical standards until 1977, when the U.S. Supreme Court held in *Bates v. State Bar of Arizona* that a blanket prohibition of lawyer advertising was unconstitutional. In 1990, the Court, in *Peel v. Attorney Registration and Disciplinary Committee*, held that the bar could not categorically prevent lawyers from making communications about their specialties."), *available at* http://apps.americanbar.org/lpm/lpt/articles/bkr01091.shtml.

[104] John W. Reed, *Specialization, Certification, and Exclusion in the Law Profession*, 27 OKLA. L. REV. 456, 460 (1974) ("[T]he bar has not been willing to recognize specialization. The fact is specialization exists in the bar. . . . Specialization has long existed at the bar, and the question is not whether it exists but whether we recognize it.").

[105] Munneke, *supra* note 103 ("The reality of practicing law in the United States today is that individuals and law firms cannot do everything; they must choose to handle some legal work and decline or refer other work. As society has become more diverse, the law has become more complex. As more lawyers have chosen to concentrate their practice areas, the threshold of competence has increased in many fields. As clients have grown more sophisticated, they have increasingly sought lawyers with greater expertise in the areas of the clients' legal problems over lawyers with general legal knowledge of the law. Generalists simply cannot compete with specialists.").

[106] As the American Bar Association (ABA) explained more than 20 years ago, "[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." ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 and commentary (3d ed. 1992) (hereinafter "ABA STANDARDS FOR DEFENSE SERVICES").

[107] NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 1.2(a) (hereinafter "GUIDELINES").

[108] RPC, Rule 1.1, comment 2 ("A newly admitted lawyer can be as competent as a practitioner with long experience.").

[109] RPC, Rule 1.1, comment 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

Rule 1.1 makes clear there is no absolute level of training or experience a lawyer must achieve as prerequisite to being qualified to handle a certain case. "A newly admitted lawyer can be as competent as a practitioner with long experience."[110] However, that a novice attorney can become competent to handle a certain case is not to suggest that all novices *are* competent to handle any type of case. As the Study Committee notes: "Public defenders fresh from the bar exam should not be representing clients charged with rape of a child or aggravated murder."[111]

But, requiring attorneys to attend training for training's sake would also be counter-productive when it comes to achieving the constitutional demands of minimum effectiveness. As the Study Committee suggests, the maintenance of one's competence is not attained through the pursuit of an arbitrary number of continuing legal education (CLE) hours. In fact, the lawyer must be required to attend training "commensurate to the complexity and seriousness of the case" to which he is assigned.[112] In other words, attending CLE training in real estate law or insurance defense may satisfy the Utah State Bar's annual requirements,[113] but does nothing to achieve or maintain competence in the defense of the criminally accused. Training must be tailored instead to the types and levels of cases for which the attorney seeks public appointments. If the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is assigned no drug-related cases.

For these reasons, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,[114] require that the indigent defense system provide attorneys with access to a "systematic and comprehensive" training program,[115] at which attorney attendance is compulsory, in order to maintain competency from year to year.

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[110] RPC, Rule 1.1, comment 2.

[111] Study Committee Standards, *supra* note 14.

[112] *Id.*

[113] Utah State Bar, MCLE Requirements: Active Status Lawyers Complying 2013 and 2014 Requirements ("A minimum of 24 hours of accredited CLE which shall include a minimum of 3 hours of accredited ethics or professional responsibility. One of the three hours of ethics or professional responsibility shall be in the area of professionalism and civility. ..."), *available at* http://www.utahbar.org/mcle/mcle-requirements/ (last visited Sept. 11, 2015).

[114] Building upon 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 (hereinafter "NAC") 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 Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, c.13 (The Defense) (1973) (hereinafter "NAC Standards"), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense.

[115] *Id.* at Standard 13.16 ("The training of public defenders and assigned counsel panel members should be systematic and comprehensive.").

If a public defense provider does not have the "knowledge and experience to offer quality representation to a defendant in a particular matter," then the attorney is obligated to move to withdraw from the case or, better yet, to refuse the appointment at the outset.[116]

But if no one monitors the qualifications, training, and performance of attorneys, then no one knows who is or is not meeting their professional ethics, and a government's obligation to ensure effective representation is unfilled. This call for systemic quality control is reflected in the Study Committee's standards requiring each public defense system to "safeguard against both case-specific and systemic violations of the right to counsel."[117] The words "safeguard against" are proactive in nature, rather than reactive.[118]

Government, therefore, has an affirmative duty to:

1. Establish minimum standards related to:
   a. Public defense attorney qualifications;
   b. Requisite training to remain qualified; and,
   c. Performance expectations.
2. Provide access to training.
3. Monitor compliance with established standards.

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[116] *Id.*, see also GUIDELINES, *supra* note 107, at 1.2 (b) ("Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation," and at 1.3(a) ("Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.").

The requirement of public defense lawyers to withdraw from cases, rather than provide incompetent representation, is reflected in the Utah *Rules of Professional Conduct*, Rule 1.16.

[117] Study Committee Standards, *supra* note 14, Standard 7.

[118] The Oxford Dictionary defines the word "safeguard" as: "to prevent something undesirable" or to "protect from harm or damage with an appropriate measure." Oxford University Press, "*Safeguard*" *Definition*, OXFORD DICTIONARIES, *available at* http://www.oxforddictionaries.com/us/definition/american_english/safeguard (last visited Sept. 11, 2015).

II.

THE STRUCTURE OF INDIGENT DEFENSE SERVICES IN UTAH

As discussed previously, the Sixth Amendment to the United States Constitution requires effective representation[119] be provided to the indigent accused at all critical stages[120] of a criminal case for which the defendant may potentially be incarcerated.[121] In *Gideon v. Wainwright*, the U. S. Supreme Court made the provision of indigent defense services a state obligation through the Fourteenth Amendment.[122]

However, right to counsel services in Utah are administered under the adage that the government closest to the people governs best.[123] Numerous local agencies and officials spread across the state's 29 counties and 236 municipalities therefore share the responsibility for ensuring the sufficiency of public defense services provided in Utah's 36 district courts and 133 justice courts.[124]

Utah Code 77-32-302 provides for three indigent defense delivery models:

Defender office:	Full or part-time public defenders paid an annual salary. Unlike other states, no public defenders in Utah are government employees. Rather, defender offices are non-profit entities under contract to the county.

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[119] The constitutional imperative for effective representation is discussed at page 39.

[120] The critical stages of a criminal case are enumerated at page 21.

[121] Gideon v. Wainwright, 372 U.S. 335 (1963). The *Gideon* Court determined that the indigent accused has the right to public counsel in felony proceedings. The Supreme Court has since clarified that the Sixth Amendment requires the appointment of counsel in any case in which a defendant may potentially face a loss of liberty. The *Gideon* mandate now extends to: direct appeals, Douglas v. California, 372 U.S. 353 (1963); juvenile delinquency proceedings, *In re* Gault, 387 U.S. 1 (1967); misdemeanors carrying jail time as a potential penalty, Argersinger v. Hamlin, 407 U.S. 25 (1972); misdemeanors with suspended sentences, Alabama v. Shelton, 505 U.S. 654 (2002); and, appeals challenging an unagreed-to sentence as a result of a guilty plea, Halbert v. Michigan, 545 U.S. 605 (2005).

[122] *Gideon*, 372 U.S. at 343-45.

[123] This is true of many government functions in Utah, where citizens have access to local policymakers and public employees to resolve issues, rather than having to deal with large statewide bureaucracies centered in Salt Lake City.

[124] For example, although county commissioners are responsible for funding indigent defense services in district court, the elected commissioners generally do not provide direct oversight of those services. To varying degrees throughout the state, decisions about contracting for public defense services, attorney qualifications, and ultimately the competency of services rendered may involve judges and county attorneys. Funding for public defense in municipal justice courts commonly is a decision of a city mayor made in conjunction with city councils or commissioners, but oversight of the Sixth Amendment in the lower courts is generally thought to be the domain of either a city prosecutor or a justice court judge. In most county justice courts, however, the responsibility for public defense services generally follows from whatever oversight structure has been decided upon for district court representation.

Contracts:	Individual attorneys, consortia of attorneys, or law firm paid a set rate to provide primary or conflict services, or paid to represent specific case types.
Assigned counsel:	Where no contract system or defender office exists, the court appoints a private attorney paid at an hourly rate established by the court. However, Utah Code 77-32-304.5(2)(f) establishes caps on total compensation: $3,500 for a non-capital felony case; $1,000 for a misdemeanor; and, $2,500 for the direct appeal. (Compensation caps may be waived with prior court approval following a hearing.)

How these three basic models are employed across Utah's various district and justice courts requires further clarification. First, none of the three models are mutually exclusive. A county may employ a defender office for primary services, but use contract attorneys to represent those defendants with whom the defender office has a conflict of interest.[125] Additionally, service models may vary between district and justice courts within a county. That is, a county may employ a defender office for district court and contract with private attorneys for county justice courts. And, variation can occur between how a county delivers services in county courts and how a municipality within the county's borders chooses to organize services in its justice court.[126]

Moreover, within each delivery service model there can be significant variations in implementation. For example, the state's two most populous counties (Salt Lake County and Utah County) both employ a defender office. However, the defender office in Utah County is also the agency that selects attorneys for conflict representation,[127] whereas the defender office in Salt Lake County plays a different role. In Salt Lake County, the defender office is the funding agency for conflict representation, but the actual selection of private attorneys for conflict representation is a function of the district court judges.

The contract model has variations too. For district court representation, Washington and Weber counties contract with an individual attorney to administer contracts with private defense attorneys. Davis County similarly has a defense coordinator, but the position is an employee of county government rather than another private contractor. Contrastingly, there are no contract defense lawyer administrators in Cache, San Juan, Sanpete, Tooele, and Uintah counties, though all use a contract system to provide defense services.

[125] It is unethical for the same attorney or law firm to represent co-defendants charged with the same crime whose interests are at odds with one another. The "primary" system takes co-defendant #1 and the "conflict" system takes co-defendant #2. For example, Salt Lake County contracts with a private non-profit law firm – the Salt Lake Defender Association – to provide primary public defense services but conflict services are provided by private attorneys under contract.

[126] For example, a non-profit defender office provides primary services in the Salt Lake County and Salt Lake City justice courts, but the rest of the municipal justice courts in Salt Lake County operate their own contract systems.

[127] The defender office in Utah County contracts with seven private attorneys for conflicts.

Utah is one of just two states requiring local governments to fund and administer all indigent defense services.[128] Though it is not believed to be unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.[129] The State of Utah, however, has no institutional statewide presence, and a limited statewide capacity, to ensure that its constitutional obligations under the Sixth and Fourteenth Amendments are being met at the local level.

For example, at the outset of this project, no statewide government entity could detail how public defense services are provided in each and every district and justice court or give the names of all of the lawyers who represent the accused. Indeed, unbeknownst to policymakers, outside of the two largest counties (Salt Lake County and Utah County), the bulk of the indigent defense workload throughout the state is handled by a small number of private attorneys. (See side bar, next page.) This is important because Utah cannot determine for itself the effectiveness of its right to counsel services if it does not first know *who* handles public defense cases from one county to the next.

Moreover, though Section 301 of the Indigent Defense Act speaks of "minimum standards for defense of an indigent,"[130] the standards mentioned there do not address the full parameters of effective representation.[131] Other than the current work of the Study

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[128] The other state is Pennsylvania.

[129] In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so. *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, The 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.'") *available at* http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

[130] Section 301 of the Indigent Defense Act states: "(1) Each county, city, and town shall provide for the legal defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with legal defense standards as defined in Subsection 77-32-201(8)." UTAH CODE ANN. § 77-32-301. "Legal defense" as defined in the Utah Code "means to: (a) provide defense counsel for each indigent who faces the potential deprivation of the indigent's liberty; (b) afford timely representation by defense counsel; (c) provide the defense resources necessary for a complete defense; (d) assure undivided loyalty of defense counsel to the client; (e) provide a first appeal of right; and (f) prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings." UTAH CODE ANN. § 77-32-201(8).

[131] For an understanding of how performance standards can establish the full parameters of effective representation, readers need look no further than the State of Nevada. In January 2008, the Nevada Supreme Court issued Administrative Order ADKT-411, instituting performance standards for indigent

A CLOSER LOOK
DETERMINING WHO PROVIDES PUBLIC DEFENSE SERVICES IN UTAH

Given the various possible permutations in service delivery approaches (see discussion of Utah's indigent defense structures, page 44), identifying the lawyers who provide indigent defense representation in each of Utah's district and justice courts required extensive data analysis.

Utah has a unified court data collection system that houses a significant amount of information on indigent defense services. It is one of only a few states with a decentralized approach to right to counsel services that also collects robust indigent defense data. Significantly, the data appears to be reported uniformly by local court clerks across all jurisdictions and levels of court.

At the outset of this evaluation, the Study Committee requested information from the Utah Administrative Office of the Courts (AOC) on all criminal cases heard in all Utah justice and district courts (not merely those of the ten sample counties) for calendar years 2011-2013.[i] The AOC data[ii] reveals that, outside of the two largest counties, a relatively small number of private attorneys handle the majority of Utah's right to counsel workload throughout the state. Prior to this study, however, this simple fact was unknown.

To explain, the data showed that there are a total of 217 attorneys providing indigent defense services throughout Utah.[iii] The two institutional public defenders in Salt Lake and Utah Counties

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[i] The AOC produced two databases (one for district courts; one for justice courts) listing every attorney who handled even a single criminal case over the three-year requested time period. Mary Westby, Court of Appeals staff attorney, is recognized for serving as a resource on questions of law throughout the project and for acting as conduit to the Administrative Office of the Courts (AOC) regarding court data. George Braden, Management Analyst of the Administrative Office of the Courts (AOC), is thanked for responding to numerous requests for large amounts of data in a timely and professional manner. The authors of this report received the AOC district court data on June 6, 2014 and the justice court data on July 17, 2014.

[ii] The 2013 AOC data was sorted by court and by attorney, and the total number of cases was then arranged in descending order (from greatest to fewest). The district court data was sorted by "felony" cases and justice court data was sorted by "misdemeanor" cases.

[iii] A blind data review was conducted to test hypotheses regarding who provides indigent defense services in each of the ten sample counties. That is, researchers who did not participate in a particular site visit identified likely indigent defense providers based solely on the available data. Site team members who visited that county then provided site notes confirming the identity of the indigent defense providers.

For example, in 2013, the Tooele District Court processed 503 felony cases, and the attorney handling the case was identified in 474 of those cases. (29 did not have an attorney of record listed, an "unmarked" rate of 5.77%). Though 67 individual lawyers were named, 58 of them handled only two or fewer felony cases that year. Of the remaining nine lawyers, three handled 75% of all felony cases in which an attorney was identified. Additionally, the three attorneys had near identical felony caseloads (123 felony cases, 122 cases and 115 cases, respectively).

employ 77 county-funded attorneys. The remaining 139 individual private attorneys provide services under contract. Of those 139 contract lawyers, the majority (93) each have a single contract to provide indigent defense services in only one criminal court. The remaining 46 contract attorneys, however, serve as an indigent defense provider in multiple courts. On average, each of these 46 attorneys holds more than three indigent defense contracts.[iv] As a result, outside of the two largest counties (Salt Lake County and Utah County), the bulk of the indigent defense workload is handled by a surprisingly small number of contract defenders.[v]

Based on this data, a researcher unfamiliar with Tooele County services identified these three attorneys as likely being indigent defense providers for that jurisdiction, and also discerned that the Tooele District Court likely assigned cases to the contract lawyers on a rotational basis. Afterwards, site team members who visited Tooele County confirmed that the three identified attorneys were indeed the indigent defense providers for Tooele District Court and that the court tries to assign cases on a pure rotational basis when possible.

This method was successful at correctly identifying the defense providers (both primary and conflict) in each of the ten sample counties visited.

Extrapolating from the state-wide data and applying this same method, public defense providers were identified across Utah for the vast majority of courts (some courts have so few cases that a primary public defense provider could not be identified). The AOC data identifying individual attorneys' cases by court does not distinguish retained clients' cases from court-appointed cases (i.e., indigent defense cases). The data analysis methodology takes this into consideration. In most jurisdictions nationwide, the indigent defense caseload is the significant majority of the total caseload for all lawyers representing criminal defendants in a given court. Therefore, the working hypothesis is that the lawyer(s) handling the significant majority of cases for each Utah courthouse is probably doing so under contract with the local government.

[iv] Of the 46 private attorneys who provide indigent defense services in more than one court, each holds, on average, 3.11 indigent defense contracts. These contracts involve either multiple district courts, multiple justice courts, or, most often, a combination of both justice and district courts. One attorney, for example, is handling indigent cases for seven different courts (one district and six justice courts over two different counties).

[v] The 46 contract defenders together represented defendants in 13,304 of the 24,373 felony and misdemeanor cases handled by all non-institutional indigent defense providers. This means that approximately 55% of the private non-institutional indigent defense workload in Utah is handled by a third of the contract lawyers.

Committee, there is no statewide entity, organization, or official at the state level with the express authority and mandate to examine the state's compliance with its constitutional obligations on an ongoing basis.[132]

The absence of state oversight is perhaps most apparent in the realm of managing public defense workload.[133] Although local governments may believe the number of cases assigned to a particular lawyer in a particular courtroom in their county is not excessive on its own, there is currently no mechanism for government to know if the additional work that attorney is doing elsewhere (in a neighboring county, or in a juvenile court, or a justice court, or on behalf of their retained clients) pushes the attorney's workload to the point that the lawyer begins triaging the duty owed to each and every person appointed to them to defend.[134]

Like the state, Utah's local governments have limited capacity to ensure systemic effectiveness of right to counsel services. Without state guidance, counties are left to determine for themselves how best to monitor indigent defense services. With no

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defense attorneys in trial-level adult criminal, juvenile delinquency, and appellate representation. (This is the same order that, among other things: removed the judiciary from the oversight and administration of indigent defense; ordered case-weighting studies; promulgated a uniform indigency standard; and, required each county to submit local plans for the delivery of indigent defense services to the Supreme Court.)

Opponents of the performance standards claimed that *Strickland* specifically prohibits any comprehensive checklist of measures that bind a defender to performing specific tasks in every single case. Indeed, *Strickland* does prohibit the use of checklists in that exact manner. Performance standards, the *Strickland* Court acknowledges, are "guides to determining what is reasonable, but they are only guides." Strickland v. Washington, 466 U.S. 668, 688 (1984). However, opponents of the performance standards take this statement to mean, therefore, that performance standards are inherently meaningless.

But that is not what *Strickland* says. The *Strickland* Court is clear that a mandatory checklist does not pass constitutional muster – not because performance standards are meaningless – but because mandatory checklists "interfere with the constitutionally protected independence of counsel." *Id.* at 689. Imposing universal performance standards that must be followed always and forever would, in the words of the *Strickland* Court, "restrict the wide latitude counsel must have in making tactical decisions." *Id.* That is, there may be perfectly legitimate reasons for a defense attorney in a particular case to decide against, for example, filing a specific motion or conducting a specific investigation. To the *Strickland* Court, the freedom to make those independent strategic decisions, in consultation with the defendant, is preeminent and a core principle of due process.

In other words, just because there may be a perfectly good strategic reason for not conducting a thorough investigation in one, or even many cases, it does not logically follow that a lawyer never has to ever investigate any case. Indeed, a lawyer needs time to determine which particular cases warrant which particular actions. And that is the true value of performance standards – they serve as guides for what a lawyer should consider doing in each case. The system's obligation then is to ensure that each attorney has sufficient time to do so on behalf of each client and in every case.

[132] Despite the absence of a statewide entity charged with the oversight of local indigent defense services, the authors of this report find that the State of Utah has a limited capacity, as opposed to no capacity, to provide accountability. This conclusion is made because of the robust court data that is currently available.

[133] An in-depth discussion of public defense workload is detailed at page 77.

[134] The presence of institutional defender offices in Salt Lake and Utah counties precludes the issue of attorneys there working in more than one county or court, but the State of Utah still has no mechanism to monitor the competency of services rendered by those offices.

uniformity amongst counties in how services are delivered and monitored, the state has no local assurances that its constitutional obligations under the Sixth and Fourteenth Amendments are being uniformly met. This void on the state's part has allowed systemic deficiencies to take root that infringe on a defender's independence and cause constructive denials of counsel.

III.
THE ROLE OF COUNTY ATTORNEYS IN THE PROVISION OF INDIGENT DEFENSE SERVICES

In the more rural parts of the state, county attorneys are involved to varying degrees in the selection of defense counsel, the negotiation of defense attorney compensation, and the oversight of defense counsel performance. Such involvement is an undue infringement on the constitutional obligation to ensure independence of the defense function.[135]

Having county attorneys involved in right to counsel decisions means that the defender's courtroom adversary is the one ultimately responsible for whether the defender gets the next appointment or contract. But, as the U.S. Supreme Court states, "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.'"[136] Perhaps for that reason, such involvement of prosecutors is rarely seen anywhere in the country.

It is understandable why county attorneys frequently play this role in rural Utah. County policymakers often are not lawyers or constitutional scholars trained in the nuances of perpetually changing Sixth Amendment case law, and they rely on the county attorneys to advise commissioners on all other matters of law. And, given that county attorneys are sworn to uphold the laws of the state, including the right to counsel, it may not appear to be a conflict of interest to county administration to have those county attorneys select public defense attorneys, supervise their work, and approve trial-related expenses (e.g., experts, investigators, etc.).

Therefore, the involvement of county attorneys in indigent defense services is not malicious. Indeed, one rural county attorney very succinctly stated why he believes he can be fair in his involvement with right to counsel services: "I am elected by all voting members of my community. I must be fair to both victims and the families of victims

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[135] This position does not mean that prosecutors never have valuable insights to a public defense services. A system that provides independent oversight should always seek input and feedback from the prosecution.

[136] Polk County v. Dodson, 454 U.S. 312, 318 (1981).

as I am to defendants and the families of defendants. If I am anything less than fair, I could be voted out of office."[137]

But here is the problem with that position. A county attorney does not have to have malicious intent for there to be an infringement on the defender's independence to act in the stated interest of the accused; a county attorney does not have to state overtly that a public defense provider must not file too many pre-trial motions or request too many experts or investigators. Defense attorneys, either consciously or unconsciously, take into account what they think they must do to please a prosecutor when balancing their own financial self-interest with what is required of zealous advocacy.[138] For this reason, some states that, like Utah, lack a centralized indigent defense system, nonetheless explicitly ban the involvement of prosecutors in indigent defense services.[139]

In 2008, the elected county attorneys from across the state met to discuss the issue of defender independence and whether the prosecution should ever be in the business of administering public defense. In the end, it was decided that policymakers from each county should decide themselves what to do about the issue.[140] Perhaps not unexpectedly, some chose to leave county attorneys in charge of indigent defense, some chose to remove county attorneys from this role, and still others tried to create ethical screens within county attorney offices by assigning oversight of defender services to a civil deputy county attorney.

Therefore, the degree to which prosecutors are involved with indigent defense services exists on a spectrum in Utah's counties. Counties with fewer residents tend to have more involvement of county attorneys, while counties of greater population tend to have more fully developed indigent defense systems that have safeguards to insulate public defenders from prosecutorial interference, as discussed below.

San Juan and Tooele Counties: County attorneys in San Juan and Tooele counties exert significant influence over the right to counsel. The San Juan county attorney advises the commissioners on matters of indigent defense, and right to counsel services are a line item in the prosecutor's budget. The county contracts with a single attorney to handle all indigent defense appointments. That defender is required to pay for all necessary

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137 Though this sentiment is very respectful and balanced, it belies the fact that electorates can and do make decisions from time to time that run contrary to the needs of effective defense advocacy – especially if the electorate votes passionately in response to a particularly egregious crime. The right to counsel must provide the same level of advocacy, regardless of the decisions of the electorate.

138 A district court judge who is a former county attorney in a rural county explained the dilemma. "I'm the prosecutor and I'm choosing my opponent? Ironically, I was in the best position to know who the best lawyers were. But I would like to somehow take it out of the county attorneys' control." Another district court judge in a rural county noted: "It always bothered me that the county attorneys were calling the shots on who would be a public defender and who wasn't. It doesn't seem right to have the prosecutor involved. It leaves open the potential for abuse."

139 For example, Washington State has a law prohibiting prosecutors from selecting defenders. *See* WASH. REV. CODE §10.101.040 ("City attorneys, county prosecutors, and law enforcement officers shall not select the attorneys who will provide indigent defense services.").

140 Interview with a county attorney who was present at and participated in the meeting.

expenses out of the flat fee, including "research, paralegal assistance, and legal clerks, copies, court fees," etc., but the lawyer can apply for funding to cover any "extraordinary unforeseen expenses." The contract, however, does not define such extraordinary expenses. And so the lawyer covers the cost of investigation out of her monthly pay.

Similarly, Tooele County contracts with three private attorneys who are appointed on a rotational basis. Requests for trial-related expenses by public defenders are made to the county attorney.[141] Though Tooele County has limited access to indigent defense training, there is no such allowance in San Juan County.

Uintah County: In Uintah County, the county attorney tried to create an ethical screen by having a civil deputy attorney perform oversight of the indigent defense function, including the drafting of contract language and making recommendations to the county administration on defense contractor hiring. Three private lawyers share the felony caseload in district court. A fourth handles the county justice court. The contract lawyers share conflicts amongst themselves (e.g., cases involving multiple co-defendants).[142]

Uintah County periodically solicits bids from private attorneys for public defense services. Individual applications are vetted through a review committee, which includes the civil deputy, the county's human resources director, the clerk auditor, a county commissioner, and a retired judge.[143] Despite this structural accountability, the hiring committee does not provide *ongoing* oversight. Nominally, the private lawyers' contracts include a requirement to submit quarterly reports to the county commission, yet it seems this requirement is frequently left unmet.[144] And so, without objective data, the ongoing oversight of public defense services by the civil deputy relies heavily on the prosecution's day-to-day observations. Ultimately, the conflict is not resolved because the civil and criminal deputies all report to the same elected county attorney.[145] Still,

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[141] In a correspondence dated August 5, 2015, former Tooele County attorney and current Third District Judge L. Douglas Hogan states that Tooele County "Public Defenders have a separate budget (although contained as a subset with the County Attorney's budget) and appear before the County Commissioners during the budgeting process to advocate budgetary issues directly with the Commissioners. Requests for additional funds (investigators or experts) are processed through the County Attorney's Office because that is where the funding is located but are not controlled by the County Attorney. There has never been a request for additional money that has been declined."

[142] A fifth attorney handles the contract for juvenile court. If a case arises with more than five co-defendants, the county hires outside counsel on an as-needed basis.

[143] Sitting judges are prohibited from serving on the selection committee in Uintah County. "If you're a sitting judge, you're going to have a conflict," the civil deputy county attorney explained. The county attorney's leadership team stressed that the county commission takes its constitutional obligations seriously, and the selection of lawyers to do the work is no different. "Everybody works under the assumption that if you get a bar license, then you can go practice law," said the county attorney's felony unit chief. "But criminal defense has a different level of competence required."

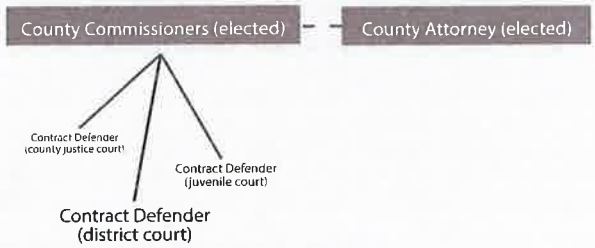
[144] In fact, one lawyer suggested the oversight burden rests with the county government: "We're supposed to be periodically reviewed – maybe annually – but I haven't done one yet."

[145] For this reason, criminal justice stakeholders in other counties find such ethical screens insufficient to remedy the systemic conflicts involved. Also, the least populated counties generally have small county

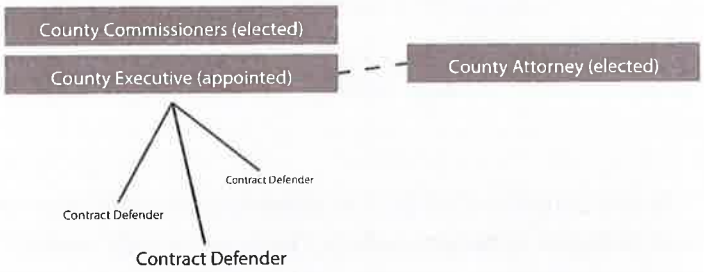
A CLOSER LOOK
INDIGENT DEFENSE STRUCTURES IN UTAH'S SMALLER COUNTIES

The state of Utah delegates to each county the responsibility for providing right to counsel services in the district courts, and each county does so by a method of its own choosing. The degree to which prosecutors are involved with the indigent defense services exists on a spectrum in Utah's counties. Counties with fewer residents tend to have more involvement of county attorneys, while counties of greater population tend to have more fully developed indigent defense systems that have safeguards to insulate public defenders from prosecutorial interference.

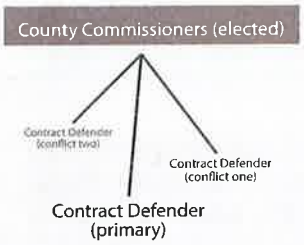
TOOELE COUNTY



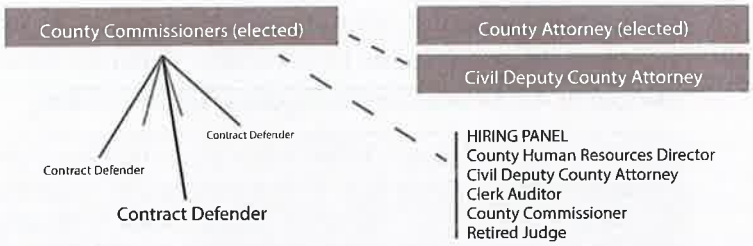
CACHE COUNTY



SANPETE COUNTY

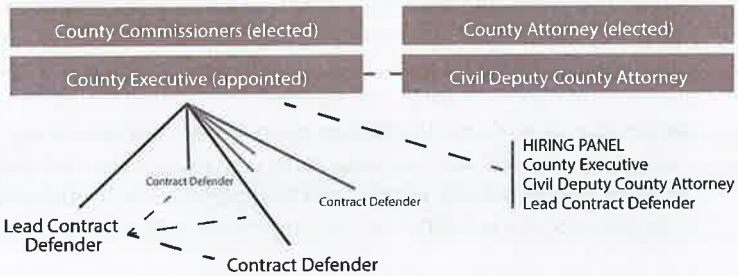


UINTAH COUNTY



SAN JUAN COUNTY

WASHINGTON COUNTY



Uintah is acknowledged for creating a more independent process for nominating attorneys to take public defender cases.

Cache County: In Cache County, three private attorneys split the district court caseload evenly. Cache County policymakers do not otherwise believe the active supervision of its contract defenders is an appropriate role for the administration to play. To them, the attorneys hired are independent contractors and government interference should be avoided. The problem of self-oversight is that it is difficult for people with no other outside experience to judge their own services against prevailing national standards.[146] Nevertheless, in the absence of any other oversight, the county executive relies on the prosecution for feedback on attorney performance.

IV.
ACCOUNTABILITY ISSUES IN COUNTIES WHERE COUNTY ATTORNEYS ARE NOT INVOLVED IN THE OVERSIGHT OF INDIGENT DEFENSE SERVICES

In the counties that do not allow county attorneys to be involved in the administration of indigent defense services, there are a wide variety of practices related to defense attorney selection, training, and performance accountability. At one end of the spectrum is an absence of any system at all of ongoing training and supervision. At the other end are the more populated counties that have created independent indigent defense systems with ongoing training and supervision. However, even these more developed indigent defense systems have conflict defender services that are not held to the same standards as the primary indigent defense services.

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attorney staffs. For example, in San Juan County, the elected county attorney is a part-time position and he has no lawyers assisting him. There is no separation of civil and criminal duties – the county attorney handles both – and so the creation of ethical screens, by passing oversight of public defense services to a civil deputy, is not an option in such counties even if it did resolve the conflict.

146 *See* Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2013). The core conclusion of Professor Eldred's research is that indigent defense lawyers, like everyone, are influenced by a number of psychological factors (called "cognitive biases and heuristics") that, under certain conditions, make it hard for them to appreciate their own limitations. The result is that many lawyers do not realize when they are providing subpar performance to their clients. First, people experience what is known as "confirmation bias." This is the tendency to seek out, interpret, and remember information in a manner that supports a pre-existing belief. The second and related concept is "motivated reasoning." Not only do people seek to confirm pre-existing beliefs, but they also reach conclusions that they prefer. Third, because of the general desire to think well of oneself, people tend to experience an "overconfidence bias," including the tendency to overestimate one's abilities to act competently and ethically when confronted with difficult dilemmas.

Sanpete County: The Sanpete County elected county attorney took the step of removing his office entirely from the administration of indigent defense services, and instead passed the administration of the right to counsel back to the county commission itself. Sanpete County has a standing contract with one private criminal defense lawyer to serve as public defender, and two additional private lawyers are under contract for conflict cases, in all district court, juvenile court, and county justice court matters.

Most criminal justice system stakeholders interviewed in Sanpete County believe the removal of the county attorney's office from the oversight of the public defense system was sound policy. And, indeed, the county attorney deserves recognition for maintaining independence from his courtroom adversaries. However, the decision leaves Sanpete County with a gap in oversight – one the county commission acknowledges.[147] Given the choice between non-qualified supervision from the commissioners and conflicted supervision from the county attorney, the county is left opting for no supervision at all over the public defense function.

Washington County: Washington County contracts with a private attorney to serve as the lead defense attorney. The lead attorney handles a percentage of public defense cases and is paid an additional sum to coordinate indigent defense services for the county. That attorney then recommends other attorneys to the county to contract with for public defense services, effectively removing the county attorney from the process of defense attorney qualification.

This structural design toward independence too is to be commended. Unfortunately, when Washington County's lead contract defender was asked whether his status as lead attorney included any supervisory responsibilities over the other contract lawyers, he indicated that it does not. Therefore, Washington County has no real independent system of accountability.

Weber County: Prior to 2010, Weber County contracted for public defense services with a non-profit corporation called the Public Defender Association (WCPDA). The corporation had an independent board, a central office, a training budget for attorneys, and two secretaries. However, none of the trial lawyers were full-time employees of the corporation. Rather, private attorneys were simply selected by the corporation's directors as sub-contractors to handle the direct representation of clients.

In 2010, Weber County opted against renewing its contract with WCPDA, causing the non-profit corporation to dissolve. In its place, the county created a new system of individual contracts with a consortium of private attorneys. The greatest difference between the old and new system is that, rather than being subcontractors of a non-profit association, the individual lawyers now are selected by, and contract directly with, the

[147] Commissioners feel they lack the expertise necessary to actively supervise contract defenders. To fill that gap, the commission chair explained: "We get feedback from our prosecuting attorney."

county administration.[148] And, in the place of the non-profit public defender association, a single private attorney – the public defender coordinator – serves as the administrative liaison to the county attorney's civil deputy on contractual and budgetary issues. With neither the county administration nor the coordinating attorney holding supervisory responsibility over the contract panel, Weber County therefore has limited accountability to ensure effective representation.

Davis County: Davis County went in a different direction, taking its coordinating defense attorney position in-house, thereby making the public defender a department of Davis County government.[149] The public defender department is small – it consists of an executive attorney and a paralegal – and is administratively placed within the county's human resources division. As such, the public defender director reports directly to the county's personnel director.[150] Unlike the other counties discussed, the public defender director in Davis County is expected to provide a level of oversight of contracted panel attorneys.[151] And indeed, with one managing attorney responsible for coordinating a loosely affiliated panel of private contract defenders, Davis County's contract system comes closest of the less populated sample counties to rendering basic accountability over services.[152]

However, it remains a system of limited oversight, with no ongoing, preemptive, and objective review over its attorneys. The defender director only occasionally conducts court observations. To be fair, court observation is an important method of supervision, but so too is the active auditing of case files and analysis of objective data. The defender director acknowledges as much. "We have no reporting requirements of our

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[148] The change also achieved a cost savings for the county of approximately $100,000 in central office support staff, rent, and training costs. For example, under the old model, each contract attorney received from the public defender association a stipend of $1,000 per year that they could put toward the cost of CLE training and events. The stipend was eliminated from the new model. Instead contract defenders must now cover the cost of any training they desire from their take home pay.

[149] To Davis County policymakers, it is important that the county attorney's office has no role in the budgeting process for public defense services, selection of individual contract lawyers, and the drafting of contract language. "We should be out of everything," said the county attorney. "If we're going to have an adversarial system, then you can't have the prosecution overseeing defenders." The ethical screens established elsewhere are insufficient. "There is nothing good with that arrangement. Placing it under the civil division chief would not satisfy the conflict of interests." In a correspondence dated August 18, 2015, Davis County Legal Defender Director Todd Utzinger notes that "[m]embers of the Davis County Board of Commissioners shared the concerns expressed by the county attorney and responded by creating a fulltime legal defender coordinator position independent of the county attorney's office."

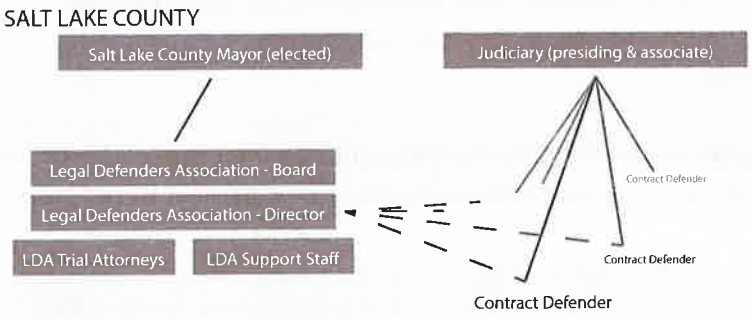
[150] It would be a mistake to consider this agency a traditional public defender office. Instead of a team of full-time staff attorneys, a panel of private contract attorneys provides direct client services.

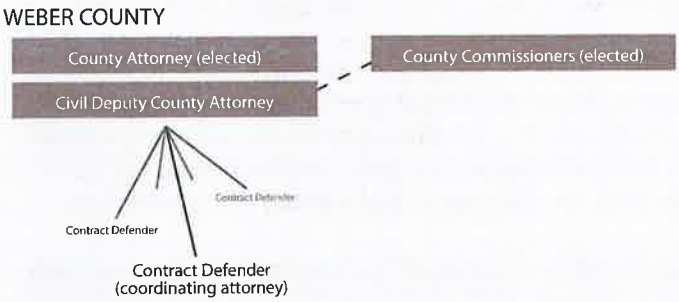
[151] Each public defense contract in Davis County is for a three-year term, and the county can terminate the agreement without cause after providing the contract defender with 60 days of notice.

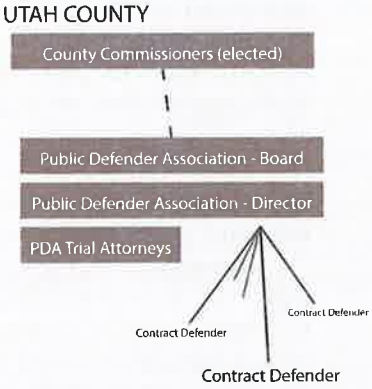
[152] For example, both the defender director and the county's personnel director noted they are in close, almost constant communication. This allows the county leadership to focus on big-picture issues, without concern they are abdicating their management responsibilities. "We sign the contracts and approve the budget," said the county commission chair, "but otherwise we rely on the defender director and the personnel director to manage the day-to-day."

A CLOSER LOOK
INDIGENT DEFENSE STRUCTURES IN UTAH'S LARGER COUNTIES

The state of Utah delegates to each county the responsibility for providing right to counsel services in the district courts, and each county does so by a method of its own choosing. The degree to which prosecutors are involved with the indigent defense services exists on a spectrum in Utah's counties. Counties with fewer residents tend to have more involvement of county attorneys, while counties of greater population tend to have more fully developed indigent defense systems that have safeguards to insulate public defenders from prosecutorial interference.







legal defenders. They used to have to give a quarterly report of what cases they have. But we don't require that anymore." Additionally, Davis County's legal defender program has no ongoing training program for new attorneys.[153]

Utah County: The Utah County Public Defender Association (PDA) was created as a public-private partnership effort in 1993.[154] Being a non-profit organization, the director is selected by and reports to the PDA board of directors. Although Utah County had a role in PDA's creation, neither the county commission nor the county attorney's office has a role in selecting the members of its board of directors. PDA's leadership is thus independent of county government and, beyond the annual contract with PDA, Utah County government is uninvolved with the administration of right to counsel services. Instead, the director receives the annual approval of his board to create full-time and part-time attorney and non-attorney positions using the contract funds, and then has full discretion over internal personnel matters.[155] The system is independent.

However, accountability is still limited, because the PDA board has no real oversight role.[156] The board sets no standards for attorney performance and there is no ongoing performance review. That being said, PDA has some level of quality review built into the system. For example, though there is no formal training, new attorneys are not assigned to cases for the first six months. Instead, new attorneys sit second-chair on cases of more experienced attorneys.[157] PDA also provides ongoing monthly training through its in-house CLE program.

However, this same level of quality assurance does not extend to conflict cases. Currently, Utah County has seven lawyers who are selected by the PDA director to provide

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[153] "Training is another area that I've thought about building up," said the county's defender director. "Everybody is required to keep up with CLE. [The Utah Association of Criminal Defense Lawyers] does lots of training sessions that are really good. But I don't have any periodic meetings with lawyers. Informally, I see them a lot. But there are no set staff trainings."

[154] For many years, a well-regarded private law firm handled all public defense services under a flat annual contract arrangement with the county. In 1993, however, they lost the contract when another firm underbid them. Shortly thereafter, Utah County felt they had made a significant mistake in their choice of contractor, and rather than merely cancelling the contract and renewing ties with its former contracting law firm, the county instead elected to change the method of providing services entirely. The non-profit agency started small; in 1999, there were only four attorneys. Another two attorney positions were added in 2003. But then, as demand for right to counsel services ballooned that decade, the Public Defender Association grew at a rapid pace. By 2012, the office had 12 trial attorney positions and one additional lawyer handling appeals.

[155] Currently, PDA employs 18 attorneys (including the director) and a team of paralegals and administrative staff. Beyond the director, the assistant director and chief counsel positions are based on seniority (i.e., there is no extra merit or selection criteria considered in filling such positions; they automatically go to the longest-tenured PDA lawyers).

[156] "It's not terribly active," the director explained. "It's necessary to have a board to have a non-profit corporation, but in all honesty [the Association is] run right here from my chair."

[157] PDA's 14 trial attorneys are assigned in teams of five to individual judges' courtrooms. Each lawyer is assigned to the courtrooms of two judges and, with each judge having two calendar days per week, each lawyer provides representation for four days of court per week.

conflict services. These conflict lawyers operate under contracts, let by the PDA out of the PDA budget, that pay a single flat rate for an unlimited number of cases. While the primary system has its own internal training approach, there is no training required of the private conflict lawyers.[158]

There is also a clear conflict in having the primary defender system responsible for the administration and funding of conflict services. The reasons why a judge or county attorney can never provide supervision are the same reasons prohibiting the primary defender system from properly supervising conflict services. That is, because of confidentiality and conflict of interest rules, the primary system cannot review case files, discuss motions practice, or exercise anything resembling supervision over the services provided by the conflict lawyers. In these ways, the conflict system in Utah County shares the same structural flaws as other less populated counties' primary systems.

Salt Lake County: Like Utah County, Salt Lake County has a more developed indigent defense system with many internal safeguards to ensure effective representation in the primary system, but lacks the systemic safeguards to ensure the same level of services for conflict representation.

The non-profit Salt Lake Legal Defenders Association (LDA) was originally established as one of many pilot programs nationwide using federal grant dollars to provide felony representation immediately following the *Gideon* decision. After showing the early success of the non-profit model, the county took over the funding obligation from the federal government. Today, LDA operates under an annual contract with the county for district court and county justice court services. A separate LDA contract with Salt Lake City provides for misdemeanor representation in the municipal justice court.

LDA's combined contracts allow for a total staff of 117 employees, including 62 county-funded and 9 city-funded attorney positions. Eight of those 71 attorneys are supervisors who, in addition to their regular caseload duties, seek to ensure quality control within the trial and appellate divisions. LDA also has a team of investigators, social workers, paralegals, law clerks, and secretaries.

LDA is strong when it comes to ongoing training and supervision of its staff, resulting in high-quality felony representation. Unlike public defender agencies of its size across the country, LDA does not have a formal training division or full-time training director. Nevertheless, the misdemeanor division director provides an orientation and training program for new attorneys assigned to the misdemeanor department. The misdemeanor department is the "training ground," with lawyers spending usually three or

[158] For example, one conflict lawyer passed the bar in October and by January was on the conflict panel handling felony cases before the district court. Again, there is no constitutional right to a lawyer who has received a certain number of hours of training. Perhaps this conflict lawyer was qualified to handle a felony caseload three months after passing the bar exam. As discussed above, that a novice attorney *can* become competent to handle a certain case is not to suggest that all novices *are* competent to handle every type of case. In Utah County, however, the government cannot be certain either way.

four years trying misdemeanors before handling felonies. The appellate director then provides an advanced training program on the appellate process for lawyers moved up to the felony division. Further still, LDA offers a monthly in-house CLE program to all lawyers run by LDA supervisors.[159] LDA ensures lawyers have access to external seminars as well, including some national training opportunities. Everyone gets $700 in seminar money per year that they can use at any time, and all misdemeanor attorneys go to nationally sponsored trainings.[160]

LDA ensures staff attorneys are appointed to cases for which they are sufficiently qualified. For example, lawyers spend another two or three years in the felony unit before the LDA director assigns them any homicide cases. Additionally, staff lawyers cover certain judges' courtrooms and are assigned to teams based on the days on which each assigned judge holds calendars. For example, the "Thursday" team is a team of 19 lawyers covering five judges' courtrooms. When making assignments to those 19 lawyers, the LDA director looks at the complexity of the cases, the number of open cases each attorney has, and subsequently assigns cases accordingly.

However, while LDA is able to provide excellent representation to many clients in the Salt Lake District Court, it is not able to guarantee the same level of quality to all defendants. LDA is contracted to pay for conflict representation.[161] Instead of the LDA director choosing conflict counsel, a panel of the district court's leadership – the presiding judge, the associate presiding judge, and the district court administrator – selects private attorneys for conflict services.[162] Conflict lawyers are not required to attend any specialized training, beyond the annual CLE requirements of the Utah State Bar. Nor does the selection process for the conflict panel envision active supervision or quality control.[163]

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159 Those trainings touch upon immigration, the state's Adult Probation & Parole division, problem-solving courts, jury issues, updates in case law, and ethics & civility.

160 Specifically, the non-profit National Criminal Defense College in Macon, Georgia conducts seminars and training sessions for criminal defense lawyers. *See* http://www.ncdc.net. Also, the non-profit National Defender Training Project has been hosted regularly as a summer program of the University of Dayton School of Law for more than five years.

161 LDA receives separate budgets from Salt Lake County for primary and conflict services. All funding for conflict representation is separate, and the money is not taken out of the LDA primary budget when expenses for experts or investigators for the conflict attorneys are approved. Should that conflict budget be depleted, the LDA director requests additional funds on behalf of the conflict attorneys.

162 "We approve attorneys on a yearly basis," said the presiding judge. "We make the decisions [on who will get a contract], and LDA carries out our decisions."

163 The LDA budget includes funds for experts and investigative resources for the conflict system. Like Utah County's indigent defense system, therefore, the conflict lawyers must apply to the primary system for access to such funds. Just as the primary system cannot review the performance of the conflict lawyers, the primary system cannot review for quality the efficacy of the conflict system's financial expenditures. The LDA director indicated that he has never turned down a request, because he thinks it is a conflict. With each conflict lawyer's request for expert services approved as blanket policy, the purpose of requiring the lawyers to submit a request in the first place is rather limited. As the LDA director explained: "It's just a way of keeping track of the dollars."

Though Utah County and Salt Lake County are to be commended for their approaches to ensure operational independence[164] and to train and supervise attorneys in their primary systems, neither county has a mechanism for ensuring minimum constitutional demands are met in conflict cases.[165] The Constitution does not differentiate between the first person accused of wrongdoing and a co-defendant. Government has an obligation to ensure that every person accused of a crime has access to the same minimum level of effective representation to which all are constitutionally entitled.

Perhaps most importantly, without additional structural protections, the operational independence the non-profit model provides remains at risk of government control. As the Weber County example demonstrates, there is nothing to guarantee that future county government officials will not simply do away with the non-profit legal defender model altogether by failing to renew the contract.[166] And so, where the right to

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[164] Operationally independent systems have solved the personal interest conflict that would otherwise prevent a lawyer from zealously advocating for an individual defendant in an individual case. In other words, the individual lawyers employed by those systems are not concerned from year to year with the renewal of their employment. As one district attorney noted: "A healthy model has defense lawyers filing motions – we may feel they're frivolous – but at least [the defense lawyer] is not thinking 'geez, if I file this motion, am I going to lose this contract?'"

Structurally independent systems are stronger still. They are operationally independent, such that the lawyers employed are free to zealously defend the clients to whom they are assigned. But the system itself is only structurally independent if the system does not risk retaliation (such as reduction of services, or loss of a non-profit's contract) for advocating for the rights of those defendants who should receive right to counsel services but are not, as one example.

[165] As noted before, the absence of oversight structures does not mean that the right to counsel services provided are constitutionally inadequate. Many stakeholders interviewed expressed their belief that the lawyers currently providing conflict defender services in Salt Lake County are of uniformly high quality. Nevertheless, the county's indigent defense structures do not provide an independent mechanism to actively monitor the conflict program for continued quality, nor to address areas of concern.

[166] This concern is not a mere abstract for Salt Lake County's non-profit model. In fact, according to a July 6, 2015, report of the Salt Lake Tribune, the county government is actively "rethinking how best to provide legal counsel for indigent offenders — a $17 million bill each year." *See* Mike Gorrell, *Jury's Out on Salt Lake County's Defense of the Indigent*, SALT LAKE TRIB., July 6, 2015, *available at* http://www.sltrib.com/home/2686546-155/jurys-out-on-salt-lake-countys. Ostensibly, the purpose is to increase parity between prosecutor and defender salaries, which is intended to achieve a higher level of quality representation for the indigent accused. Nevertheless, one option on the table for debate "would be to scrap the contract with the Legal Defender Association and to put the job out for bid." Further still, there is nothing to prevent a future Salt Lake County administration from considering the same structural changes for reasons less constructive to the indigent accused.

The non-profit defender model has been overhauled elsewhere in recent years as well. Prior to recent changes, King County (Seattle), Washington provided right to counsel services through four non-profit legal defender offices that shared conflicts. In Dolan v. King County, 258 P.3d 20 (Wash. 2011), the Washington Supreme Court affirmed a lower court determination that employees of the public defender agencies should be considered county employees for purposes of participating in the public employee retirement fund because they serve a basic government function. Following that decision, King County refused to renew the contracts with the non-profits and, instead, created a new county government agency to provide right to counsel services.

counsel is subject to such structural influence, the non-profit is liable to weigh operational decisions (even where such decisions may be to the detriment of the indigent accused) against the potential loss of its annual contract.[167]

[167] For example, when an entire category of defendants receives a reduced level of services (or no services at all), the non-profit is left with a choice. The non-profit could (and should) push for the funds necessary to provide effective services to all defendants, as each defendant's individual constitutional right. But if the government is already on record considering less-costly options, *see supra* note 166, the non-profit has a clear incentive to rationalize the reduced services it provides rather than risk its very existence. In many ways, this is not far removed from the 10% cut scenario discussed on page 13.

CHAPTER 4
CONSTRUCTIVE DENIAL OF COUNSEL
PART B: FINANCIAL CONFLICTS OF INTEREST

Each and every defendant has a right to effective representation that is free from conflicts of interest. This is because trust is central to the proper functioning of our American system of justice and is a principal tenet upon which the entire legal profession is founded.[168]

In September 2013, an ethics panel of the Utah State Bar was asked to revisit the question of the lawyer's "duty of loyalty" to the client. Maintaining undivided loyalty to the client's interests, the ethics committee noted, is a fundamental duty of all lawyers. But it is especially "heightened for the criminal lawyer by the duty of loyalty under the Sixth Amendment to the United States Constitution."[169] In other words, all lawyers have an ethical obligation to preserve the client's confidence and trust. But for the appointed lawyer representing the criminally accused, loyalty is not a question of aspiration or ethics alone; it is a constitutional imperative foundational to the fairness of the entire criminal process.[170]

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[168] This tenet is accepted as a bedrock principle of the practice of law in Utah, just as it is nationally. For example, among Utah lawyers, even in the midst of the nationwide debate during the turn of the 21st century regarding the advent of multi-disciplinary practices (whether the very existence of MDPs threatened the future of the legal profession), the attorney's "loyalty to the client" was the universal measure used by proponents and opponents alike in weighing such deep existential questions. See, e.g., Stephen W. Owens, *Keeping Our Core Values (and Sanity) in the Internet Age*, 23 UTAH B.J. 8 (2d ser. 2010) ("These and other changes offered by the Internet Era bring speed and efficiency. However, we need to be careful that we do not lose our core values as a profession: Trusting relationships, understanding client needs and goals, civility, confidentiality, and competence."); Mark C. Quinn, *The MDP Question: Should We Board the Train to the Future or Lie Down in Front of It*, 14 UTAH B.J. 27 (2d ser. 2001) ("The debate over whether to allow Multi-Disciplinary Practices (MDPs) to exist as legitimate entities under our rules of professional conduct centers around the question of whether our profession can maintain its core values (e.g. independent judgment, confidentiality, attorney-client privilege, loyalty to clients and competence) while permitting the convenience and competitive advantages created by permitting lawyers to practice alongside, and share fees with, non-lawyers."); Charles R. Brown, *That Vision Thing - A.K.A. The Future of Our Profession*, 12 UTAH B.J. 6 (2d ser. 1999) (an accounting firm had "... failed in its adherence to the values of client loyalty, confidentiality, and avoidance of conflicts.").

[169] UTAH STATE BAR, ETHICS ADVISORY OPINION 13-04 (issued September 30, 2013).

[170] *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 aris-

The Utah courts and legislature alike have reaffirmed the core values of the legal profession, which include the lawyer's duty to maintain undivided loyalty to the client and to avoid conflicts of interest with the client. The *Rules of Professional Conduct* expressly prohibit all lawyers from representing a client whenever a conflict of interest exists, commenting further that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."[171] It is, therefore, imperative that the attorney avoids and eliminates any conflict of interest between himself and his client – whether real or merely perceived – or else the attorney must withdraw from representing the client with whom the conflict exists.

While the *Rules of Professional Conduct* govern all areas of the legal practice, in 2012 the Utah State Legislature reaffirmed the need for public defense services specifically to be provided free from conflicts of interest, establishing the "undivided loyalty of defense counsel to the client" as a "minimum standard" for the defense function.[172]

The statutory and ethical standards discussed above reflect the dictates of U.S. Supreme Court case law. The Court stated in *Glasser v. United States*: "'[A]ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[173] Government, therefore, has a constitutional obligation to ensure the systems established for providing Sixth Amendment services are free from conflicts that interfere with counsel's ability to render effective representation to each defendant.

So, what is a conflict of interest? According to the Utah Court's *Rules of Professional Conduct*, conflicts come in three basic categories:[174]

> *Another Client*: an attorney cannot represent two or more clients whose interests might be at odds with each other; separate representation must be provided for all co-defendants in a particular criminal case.

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es 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 untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.").

171 RPC, commentary to Rule 1.7.

172 UTAH CODE ANN. § 77-32-301, citing UTAH CODE ANN. § 77-32-201(8), which defines "legal defense" as: "'Legal defense' means to: (a) provide defense counsel for each indigent who faces the potential deprivation of the indigent's liberty; (b) afford timely representation by defense counsel; (c) provide the defense resources necessary for a complete defense; (d) assure undivided loyalty of defense counsel to the client . . . ."

173 *Glasser*, 315 U.S. at 70.

174 RPC, Rule 1.7(a)-(a)(2) ("[A] lawyer shall not represent a client if . . . [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

> *Third Person*: an attorney cannot represent a defendant if, for example, the attorney already represents a client in a different case who happens to be the state's main witness to the alleged offense of the new defendant.
>
> *Personal Interest*: an attorney cannot represent a defendant if the attorney's personal interests are in direct conflict with the client's case-related interests.

Just as an individual attorney in these scenarios has to withdraw from representing the person with whom there is a conflict, so too does the entire law firm in which that attorney practices.[175] Because of this, conflicts of interest involve systemic considerations as much as they do a single lawyer and his client. Indeed, as the Study Committee's standards warn: "Systemic conflicts of interest can arise in the contract terms of engagement, the manner of selection, funding, and payment of defense counsel."[176]

Further still, U.S. Supreme Court case law is clear that all defendants have a right to representation without government interference.[177] Because of this right, the government's method for providing public defense services "should not create incentives that undermine the effective assistance of counsel."[178]

I.
FINANCIAL CONFLICTS CREATED THROUGH FLAT FEE CONTRACTING

Outside of the primary defender offices in Utah and Salt Lake Counties, indigent defense services in Utah use flat fee contracts that give attorneys, to varying degrees, financial incentives to dispose of cases quickly, rather than effectively, causing a personal interest conflict.

As noted in Chapter 2 above, San Juan County contracts with a single attorney who is paid a monthly fee of $6,250 ($75,000 per year) for a limitless number of cases. The defender is required to pay for all necessary expenses out of the flat fee, including "research, paralegal assistance, and legal clerks, copies, court fees," etc., but the lawyer can apply for funding to cover any "extraordinary unforeseen expenses." The contract, however, does not define such extraordinary expenses. And so the lawyer covers the

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175 RPC, Rule 1.10.

176 Study Committee Standards, *supra* note 14, at Standard 2.

177 Strickland v. Washington, 466 U.S. 668, 686 (1984) ("Government 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."); *see also* Study Committee Standards, *supra* note 14, at Standard 3 ("In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice if the state interferes with the assistance of counsel. State interference can take many forms.").

178 Study Committee Standards, *supra* note 14, at Standard 6.

cost of investigation out of her monthly pay. The more investigations required for effective defense, the less take-home pay for the lawyer.

Similarly, Cache County's contracts for public defense services divide the work provided into two categories: base legal services, and special legal services. All representation in juvenile and civil commitment matters is "special legal services," for which the defenders are paid $50 per hour. Everything else before the district court – i.e., all adult criminal representation – is considered "base legal services," for which they are paid a flat rate. The rate of pay for base legal services has remained at $4,305.56 per month ($51,666.72 per year) since the current contracts expired in 2012. The base legal services contract provides lawyers the same amount of pay no matter how much or how little work is involved.

The contract makes clear the base rate of pay is to cover everything, including attorney pay and all case-related expenses, unless otherwise approved in advance on a case-by-case basis. The public defenders are "responsible to provide and pay for clerical, secretarial, or other staff employees; investigative services not approved by the court in advance; and their own office space, supplies, utilities, and materials necessary…"

With all flat fee contracts, where the defendant has a winnable case, the incentive nevertheless is to resolve it by plea. The attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Rather, the attorney is hurt financially the more he does for his clients.[179] Put another way, the government's compensation structure creates a conflict between the lawyer's financial interests and the case-related interests of each of his court-appointed clients. As a result of that conflict, the lawyer may triage the time and energy he puts into his cases.[180]

A federal court in 2013 called the use of such flat fee contracts an "[i]ntentional choice[]" of government that purposefully "left the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable."[181] Using this same reasoning, the Study Committee points to the use of flat fee annual contracts as a concrete example of government interference through the creation of structural conflicts.[182]

But conflicts still arise even in those counties that have more contractual safeguards. For example, Washington County contracts with private lawyers, each expected to handle one-sixth of the district court caseload regardless of the number of cases and paid a

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[179] As one defense lawyer commented: "If you do a trial, you're hurt because you have to prepare. So I do a lot of motions practice."

[180] And the attorney has no incentive to dedicate time toward developing his client's trust. "Things happen quickly," said one contract lawyer. "I can't say I'm able to meet with every client in the jail. But they can always call me for free."

[181] Wilbur v. City of Mount Vernon, No. C11-1100RSL, Memorandum of Decision at 15 (W.D. Wash. Dec. 4, 2013), *available at* http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf.

[182] Study Committee Standards, *supra* note 14, Standard 6.

flat $4,363 per month ($52,356 per year). In addition, the county agrees to cover certain costs, including witness fees, costs for transcripts and printing briefs as necessary for appeals, investigation, and other extraordinary expenses.

Though the county is commended for paying separately for these case-related expenses, the county does not cover any of the cost of attorney overhead. For example, one attorney takes a third of the district court's public defender caseload (for $8,726 per month), and the work is split between himself and his associate. Overhead alone for both lawyers – rent, utilities, insurance, phones, internet, fax, copiers, basic supplies, and a part-time legal assistant – is approximately $4,500 per month. Next, the lead attorney pays his associate $3,700 per month. That leaves the lawyer with around $526 per month for himself. The attorney indicated that he makes up the difference with private clients. Therein lies the problem. His own financial conflict creates a concurrent conflict between his public clients and his private clients, as he has an incentive to dedicate time to the latter and to the detriment of the former in order to cover overhead costs and a reasonable fee.[183]

Such conflicts have led a number of state supreme courts to require that governments pay lawyers a "reasonable fee" in addition to "overhead expenses."[184]

[183] "I don't know if, realistically, I can continue this much longer," said the contract attorney. "When you consider that we've got to cover our overhead, I'm almost doing this for free."

[184] *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, in case where state's Attorney General had issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying); May v. State, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993) (determining indigent defense attorneys were entitled to overhead expenses in addition to a reasonable fee); DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (determining that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. "[R]equiring 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." 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." Testimony was taken in the case that the average overhead rate of attorneys in Kansas in 1987 was $30 per hour); Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1990) (determining that indigent defense attorneys are entitled to "reimbursement of actual expenses" in addition to a reason-able sum, defining "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," and allowing defense attorneys to receive a "pro rata share of actual overhead"); State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990) (finding that 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;" and determining a reasonable appointed counsel fee to be between $14.63 and $29.26 (based on experience) and "[a]s a matter of course, when the district attorneys' ... salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel." Additionally, in order "to place the counsel for the defense on an equal footing with counsel for the prosecution," "provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses"); Jewell v. Maynard, 383 S.E.2d 536, 540 (W. Va. 1989) (raising the hourly rate paid to court appointed attorneys on a

II.
CONFLICTS IN ACCESSING TRIAL-RELATED EXPENSES

In the less populated counties, it is common practice for district courts to require that contract defenders ask the county attorney for trial-related expenses or apply in open court for non-attorney support resources. Neither practice is common nationwide. In fact, Utah is one of only a handful of states where appointed counsel is required to make a showing for important case-related resources in open court.

In other states, public counsel seeking investigative resources or expert assistance for an indigent client may apply to the judge for those funds in an *ex parte* proceeding – the prosecution typically receives notice that such a proceeding will occur, but the prosecutor is not present and does not participate in the hearing where the defense provider will put on evidence about what is needed and why it is needed. As such, there is no opportunity for the prosecution to learn about the defense strategy or to object to case-related needs of the defense.[185] "The reason ex parte application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary."[186]

The fear of revealing to the prosecution the legal strategy involved in a case might cause any defense lawyer anywhere in the country to hesitate before requesting in open court, for example, funds for an investigator to reexamine the detective's analysis of the crime scene. But that fear is only compounded in Utah when the county attorney's office has a role in approving contracts for public defense services, or directly approves trial-re-

finding that they were forced to "involuntarily subsidize the State with out-of-pocket cash," because the then-current rates did not cover attorney overhead shown to be $35 per hour in West Virginia in 1989. "Perhaps the most serious defect of the present system," the West Virginia Court determined, "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.").

[185] The prosecution certainly can challenge the testimony and evidence proffered by the defense during the trial. Likewise, there is law on how the trial courts should determine whether an expert's testimony is admissible under the state's rules of evidence. But there is no opportunity in those states for the prosecution to challenge the defense's application for funds to hire an expert or an investigator or issue a subpoena in the first instance. See, e.g., N.Y. COUNTY LAW §722-c ("Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant . . . is financially unable to obtain them, the court shall authorize counsel . . . to obtain the services on behalf of the defendant or such other person.").

[186] Blazo v. Superior Court, 315 N.E.2d 857, 860 n.8 (Mass. 1974) This holding was codified as Rule 17(b) of the MASSACHUSETTS RULES OF CRIMINAL PROCEDURE ("At any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness, the court shall order the issuance of an indigent's summons.").

lated expenses, or where prosecutors openly challenge requests.[187] To put it another way, there is a systemic conflict between the zealous advocacy interests of the indigent accused and the personal interests of the appointed attorneys in retaining their contracts from year to year. In the end, such systemic conflicts likely contribute to the limited use of investigators throughout the state.

III.

CONFLICTS AND THE LIMITED USE OF INVESTIGATORS[188]

The U.S. Supreme Court determined that, because governments "quite properly spend vast sums of money to establish machinery to try defendants,"[189] a poor person charged with crime cannot get a fair trial unless a lawyer is provided at state expense. And, in the face of such "machinery," due process requires the defense to subject the prosecution's case to "the crucible of meaningful adversarial testing."[190]

The "fair fight"[191] envisioned by our adversarial system of justice requires the defense function to test the prosecution's case and, in order for that "adversarial testing" to be "meaningful,"[192] the defense function must have adequate support resources, such as investigators, social workers, paralegals, substantive experts, and forensic testing. Therefore, as the Study Committee notes, "access to defense resources" is a factor that may "materially impact the adversarial nature of proceedings."[193]

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187 In a letter dated June 18, 2015, Deputy Washington County Attorney Eric Clarke notes that this process is not uniformly carried out throughout Utah: "I recently had a hearing where the judge and I both agreed that the statute only allowed the judge to order the funds if the county did not provide them. In our county' we budget for the requests and have always covered any request approved by our lead public defender. Thus, we have resolved the concerns you raise." To be clear, not every county in Utah has the structural conflict of making the public defenders seek funds after disclosing to the county attorney's office what the funds will be used for, but the practice is prevalent.

188 The underutilization of investigators in Utah is demonstrative of the general lack of other non-attorney trial-level resources, such as mitigation specialists and other social work professionals. For ease of readership, the discussion of investigators is used as a placeholder for all such services.

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

190 United States v. Cronic, 466 U.S. 648, 656 (1984).

191 Study Committee Standards, supra note 14, at Standard 5.

192 *Cronic*, 466 U.S. at 656.

193 Study Committee Standards, supra note 14, at Standard 5b ("By statute, counties and cities are required to provide defense resources at public expense. These include 'a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary, for an effective defense.' (UTAH CODE § 77-32-201(3).)"). This standard is reflected in U.S. Supreme Court case law. The Court has held, for example, that an indigent accused is entitled to the assistance of a psychiatrist at public expense to assert an insanity defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

The Utah Supreme Court has determined that the failure to conduct adequate investigation may be grounds for a finding of ineffective assistance of counsel. For example, the Utah Supreme Court held in *State v. Lenkhart*:

> A review of the record reveals that Mr. Lenkart's trial counsel failed to fulfill his duty to conduct an adequate investigation of the facts and evidence in this case, and thus, his performance was deficient under the first prong of the *Strickland* standard. We have repeatedly held that one of criminal defense counsel's most fundamental obligations is to investigate the underlying facts of a case. This duty is not optional; it is indispensable. As we stated in *Taylor*, "failing to investigate because counsel does not think it will help does not constitute a strategic decision, 'but rather an abdication of advocacy.'"[194]

And in *Gregg v. State*, the Court similarly ruled:

> Trial counsel's failure to conduct a reasonable investigation into the underlying facts of a case constitutes deficient performance under the first *Strickland* prong. In *State v. Templin*, we vacated a conviction of rape and remanded for new trial where the defendant's trial counsel failed to investigate facts that would have contradicted the victim's testimony. We noted that when "counsel does not adequately investigate the underlying facts of a case, . . . counsel's performance cannot fall within the 'wide range of reasonable professional assistance'" because "a decision not to investigate cannot be considered a tactical decision."[195]

In less populated counties, indigent defense providers appear to see no need for investigation and often make do without it. "I've not had to ask for an investigator," said a contract defender in one rural county. "I haven't asked for an investigator in the entire time of the contract," said another private lawyer who has handled indigent defense cases in a different rural county for multiple years. "I've done my own investigating," the lawyer stated, indicating that if she needed a witness to an interview she brings along her secretary.

Washington County has an annual budget that includes a line item for "Investigation & Special Defense."[196] One Washington County contract defender estimated he made only one or perhaps two requests for investigation in felony cases over the past year. Some Washington County public defenders say they actually hold back from using investigative resources because using the resources today could deplete resources for a

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[194] State v. Lenkhart, 2011 UT 27, ¶ 38, 262 P.3d 1 (Utah 2011) (citations omitted); *see, e.g.*, 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.").

[195] Gregg v. State, 2012 UT 32, ¶ 24, 279 P.3d 396 (Utah 2012) (citing and quoting State v. Templin, 805 P.2d 182, 188-89 (Utah 1990)).

[196] In the most recent fiscal year, the county budgeted $40,000 and actually spent $42,000. In fiscal year 2011, as another example, the county budgeted $48,000 and actually incurred $69,666 in expenses. That a county regularly exceeds its budgeted amount, however, does not necessarily mean the county budgeted an adequate amount of money to begin with, nor that all expenditures that *should* have been made were *in fact* made.

different case tomorrow that may demand a greater need for an investigator. This position is not universally true for all Washington County attorneys.[197]

Weber County contracts with a private investigator at a flat annual rate, just as it does with the individual defense lawyers. This causes difficulty when it comes to conflict representation.[198] Of equal importance, the flat fee contract places the investigator in the same financial conflict of interest as the lawyers. The contract defenders send cases to the investigator as the need arises.[199] The investigator estimates he receives between five and 15 new requests each month and has 50 to 60 open cases at any given time. According to the investigator, however, his caseload really demands a team of three investigators.

Like Weber County, Davis County also has a standing agreement with a local private investigator for primary investigative services. Using defender agency funds, the county's defender director pays the investigator at a rate of $60 per hour for his services. Out of that hourly rate, the investigator hires another private investigator to assist part-time for a flat annual rate. Rather than splitting the investigative caseload – approximately 200 cases per year, according to the investigator – he and his part-time assistant work on all cases as a team. Davis County has a third investigator who is independent of its primary investigators and attorneys may use other investigators on a case-by-case basis with prior approval of the legal defender coordinator. The use of investigative resources in Davis County, though, occurs primarily in felony cases. The comparatively limited use of investigative resources in misdemeanor cases is concerning because even misdemeanor cases carry potential penalties of up to a year in jail.

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[197] One Washington County contract defender frequently seeks investigation resources, noting for example that technological advancements have increased the amount of discovery materials lawyer must review in each case, and that investigators are important for getting through all of it.

[198] Investigators have the same ethical duties as the lawyers who hire them. As with the attorney, the defender investigator must maintain confidentiality and provide conflict-free investigative services. For this reason, just as there must be separate counsel provided to two or more co-defendants in a given case, so too must there be separate investigative services provided for each defendant.

[199] The lawyer sends the defendant's name, the case number, the date of the incident, and the lawyer's objectives. Frequently, the investigator is asked to review the police report, review witness statements, or interview witnesses directly. "The lawyer includes some sort of instruction, like: 'Client indicates there was a witness in the vehicle with him, who was pressured to give a statement to the police,'" said the investigator. "'Go find her and interview her.'"

IV.
CONFLICTS IN THE DETERMINATION OF ELIGIBILITY FOR PUBLIC COUNSEL SERVICES

Utah provides a uniform standard for determining who qualifies for public defense services.[200] That standard, however, is not applied uniformly across the state, often creating a conflict of interest between the indigent accused and the attorneys providing indigent defense representation. This is especially true where flat fee contracts are employed.

Utah Code 77-32-202 establishes that a defendant is to be found "indigent" if the accused does "not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities."[201] Courts are instructed to take into account such things as number of dependents and current debt level when making such determinations.[202] All people earning below 150% of the federal poverty guidelines are to be presumptively determined to be indigent.[203] Despite this, the determination of indigency varies greatly from district court to district court. Court observations revealed examples of judges stating that the presumptive indigency standard is 125% of the federal guidelines and some judges that appointed lawyers to anyone asking for counsel.

The lack of consistency in the determination of eligibility for public counsel services produces further conflicts. For example, during a court observation in a district court, a woman appeared for her arraignment on a single misdemeanor count of criminal trespassing within a dwelling.[204] After she requested public counsel, the judge asked the defendant many questions to determine her financial eligibility for representation at public expense, one of which was: "Do you own any land?" The woman explained she was the owner of a 144-acre plot of a much larger 780-acre parcel of tribal lands in Montana. In response to the judge's inquiry of whether or not she could sell the land, she replied that she tried unsuccessfully in the past.

The contract public defender staffing the courtroom interjected, suggesting that the judge set the case for review, as the defender did not want to have to handle the case if

200 UTAH CODE ANN. §77-32-202.
201 UTAH CODE ANN. §77-32-202(3)(a)(i).
202 UTAH CODE ANN. §77-32-202(3)(b).
203 UTAH CODE ANN. §77-32-202(3)(a)(b).
204 A class A misdemeanor. UTAH CODE ANN. §76-6-206(3).

he did not have to. That is, the defender has a personal interest in trying to reduce the number of clients he represents. The less cases, the less potential work and trial-related expenses, the greater his take-home pay and the opportunity to take on more private paying cases.[205] Financial conflicts exist even where the contract defenders play no role in determining a defendant's financial eligibility. Several lawyers said they often get frustrated when appointed to represent clients who they believe should not qualify financially.

In some counties, the defendant's financial eligibility depends on his custodial status pending trial. For example, in-custody initial appearances in another district court are held by videoconference, with a contract public defender appearing from the jail alongside the defendants, and the rest of the criminal justice system appearing in the courtroom. "Does he qualify for a public defender?" the judge asked the public defender of one defendant. This defendant was accused of a 3rd degree felony count of possession of a controlled substance and another count of class B misdemeanor theft. "If he gets out, he won't," the public defender replied. "I will appoint the public defender to represent you," said the judge to the defendant. "And I will impose bail in the amount of $6,000."

An indigent defendant should not have to choose between being at liberty pre-trial and getting counsel.[206] As such, eligibility for public counsel should not depend on a defendant's ability to post bail:

> Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. . . . Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.[207]

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[205] "Sometimes the defenders are appointed to people who are not indigent," said the Uintah County Attorney, explaining that the judges try to ensure people have access to legal representation, but the defenders would prefer if the judge would slow down the appointment process and instead take more time to verify the defendant's financial eligibility. "They feel like it's inflating their workload," said the county attorney. The financial conflict between the appointed lawyer and his clients gets compounded over time, where the rate of pay causes the lawyer to feel trapped in the job.

[206] National standards reflect Utah statutes requiring jurisdictions to determine whether hiring counsel would be a "substantial hardship" to the defendant. See ABA STANDARDS FOR DEFENSE SERVICES, supra note 107, at Standard 5- 7.1 (regarding eligibility and ability to pay partial costs: "Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.").

[207] Hardy v. United States, 375 U.S. 277, 289 n.7 (1964) (Goldberg, J., concurring) (quotation marks and citations omitted). Chief Justice Warren and Justices Brennan and Stewart joined in Justice Goldberg's concurring opinion. The Court's holding in Hardy was limited to whether defense appellate counsel was entitled a free transcript of the trial, and thus, while instructive here, the discussion of indigence for the purpose of receiving the public's assistance of counsel was merely intended as support for the Justice's concurring opinion. See also NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDE-

The notion that indigent is not synonymous with destitute – or "totally devoid of means," as U.S. Supreme Court Justice Goldberg put it[208] – is a notion with which jurisdictions across Utah struggle. Certain defendants, for example, fall into a sort of administrative gray area, wherein they do not meet the presumptive threshold of earning less than 150 percent of the Federal Poverty Guidelines, *and* the court cannot say with certainty that it would cause them a "substantial hardship" to pay for all the costs of their own defense. After all, a judge cannot, at the outset of a case, predict with 100 percent certainty exactly what resources will be needed by the defense as the case proceeds nor how quickly the case will proceed. For example, some defendants may not have the full amount of needed cash on hand at the time their case begins, but could set aside some money from each future paycheck and so might be able to pay for their own defense if the case proceeds slowly enough and lasts long enough for them to do so. Across the nation, these defendants are often referred to as being "partially indigent" or "near indigent."

Many Utah local governments have attempted to solve for the partial indigency problem by requiring such defendants to reimburse the county for some or all of the cost of representation. The reimbursement goes back to the government, not to the individual attorneys. As a result, the financial conflict between attorney and client is compounded with each new partially indigent defendant being found eligible for their services. The work goes up but the pay stays the same.

An even more vexing situation occurs, though, where a defendant is found by a judge to be fully indigent, i.e., cannot afford to pay for his own defense attorney and defense

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LINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, c. 13, Guideline 1.5:

> Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.
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> (a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.
>
> (b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

See e.g., BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING COUNSEL (2008), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf; THE SPANGENBERG GROUP, DETERMINATION OF ELIGIBILITY FOR PUBLIC DEFENSE (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/determinationofeligibility.authcheckdam.pdf.

[208] *See* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.2(e) (1984) ("The appellate courts agree that indigency is not a synonym for 'destitute.' A defendant may have income and assets yet still be unable to bear the cost of an adequate defense.").

resources without substantial hardship. But then, a private attorney enrolls to represent that defendant. Perhaps the private attorney is a family friend or a criminal justice activist who agrees to represent the defendant for free. Perhaps a family member ponies up the attorney fee to hire that private lawyer.[209] In whatever manner the private attorney came to represent the defendant, that defendant is still indigent and someone must pay for any necessary defense-related expenses such as an investigator or experts.

On January 27, 2015, the Utah Supreme Court issued decisions in five cases, all addressing exactly this situation.[210] The court determined that, under amendments to Utah statutes that took effect May 8, 2012,[211] an indigent defendant who somehow is represented by private counsel is not entitled to public assistance for necessary case-related expenses: "Under the 2012 amendments to the IDA, a defendant who opts out of public representation has also opted out of public defense resources."[212] In other words, once the trial court decides the defendant is indigent, the defendant must choose: he can get both his attorney and his resources provided at public expense, or he must pay for both his attorney and all of his defense resources himself. What he *cannot* do is obtain an attorney at no expense to the public and then receive public funding for only his case-related expenses.[213]

But how is a person to know this when they come before the judge for the first time and are asked whether they can afford to hire their own attorney? In the absence of being given this information by the trial court, it is highly unlikely that a non-lawyer defendant could foresee and understand that they must have enough money to both hire the attorney and pay all expenses of their case, much less accurately estimate what

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[209] *See e.g.*, State v. Parduhn, 2011 UT 55, ¶5, 283 P.3d 488 (Utah 2011) (indigent defendant "received a one-time monetary gift from his grandparents that he used to retain private counsel").

[210] State v. Earl, 2015 UT 12, 345 P.3d 1153 (Utah 2015); State v. Perez, 2015 UT 13, 345 P.3d 1150 (Utah 2015); State v. Folsom, 2015 UT 14, 345 P.3d 1161 (Utah 2015); State v. Steinly, 2015 UT 15, 345 P.3d 1182 (Utah 2015); State v. Rodriguez-Ramirez, 2015 UT 16, 345 P.3d 1165 (Utah 2015). In each of the five cases, the defendant was found by the trial judge to be indigent. Earl, at ¶4; Perez, at ¶¶3,5; Folsom, at ¶¶4, 15; Steinly, at ¶4; Rodriguez-Ramirez, at ¶5. At the time of seeking public funding for necessary defense resources, each defendant was represented by private counsel, though the cases are silent about how the defendants acquired their private attorneys. Earl, at ¶4; Perez, at ¶3; Folsom, at ¶4; Steinly, at ¶4; Rodriguez-Ramirez, at ¶3.

[211] UTAH CODE ANN. §77-32-303.

[212] *Steinly*, 2015 UT 15, at ¶22; see also Earl, 2015 UT 12, at ¶24. By way of contrast, prior to May 8, 2012, "local governments [were] statutorily required to provide an indigent defendant with funding for necessary defense resources, even when the defendant is represented by private counsel," State v. Parduhn, 2011 UT 55, ¶22, 283 P.3d 488 (Utah 2011). Under the statutes then in effect, "the right to necessary defense resources [in the Indigent Defense Act] was a separate and distinct right from the right to counsel." *Parduhn*, at ¶¶22, 24. After the *Parduhn* decision, the Utah legislature amended the Indigent Defense Act and "chose[]to couple the availability of defense resources with the retention of government-funded counsel." *Steinly*, at ¶20. The 2012 amendments to the IDA cannot, though, be applied retroactively. *Perez*, 2015 UT 13, at ¶15; *Folsom*, 2015 UT 14, at ¶15.

[213] As the Utah high court observed in explaining the county's argument: "The County agreed that Rodriguez-Ramirez was indigent, but asserted that the 2012 amendments to the IDA applied to this case and foreclosed the request for resources unless Rodriguez-Ramirez agreed to be represented by a public defender." *Rodriguez-Ramirez*, 2015 UT 16, at ¶5.

those expenses might total. If judges do begin to advise defendants about this situation at their first appearance in court, an even larger percentage of people facing criminal charges are apt to request appointed counsel – foregoing even a free private attorney, in order to secure defense resources necessary for their case. Again the number of clients that a contracted attorney must represent will grow, with yet again no increase in the lawyer's pay, and the financial conflict between the appointed lawyer and all of his indigent clients is exacerbated. The appointed lawyer has every incentive to remain silent any time an indigent client hints at securing a private attorney, even if that lawyer knows this may well result in the client losing needed defense resources. In the wake of the 2012 amendments to the Indigent Defense Act and the Utah Supreme Court cases construing them, the defendant's access to necessary resources hinges upon a non-uniform indigency determination process that includes many forms of built-in conflicts, as discussed above. It is vital that the state get this right.

CHAPTER 5
CONSTRUCTIVE DENIAL OF COUNSEL
PART C: INSUFFICIENT TIME

No matter how complex or basic a case may seem at the outset, there are certain fundamental tasks each attorney must be capable of doing on behalf of the client. Even in the average misdemeanor case, the attorney must be able to, in part: meet with and interview with 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; prepare for and appear at the arraignment, wherein he must preserve his client's rights; request formal and informal discovery; launch an investigation, scouring all sources of potential investigative information in the process and as soon as possible; develop and continually reassess the theory of the case; file and argue on behalf of pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; and all the while prepare for the event that the case will be going to trial.[214]

All national standards on appropriate workload for public defense providers are consistent that establishing and applying a single caseload standard uniformly across a state and to all attorneys of varying experience levels is not the best way to ensure that attorneys can provide the same level of adequacy to each and every one of the people the lawyer is appointed to represent. As explained by the U.S. Department of Justice in August 2013, "caseload limits are no replacement of a careful analysis of a public defender's *workload*, a concept that takes into account 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."[215]

Simply put, a public defender in an urban jurisdiction in which the public defender office, court, and jail are all in close proximity may be able to handle a greater number of cases, for example, than a defense provider in a rural jurisdiction where courtroom

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[214] *See generally* GUIDELINES, *supra* note 107.

[215] Statement of Interest of the United States, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wash) (filed Aug. 14, 2013) *available at* http://sixthamendment.org/wp-content/uploads/2013/08/wa_dojsoi_08142013.pdf. *Wilbur* was a federal lawsuit challenging the constitutionality of indigent defense services in municipalities in Washington State.

coverage alone may require significant travel time. An attorney's experience is also a factor, in that a young attorney fresh out of law school cannot handle as many or as complex cases as a seasoned competent attorney.

However, in Utah there are no jurisdiction-specific standards by which to measure public defender workloads. In the most sophisticated indigent defense systems in the country, all indigent defense providers are required to track their time against case-specific tasks[216] and non-case-specific tasks[217] alike. Specific case-tasks, and the time needed to accomplish them, are also tracked by case-type. By analyzing the data, an indigent defense system can determine, for example, the average time its attorneys are spending from appointment through disposition and sentencing for the average felony case. Predicated on those attorneys providing effective representation, dividing that number into the average hours worked by attorneys in a year will result in an average number of cases, of a specific case-type, an attorney can handle in a year. And, these averages, or caseload standards, can be made specific to a jurisdiction to incorporate the variations in practice.

Utah has no infrastructure to require that public defense attorneys record their time or to promulgate standards resulting from a time analysis.

I.
WORKLOAD OF CONTRACT ATTORNEYS

Although the Study Committee standards state that national caseload standards[218] may be "instructive," even if they are not "outcome determinative for Utah,"[219] one does

[216] For example, client contact, investigation, motions practice, in-court advocacy, etc.

[217] For example, training, staff meetings, etc.

[218] National defender caseload standards were first created under the NAC STANDARDS, *supra* note 113, as a U.S. Department of Justice-funded initiative. NAC Standard 13.12 prescribes numerical caseload limits of: 150 felonies per attorney per year; 400 misdemeanors per attorney per year; 200 juvenile delinquencies per attorney per year; 200 mental health per attorney per year; or, 25 appeals per attorney per year. This means a lawyer handling felony cases should handle no more than 150 felonies in a given year, assuming the lawyer has no additional duties. That is, she does not have any supervisory responsibilities, nor handles misdemeanors (or other case types), nor engages in any private practice on the side. The NAC standards can be prorated to assess mixed caseloads. That is, an attorney would still meet the NAC standard by carrying 75 felonies and 200 misdemeanors per year. These standards are referenced in the American Bar Association *Ten Principles of a Public Defense Delivery System*. Principle 5 states that "in no event" should these NAC standards be exceeded.

[219] Study Committee Standards, *supra* note 14, at Standard 5c ("The Sixth Amendment does not entitle the accused to a public defender with a particular number of cases annually. But the 'fair fight' is clearly impacted by the amount of time a public defender can devote to each case. National caseload standards may be instructive, but not outcome determinative for Utah. As Professor Backus observed: '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

not have to refer to those standards to understand defender caseloads in most regions of Utah are excessive. By any measure, 35 percent of Utah's defense contract attorneys have excessive caseloads.

Consider, for example, the Seventh Judicial District, which encompasses Carbon, Emery, Grand, and San Juan counties. A single attorney holds the indigent defense contract in two of the district courts: Carbon County District Court, and Emery County District Court. He also provides defender services in three justice courts: Carbon County Justice Court, Castle Dale Justice Court, and Green River Justice Court. Collectively, this attorney handled 297 felonies and 144 misdemeanors in 2013. This same attorney also provided representation in 33 delinquency cases that year.[220]

In Tooele County, one of the three attorneys who provides felony representation in the district court had a criminal caseload of 115 felonies and 14 misdemeanors (and he does not hold another criminal indigent defense contract anywhere else in the state). This appears reasonable,[221] however, this attorney also provides juvenile court representation. In 2013, he additionally handled 122 delinquency cases and appeared at 149 dependency hearings.[222]

One of three contract defenders in Cache County District Court also provides public defense services in the Hyrum Justice Court and the North Logan/Hyde Park Justice Court. On first pass, the lawyer's combined felony caseload (134) and misdemeanor caseload (84) do not appear too egregious.[223] However, he also handled 270 delinquency cases and appeared at 432 dependency cases in 2013.[224]

Another lawyer serves Davis County District Court at its Farmington courthouse and two justice courts (Centerville and Woods Cross). This defender also contracts with Bountiful City to provide representation for misdemeanor cases prosecuted by the city at the district court located in Bountiful. This provider handled 186 felonies and 249 misdemeanors – a large caseload even before factoring in the travel and logistics of regularly covering four separate courts.[225] (See chart, next page, for visual representation.)

Sometimes, it is not just an individual lawyer providing indigent defense services, but rather a consortium of lawyers or a law firm. A single law firm provides primary indi-

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and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.'" (quoting Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006))).

220 This means this one attorney is carrying a caseload that would require 2.34 attorneys under the NAC standards. *See supra* note 218.

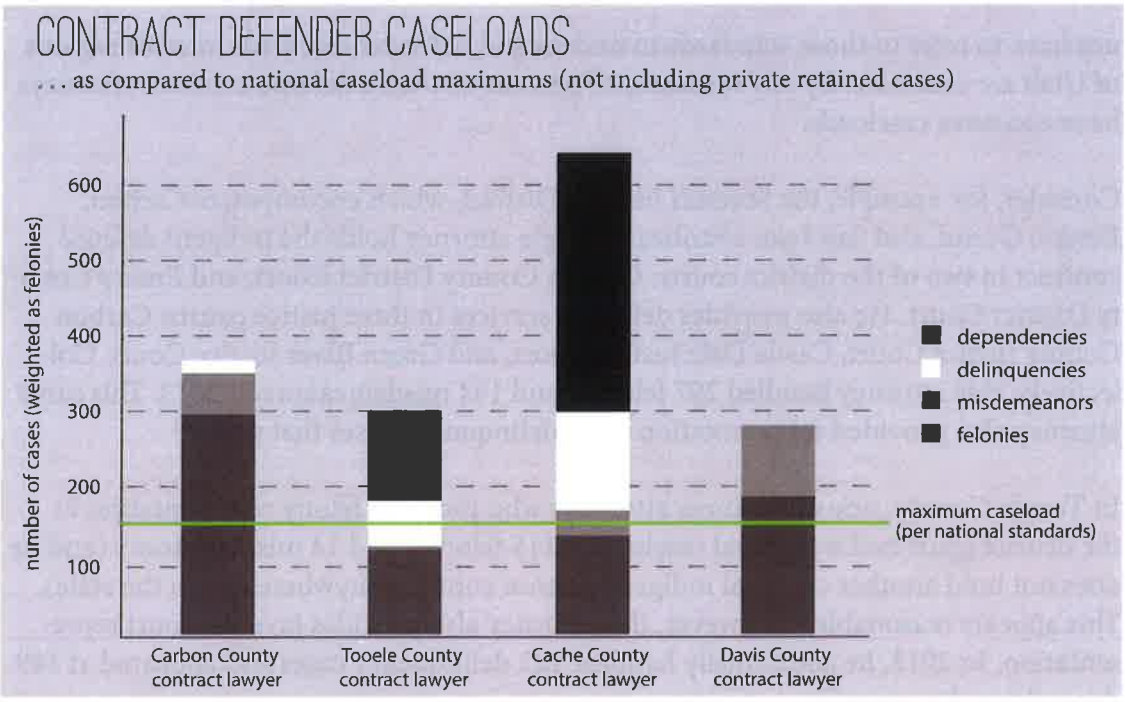
221 In analyzing his criminal caseload against the NAC standards, his criminal workload is about 80% of what is allowable under a mixed felony/misdemeanor NAC standard analysis.

222 This additional work indicates that he is doing the work of 1.81 attorneys under the NAC standards.

223 By NAC standards, he is at 90% of a felony FTE and 20% of a full time misdemeanor attorney. Taken together, this is approximately 110% of the combined NAC standard.

224 This means that he is actually doing the work of 3.81 lawyers under NAC standards.

225 This is the equivalent of 1.86 attorneys under the NAC standards.



gent defense services in the Layton District Court and in six justice courts.[226] The law firm's website indicates that there are five attorneys in the firm. The AOC database showed the attorneys in the law firm enrolled as counsel – without regard to whether the cases were private or public – in over 3,000 misdemeanor cases across 31 different justice courts and nine different district courts in 2013. If cases are split evenly amongst the attorneys, each attorney is handling 600 cases annually – or resolving approximately two cases per day every day including weekends.[227]

On the basis of similar analysis, 35 percent of Utah's defense contract attorneys have unreasonable caseloads. In the absence of Utah-specific workload standards that take into account local criminal practices and procedures, geography, court locations, and other variances, it is difficult to determine whether the remaining 65 percent of the identified contract defense attorneys' workloads are, in fact, reasonable.[228]

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[226] The six courts are Bluffdale, Harriman, Midvale, Murray City, Saratoga, and West Valley justice courts.

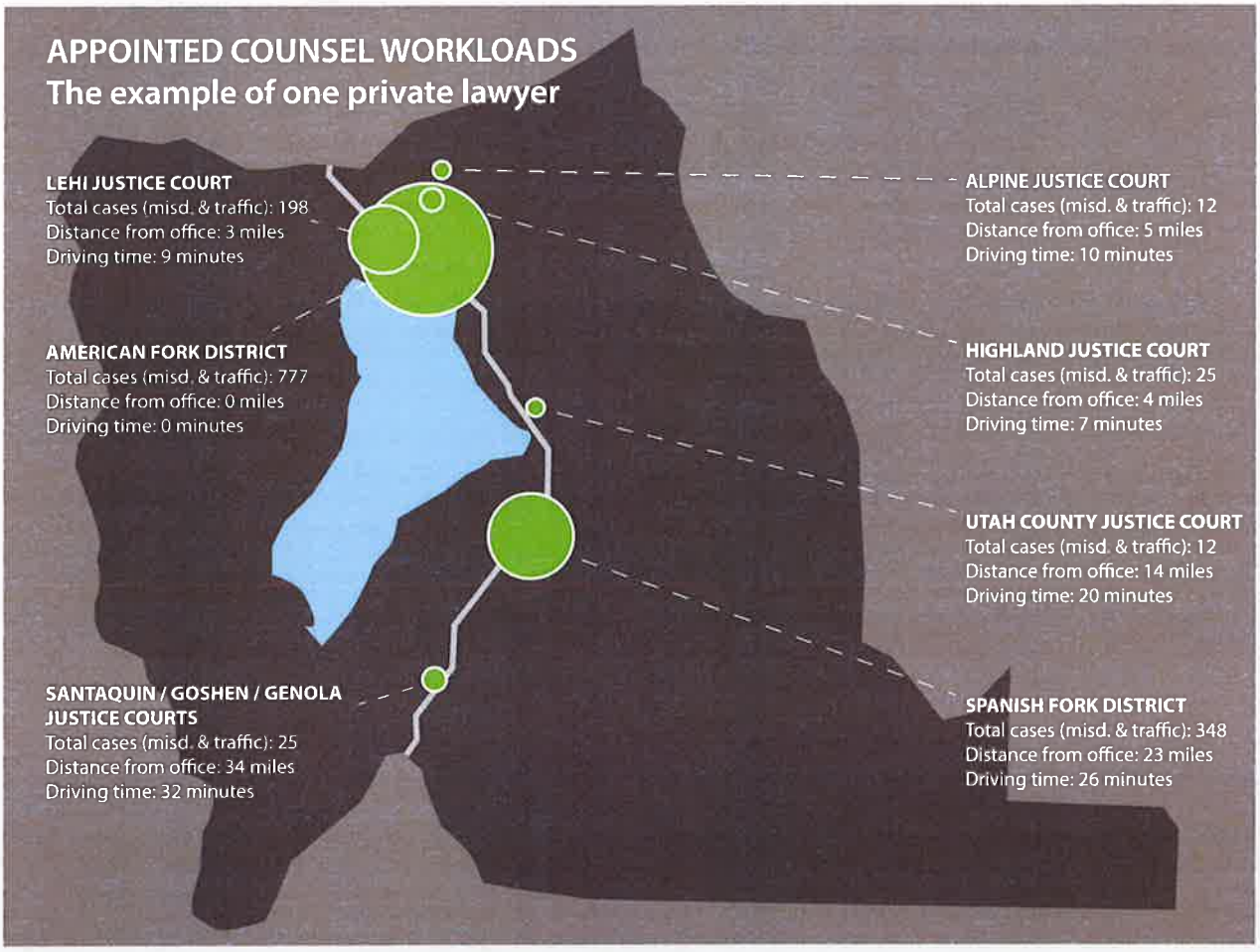
[227] In other words, the five attorneys are doing the work of 8.77 attorneys under NAC (even before factoring in the logistics and travel time necessary to cover 40 different courts).

[228] While the NAC caseload limits, *supra* note 218, were established as absolute maximums, policymakers in many states have since recognized the need to set local workload standards at the state and county level. Local standards can take into account factors that affect attorney performance (such as time traveling between the court and the local jail to meet with clients, or the prosecution's charging practices), as well as additional obligations placed upon defense attorneys (such as through evolving U.S. Supreme Court case law, improvements in forensic sciences, and advancing criminal justice technologies) – all of which increase the time needed to render effective representation beyond what was established in 1973. For exactly this reason, many critics argue that the caseload standards permitted by NAC are far too high, and that the actual maximum, for felony cases in particular, should be adjusted to well below 150 cases per attorney per year. This, of course, is just one more reason the State of Utah should work toward establishing its own workload standards for public defense services.

A CLOSER LOOK
WORKLOAD CONCERNS IN THE MISDEMEANOR COURTS

In most district courts, the county attorney's office is responsible for prosecuting class A misdemeanor cases – such as domestic violence-related assault, possession of marijuana in a drug free zone, or sexual battery – alongside their regular felony caseloads.

Under state law, however, a city may opt to have its own city attorney prosecute class A misdemeanors in district court. If the local government chooses to prosecute its own cases in this way, then it must also carry the burden of providing defense services. Most cities that exercise this option provide defense lawyers using the same method that they use for their local justice court cases.



In Utah County, for example, the city of American Fork does not have its own justice court, so the district court in American Fork hears all of their misdemeanor cases. The city has a standing contract with one private attorney to serve as its prosecutor on these misdemeanors, and a second contract with another private attorney to serve as its public defender. The contract defender handles approximately 700 misdemeanors each year[i] before the district court in American Fork.

If all the defense attorney does is represent clients before the American Fork District Court, he can devote only 2.9 hours per case, and that assumes the lawyer takes no sick days, vacations, or holidays.[ii] But this lawyer handles another 348 misdemeanor cases in the Spanish Fork District Court, located nearly 30 minutes away, which only decreases the amount of time he has available to each of his clients. In fact, this lawyer supplements his district court work with a number of justice court contracts across the county, including Spanish Fork, Salem, Santaquin, Genola, and Goshen. In total, each year the lawyer handles more than 1,200 misdemeanor and traffic cases before nine district and justice courts scattered across Utah County. The lawyer has only 1.7 hours available per case, without yet accounting for the driving time necessary to appear for his clients' hearings at each courthouse location.

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[i] In FY2011, the lawyer handled 675 cases in American Fork (591 misdemeanors, 46 misdemeanor DUIs, 8 infractions, and 30 contested traffic charges). In FY2012, the total was 698 cases, and in FY2013 it was 777. On average, that comes to 717 cases per year. We rounded down to 700 for a more conservative annual estimate.

[ii] 40 hours per week, for 52 weeks per year, is a total working year of 2,080 hours. Dividing that by his total caseload yields 2.97 hours per case (2,080 / 700 = 2.97). If the lawyer takes any time for vacations, holidays, sick leave – or time for mandatory CLE or other training – he has even fewer hours available for each case.

II.

WORKLOAD OF INSTITUTIONAL INDIGENT DEFENSE PROVIDERS

The use of a defender office, rather than contract attorneys, does not appear to improve this workload concern in Utah. In fact, both of the state's institutional public defender offices, in Salt Lake County and Utah County, have too many cases. The workloads of the Salt Lake Legal Defenders Association (LDA) lawyers, however, are particularly troublesome.

To be clear, LDA has a well-deserved reputation within the state of Utah. Its attorneys provide excellent representation for large categories of defendants, particularly in felony cases. That level of quality is jeopardized in justice court misdemeanor cases, however, where LDA is handling more than double the workload its lawyers reasonably could be expected to handle effectively. All told, LDA needs a staffing increase of approximately 38%, if not more, to effectively handle its current total trial-level workload. (See side bar, next page.)

The Public Defender Association (PDA) in Utah County has comparatively less significant workload issues than LDA, but caseloads there are still troubling. PDA has 12.5 full-time equivalent lawyers on staff. In 2013, the public defender office handled 2,349 felony cases and just 68 district court misdemeanor cases. Under national standards, the office needs a staff of 15.83 lawyers.

However, as with the Salt Lake Legal Defenders Association, this staffing estimate for PDA does not yet incorporate adequate supervision. In fact, the office's chief public defender maintains a full caseload, as do both chief deputies, meaning none of the three most senior attorneys have sufficient time available for supervisory duties.[229] Accounting for adequate supervision, PDA needs another 1.6 lawyers (17.4 attorneys total). To put that into perspective, the office needs an increase of approximately 40% in attorney staff, just to meet current workload demand using the NAC standards.[230]

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[229] Any amount of time the most senior attorneys spend on supervision takes away from their caseload responsibility, and their caseload responsibility makes providing adequate supervision extremely difficult. If all three are in court at the same time that an attorney or support staff person needs advice, there is no meaningful supervision available.

[230] For consistency across all counties, regardless of the model used or the size of the county, the authors of this report relied on the AOC's data for workload analysis. The Utah County Public Defender Association disputed the accuracy of the AOC's district court data for Utah County. According to PDA, staff attorneys handle more than 200 felonies on average each year, whereas the AOC data shows the PDA caseloads being 187.9 felony cases per attorney. Taking as we did the more conservative numbers provided by AOC, the Utah County public defenders are operating at 125% of capacity under NAC. If PDA's internal data is correct, however, PDA lawyers are in fact operating at 133% of capacity under NAC.

A CLOSER LOOK
DEFENDER CASELOADS IN SALT LAKE COUNTY

The Salt Lake Legal Defenders Association is commended for maintaining a robust case-tracking system. Without data, policymakers are left to rely on gut feel, chance, or even bias when making important criminal justice policy and budgetary decisions. LDA regularly assesses its attorneys' caseloads in light of national caseload standards, and it incorporates internal data and caseload figures into its budget requests to Salt Lake County. Indeed, as a measure of the effectiveness and value of tangible data-points, LDA recently received funding for additional felony attorney positions to maintain compliance with its internal workload goals.

For example, according to court records, LDA provided representation in 7,440 felonies and 1,843 misdemeanors in district court in 2013.[i] To handle that many cases effectively, national standards suggest LDA needs a felony staff of 54.21 attorneys[ii] – slightly more than the 54 attorneys LDA had assigned to district court that year.[iii] The attorney positions added since aim to ensure LDA stays within national caseload maximums.

However, the staffing situation for LDA's district court workload is more concerning than those numbers suggest. First, national standards indicate that there should be one attorney supervisor for every ten attorneys.[iv] Where that supervisor also carries a caseload, as do LDA's supervising attorneys, the same standards call instead for one part-time supervisor for every five attorneys, i.e.

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[i] In correspondence dated May 22, 2015, LDA Executive Director Patrick Anderson reported that the AOC data does not match the organization's own case-tracking data. LDA recorded 7,896 felonies and 1,625 state misdemeanor cases, for a total of 9,521 total district court cases in 2013. The AOC reported a combined 9,260 such cases. This relatively small difference of 261 cases can be explained by variations in counting methodology. For example, if LDA counts "cases assigned" and the AOC counts "cases disposed," there will always be a difference. Some cases assigned in 2012 will be disposed in 2013 or later, and some cases assigned in 2013 will not be disposed until future years. Additionally, if LDA records the charge at assignment (e.g. felony) and the AOC records charge at disposition (e.g. a felony reduced to a misdemeanor), the numbers for type of case will differ. Though, for the record, using LDA's numbers means their caseloads in district court are greater than this analysis suggests.

[ii] The NAC workload standards are referenced to explain the workload issues because no jurisdiction-specific standards exist in Utah or locally in Salt Lake County. That is, we are not suggesting adoption of these NAC standards, but rather are using them as a reference for comparison. NAC standards call for workloads of no more than 150 felonies per attorney per year, or 400 misdemeanors per attorney per year

[iii] In correspondence dated May 22, 2015, LDA Executive Director Patrick Anderson noted the number of attorneys handling district court cases has since increased.

[iv] National Study Commission on Defense Services. Guidelines for Legal Defense Services in the United States, Standard 4.1 (1976). Developed under a grant from the U.S. Department of Justice, Law Enforcement Assistance Administration.

one out of every six attorneys should be a supervisor who carries only a part-time caseload.[v] Thus, LDA requires five more lawyers than it currently has available (for a total of 59.14 attorneys) to provide adequate supervision over the total district court workload.[vi]

Meanwhile, LDA also has a team of 12 lawyers providing representation in the county and city justice courts. The office's internal data suggests the workload of its misdemeanor lawyers falls well below national standards.[vii] LDA's misdemeanor workload projections, however, only account for those cases that go beyond arraignment. Court data, though, correctly accounts for all new cases in which the right to counsel attaches and a public defense lawyer appears, whether the defendants plead guilty at the arraignment or not.[viii]

Indeed, AOC data shows LDA lawyers handled a combined total of 13,367 misdemeanors, contested traffic, and other cases in 2013 – far above the 3,702 misdemeanors counted internally by LDA. When using AOC's data, national standards suggest LDA needs a misdemeanor staff of 29.26 lawyers to handle its current justice court workload (more than twice as many as its current staff of 12 lawyers). Put another way, if LDA accounts for all cases it actually handles, including those disposed of at arraignment, its misdemeanor lawyers in fact are each carrying more than double the workload they could reasonably be expected to handle effectively. And that is before accounting for adequate supervision levels for LDA's justice court teams.[ix]

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[v] *Id.* Only the LDA executive director carries no caseload.

[vi] Accounting for adequate supervision in district court cases alone, LDA's 7,440 felony cases require 54.11 lawyers, and its 1,843 misdemeanors require another 5.03 attorneys. Per national standards, a team of six felony lawyers with one acting as part-time supervisor can handle 825 felony cases per year: five attorneys handle 150 cases each, and the sixth handling the reduced 75 cases to allow for her part-time supervisory duties.

[vii] In correspondence dated June 18, 2015, LDA Executive Director Patrick Anderson reported misdemeanor attorneys handling cases in Salt Lake City Justice Court receive an average of 355 new cases per year (88.75% of the NAC standards). "The average caseload per attorney handling Salt Lake City cases is 355 new cases per attorney per year. This number is below the targeted national recommendation and far less than many of the caseloads referred to in justice courts around the State. LDA misdemeanor attorneys are trained and supervised very closely by the Chief Misdemeanor attorney and their performances are evaluated on an ongoing basis. Each attorney in justice courts tries between 6 and 15 cases per year and files numerous written motions and appeals subsequent to judicial rulings and jury trials. We only try bench trials in justice court if the case has been amended to an infraction, and it is our policy to try all other cases to juries." These are all valid and important markers of quality advocacy. However, the high-quality advocacy provided to those clients whose cases survive arraignment is dependent on an even larger number of clients pleading guilty at their first appearance in justice court.

[viii] As previously discussed, *supra* note i, LDA contests the accuracy of the AOC's caseload data for LDA lawyers. The largest difference between LDA's data and the AOC's is in justice court misdemeanors: LDA counted 3,702 to AOC's 10,873 cases handled in 2013. Email correspondence in July 2015 clarified that LDA only counts those cases that go beyond arraignment, while the AOC counts all cases – those that go beyond arraignment *and* those in which the defendant pled guilty at arraignment. Indeed, if the cases LDA disposes of at arraignment are added to its reported case count, then LDA's numbers and the AOC numbers are off by only a few hundred cases, and the difference is likely the result of counting cases at time of assignment versus time of disposition. According to the LDA director, the defendants represented by LDA who plead guilty at arraignment are mostly involving crimes of homelessness and vagrancy (e.g. public intoxication) where the defendant is given time served in exchange for a guilty plea.

[ix] Accounting for one part-time supervisor for every five trial lawyers, standards suggest LDA requires 31.92 attorneys in total to provide adequate supervision over and effectively handle the justice court workload. *See supra* notes iv and v.

All told, LDA needs an increase of approximately 38% in its trial divisions to handle its current workload, if not more.[x]

For example, to the extent that any of the 7,440 felony cases in Utah in 2013 were death-eligible, the number of attorneys needed in Salt Lake County increases further still. Under the U.S. Constitution, states can elect to impose the death penalty upon conviction of certain crimes. However, states that choose to have a death penalty have extra requirements imposed on them to ensure due process in these cases. The U.S. Supreme Court has consistently determined that, for death penalty representation to be deemed effective, defense counsel has an obligation to conduct a thorough investigation, including looking into a defendant's background for information that may be used as aggravating or mitigating factors in the penalty phase of the case.[xi] Moreover, the Court stated that prevailing national standards, including the American Bar Association *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* are guideposts that "no one can misunderstand"[xii] in deciding if defense counsel's performance is unreasonable, and thus deficient. The ABA *Death Penalty Guidelines* require no fewer than two attorneys per case and specifically suggest that an attorney handle no more than two-to-three death-eligible cases per year (and nothing else).[xiii]

The NAC standards were developed during that period in our nation's history where the death penalty was not in operation, and thus are mute on the allowable number of death-eligible cases one attorney can competently handle a year. For this reason, in analyzing LDA workload above in light of NAC standards, the number of attorneys needed presumes none of the felonies handled in 2013 were capital cases. We note, however, that 14 LDA attorneys are identified as "capital" attorneys.

As a final consideration in evaluating workload, while site work was being conducted for this study, Salt Lake County had in place an early case resolution (hereafter "ECR") program.[xiv] LDA designated specific attorneys to cover the ECR cases that the prosecutor had identified for a quick resolution – within 30 days and with very limited criminal justice process. In 2013, eight LDA attorneys assigned to ECR resolved a combined 3,255 felony cases. Divided evenly, that is an average of more than 400 felonies per lawyer, and under national standards, LDA should have had 21.7 lawyers to effectively handle just this caseload. The NAC caseload standards were designed, though, with the assumption that the maximum 150 felony cases handled by an attorney

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[x] The total of 91.06 attorney staff required to handle LDA's combined district court and justice court workload (accounting for proper supervision ratios) is 25.06 attorneys greater than the office's current 66 attorney positions, or an increase of 37.96%.

[xi] *See* Rompilla v. Beard, 545 U.S. 374 (2005; Wiggins v. Smith, 539 U.S. 510 (2003; Williams v. Taylor, 529 U.S. 362 (2000).

[xii] *Rompilla*, 545 U.S. at 387.

[xiii] ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guidelines 4.1, 6.1, 10.3, and Commentary (2003).

[xiv] *See infra* Appendix B, page 105, for the authors' view on the former early case resolution program.

would include a full-range of felonies, with a greater number of less-complicated faster-resolving cases balancing out a fewer number of complex lengthy cases. So arguably, an attorney might be able to handle more ECR cases *because* by definition they were supposed to have been clear-cut cases that required virtually no investigation, no research, and no need to have hearings before a judge. Now that the ECR program is terminated, these 3,255 felony cases will come back into the normal district court case calendar, complete with the full panoply of criminal justice process, and, in theory, be distributed among all of the LDA district court attorneys on top of their existing caseloads. Thus, the overall workload of LDA trial attorneys likely will increase further, and LDA will likely need an even greater number of attorneys than projected above in order to provide effective representation to every client.

"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 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."

Powell v. Alabama, 287 U.S. 45, 68-69 (1932)

CHAPTER 6
CONCLUSION & RECOMMENDATIONS

Government has an obligation to ensure that in every criminal case the prosecution's evidence is subjected to rigorous adversarial testing. Such adversarial testing, the U.S. Supreme Court reminds us, can only be realized where the defendant is provided with unfettered access to Sixth Amendment right to counsel services.[231] Therefore, any actual or constructive denial of counsel is a violation of the defendant's constitutional guarantee of a fair day in court.[232]

Utah's trial courts do not uniformly provide counsel to indigent defendants at all critical stages of criminal cases as required by the U.S. Supreme Court, with many defendants – particularly those facing misdemeanor charges in justice courts – never speaking to an attorney. Those defendants that do receive representation too often receive an attorney who operates under multiple conflicts of interest arising from unfair contractual arrangements that produce incentives to curtail zealous representation. The challenge of providing effective representation for each client can be exacerbated by an excessive caseload that reduces the time a lawyer can spend on an individual case. And, these attorneys generally lack the appropriate independence from undue state and local government interference in securing the necessary resources to put the state's case to the test. The primary cause for the institutionalization of these practices is the lack of accountability inherent in the system.

Accordingly, the following recommendations are made to rectify the actual and constructive denial of counsel prevalent in Utah's trial courts.

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[231] United States v. Cronic, 466 U.S. 648, 654 (1984) ("[T]he right to be represented by counsel is by far the most pervasive, for it affects [an accused person's] ability to assert any other rights he may have." (citing Schaefer, *Federalism and State Criminal Procedure*, 70 HARV.L.REV. 1, 8 (1956))).

[232] *Id.* at 656-57 ("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.").

RECOMMENDATION 1

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

Most states eliminate the potential for direct government interference by establishing an independent commission to oversee the defense function.[233] Following the recommendations of nationally recognized standards of justice, such states achieve constitutionally mandated independence by insulating right to counsel services under a board made up of members selected by diverse appointing authorities, such that no single branch of government has the ability to usurp power over the system. Other states publicly elect chief defenders[234] to ensure that they are accountable to the voters and not to judges or other elected officials.

A statewide indigent defense commission does not require services to be administered and funded at the state level. Rather, commissions set standards and monitor compliance against those standards.

Though there is no uniform cookie-cutter indigent defense services model that can or should be applied to each and every state, there are national standards that serve as guidelines for policymakers. The prevailing standards are the American Bar Association, *Ten Principles of a Public Defense Delivery System*. Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles* 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 first of the ABA *Principles* requires that the public defense function, including the selection, funding, and payment of defense counsel, be "independent." Commentary on Principle 1 states that the defense function must be insulated from outside political or judicial interference by a board or commission appointed from diverse authorities, so that no one branch of government can exert more control over the system than any others. Footnotes then refer to National Study Commission on Defense Services' *Guidelines for Legal Defense Systems in the United States* (1976). The *Guidelines* were

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233 *See supra* note 13.

234 Those states are Florida and Tennessee.

created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10* (*The Defender Commission*) states in part:

> 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: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission. (c) Organizations concerned with the problems of the client community should be represented on the Commission. (d) A majority of the Commission should consist of practicing attorneys.

In practice, states with statewide indigent defense commissions generally give equal appointments to the executive, legislative, and judicial branches of government. To fill out the remainder of appointments, states often give one or two appointments to the state bar association. States have also found that giving appointments to the deans of accredited law schools creates professional alliances that help the indigent defense commission (for example, law schools can help with standards-drafting, training facilities, etc.). Additionally, many states have tried to include a voice from the communities most predominantly affected by the criminal justice system (for example, the African American Bar in Louisiana, or Native American interests in Montana).

Examples of indigent defense commission appointments from other states include:[235]

- *Louisiana*: The Louisiana Public Defender Board (LPDB) is a 15-member commission. LPDB members are appointed by: Governor (6 appointments, 4 of whom are affiliated with certain designated law schools); Chief Justice (2 – one juvenile justice expert; one retired judge); Senate President (1); Speaker of the House (1); president of the Louisiana State Bar Association (2); president of the Louis A. Martinet Society (African-American Bar - 1); chair of the Louisiana State Law Institute's Children Code Committee (1); and, the executive director of the Louisiana Interchurch Conference (1).[236]

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[235] For ease of discussion, the authors of the report point the Study Committee to specific jurisdictions that are more akin to Utah from our perspective (i.e., more conservative or Western states as opposed to more liberal or Northeastern states). However, Task Force members may browse how every state funds and administers right to counsel services on the 6AC website at: http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems/.

[236] La. Rev. Stat. Ann. §15:146(3).

- *Michigan*: The Michigan Indigent Defense Commission (MIDC) is a 15-member commission. The governor appoints all members of MIDC based on recommendations submitted by: the Senate Majority Leader (2 appointees); Speaker of the House of Representatives (2); Chief Justice (1); Criminal Defense Attorney Association of Michigan (3); Michigan Judges Association (1); Michigan District Judges Association (1); State Bar of Michigan (1); a bar association advocating for minority interests (1); former prosecutor recommended by Prosecuting Attorney's Association of Michigan (1); local units of government (1); and, one member of the general public. The Chief Justice of the Supreme Court serves as an ex officio member of the MIDC without vote.[237]

- *Montana*: The Montana Public Defender Commission (MPDC) is an 11-member public defender commission. Appointments are made by: the Supreme Court (2 appointees); the president of the State Bar (3); the President of the Senate (1); the Speaker of the House (1); and, the Governor (4 appointments, but they must be nominated from organizations representing: (a) indigent persons, (b) Native American interests, (c) people with mental illness, and (d) people with addictions).[238]

- *New Mexico*: The New Mexico Public Defender Department is an 11-member commission appointed by diverse authorities: Governor (1 appointee); Chief Justice (3); dean of University of New Mexico School of Law (3); Speaker of the House of Representatives (1); Senate President (1); and, the majority floor leaders of each chamber (one each).[239]

- *North Carolina*: The North Carolina Office of Indigent Defense Services (IDS) is an independent 13-member commission appointed by: Chief Justice (1 appointee, current or retired judge); Governor (1 – non-attorney); President Pro Tempore of the Senate (1 attorney); Speaker of the House of Representatives (1 attorney); North Carolina Public Defenders Association (1 attorney); North Carolina State Bar (1 attorney); North Carolina Bar Association (1 attorney); North Carolina Academy of Trial Lawyers (1 attorney); North Carolina Association of Black Lawyers (1 attorney); North Carolina Association of Women Lawyers (1 attorney); and, the IDS Commission itself (3, one non-attorney, one judge, and one Native American).[240]

- *North Dakota*: The North Dakota Commission on Legal Counsel for Indigents (CLCI) is a seven-person commission appointed by: Governor (2 appointees, one from a county of less than 10,000 people); House of Repre-

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237 MICH. COMP. LAWS ANN. §780.987 (1)(a-k).
238 MONT. CODE ANN. § 2-15-1028(2)(a-g).
239 N.M. STAT. ANN. §31-15-2.1(A)(1-6).
240 N.C. GEN. STAT. § 7A-498.4 (b)(1-11).

sentatives (1); Senate (1); Chief Justice (2 appointees, one from a county of less than 10,000 people); and, North Dakota State Bar Association (1).[241]

NSC *Guideline 2.10* (*The Defender Commission*) continues on to state that the "Commission should not include judges, prosecutors or law enforcement officials." Additionally, more and more states have found it a conflict to have any member that stands to benefit financially from the policies of the commission. This means that some states have banned criminal defense lawyers who handle public cases. Again, here are a few examples of states on this point:

- *Louisiana*: "Persons appointed to the board shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No person shall be appointed to the board that has received compensation to be an elected judge, elected official, judicial officer, prosecutor, law enforcement official, indigent defense provider, or employees of all such persons, within a two-year period prior to appointment. No active part-time, full-time, contract or court-appointed indigent defense provider, or active employees of such persons, may be appointed to serve on the board as a voting member. No person having an official responsibility to the board, administratively or financially, or their employee shall be appointed to the board until two years have expired from the time the person held such position and the date of appointment to the board."[242]

- *Montana*: "While serving a term on the commission, a member of the commission may not serve as a judge, a public defender employed by or under contract with the office of state public defender … , a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official."[243]

- *New Mexico*: "A person appointed to the commission shall have: (1) significant experience in the legal defense of criminal or juvenile justice cases; or (2) demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department. The following persons shall not be appointed to and shall not serve on the commission: (1) current prosecutors, law enforcement officials or employees of prosecutors or law enforcement officials; (2) current public defenders or other employees of the department; (3) current judges, judicial officials or employees of judges or judicial officials; (4) current elected officials or

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241 N.D. CENT. CODE § 54-61-01 (2).

242 LA. REV. STAT. §15:146(B)(2).

243 MONT. CODE ANN. §2-15-1028(7).

employees of elected officials; or (5) persons who currently contract with or receive funding from the department or employees of such persons."[244]

These prohibitions are only on *sitting* judges, defenders, and prosecutors. States often find that former judges, former defenders, former prosecutors, and former law enforcement officials make very good commission members.

The ABA reports: "experience shows that there is no clear advantage to location in the judicial or executive branch."[245] The ABA's position is underscored by the fact that the 21 statewide commissions with complete oversight of all aspects of indigent defense services are divided evenly between the executive and judicial branches of government. Ten house their commissions in the judicial branch of government, while ten established their commissions as part of the executive branch of government. One state, Michigan, has two commissions: the commission overseeing trial-level services resides in the executive branch, while the appellate commission is housed in the judicial branch.

What the ABA does conclude as important to the success of an indigent defense commission is that statutory language ensures the commission is "independent," no matter in which branch of government it is placed. For example, Connecticut statutes state that its Public Defender Commission is an "autonomous body within the judicial department for fiscal and budgetary purposes only." Similarly, in Montana, statutory language establishes the Public Defender Commission in the department of administration of the executive branch "for administrative purposes only." The most recently created public defender commission, that of Idaho, places the entity within the Department of Self-Governing Agencies – though technically still in the executive branch, under a provision of Idaho's constitution this means that the commission does not have to answer directly to the governor.

There is wide variance in state commission powers. For example, Louisiana statutes explicitly say: "Except for the inherent regulatory authority of the Louisiana Supreme Court provided for in Article V, Section 5 of the Constitution of Louisiana regarding the regulation of the practice of law, the Louisiana Public Defender Board shall have all regulatory authority, control, supervision, and jurisdiction, including auditing and enforcement, and all power incidental or necessary to such regulatory authority, control, supervision, and jurisdiction over all aspects of the delivery of public defender services throughout the courts of the state of Louisiana."[246] Most other states simply empower their commissions: 1) to promulgate uniform standards; 2) to hire the executive director to run the central office; 3) to authorize the executive director to hire appropriate staff to accomplish the work of the commission; and, 4) to require data collection from all local indigent defense systems.

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[244] N.M. Stat. Ann. §31-15-2.2.

[245] The Spangenberg Group, American Bar Association, State Indigent Defense Systems (Dec. 2006).

[246] La. Rev. Stat. §15:147.

Both the Montana and Michigan Acts are rather lengthy, but excerpts regarding the commissions' critical task of establishing standards are included below. The Montana Act delineates those areas for which the commission must promulgate standards:

> Section 6. Commission -- duties -- report -- rules.
> (2) Establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state.
>
> The standards must take into consideration:
> (a) The level of education and experience that is necessary to competently handle certain cases and case types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types in order to provide effective assistance of counsel;
> (b) Acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
> (c) Access to and use of necessary professional services, such as paralegal, investigator, and other services that may be required to support a public defender in a case;
> (d) Continuing education requirements for public defenders and support staff;
> (e) Practice standards;
> (f) Performance criteria; and
> (g) Performance evaluation protocols.[247]

Michigan was even more direct with their recent reform legislation:

> Sec. 11. (1) The MIDC shall establish minimum standards, rules, and procedures to effectuate the following:
>
> (a) The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.
>
> (b) If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.
>
> (c) Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.
>
> (2) The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the constitution of the United States and section 20 of article I of the state constitution of 1963. In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles:

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247 MONT. CODE ANN. § 47-1-105.

> (a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
> (b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.
> (c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
> (d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
> (e) Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
> (f) Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.[248]

It is recommended that all indigent defense attorneys should be made to track their time. Montana requires time-tracking as part of the rules promulgated by the commission under its inherent authority to set policies for manageable caseloads. In Louisiana, they codified this by requiring the Louisiana Public Defender Board to develop an empirical case-weighting system (a term of art requiring time-tracking).[249] Delineating the areas requiring uniform standards, it states the LPDB must create:

> 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; and, (iii) Client enhancers specific to each client such as the presence of mental illness.

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248 MICH. COMP. LAWS ANN. §780.991.
249 LA. REV. STAT. §15:148(1)(a).

RECOMMENDATION 2

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

Not all contract systems produce financial conflicts of interests. Oregon is the only statewide system in the country that relies entirely on contracts for the delivery of public defense services. ORS 151.213 establishes the Oregon Public Defender Services Commission ("OPDSC") as an independent body in the judicial branch that is responsible for overseeing and administering the delivery of right to counsel services in each of Oregon's counties. The commission is statutorily responsible for promulgating standards regarding the quality, effectiveness, and efficiency by which public counsel services are provided.[250]

With all funding for direct services provided by the state, the commission's central Office of Public Defense Services (OPDS) handles the day-to-day management of the system. OPDS lets individual contracts with private not-for-profit law firms, individual private attorneys, and consortia of private attorneys working together. The contracts are the enforcement mechanism for the OPDSC performance standards. Should indigent defense providers fail to comply with their contractual obligations, the contract is terminated and not renewed.

Importantly, the contracts set a precise total number of cases each contractor will handle during the contracting period, thereby ensuring that attorneys have sufficient time to fulfill the state's performance criteria. But more than that, the contracts safeguard the local service providers as well, by allocating cases across case types according to the number of hours generally required to meet the performance demands of each type of case. In other words, rather than focusing solely on the number of cases assigned, the Oregon system is built around the concept of "workload" by assigning "weights" to specific types of cases, adjusted for availability of non-attorney support staff and for other non-representational duties of the attorney (such as travel or attending continuing legal education training).

Each service provider's workload is tracked on an ongoing basis, down to the week, enabling the contract defenders to accurately predict when they will reach their workload maximums for a given month, all the while keeping the local court informed. In practice, a service provider can project that he will reach his maximum allowed under the contract on a Tuesday and will inform the court that he will be declaring unavailability starting Wednesday and onward through the end of week. With all stakeholders kept informed, there are no surprises – the extra cases are simply assigned to one of the other service providers available in that county under contract with the OPDS.

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250 Or. Rev. Stat. §151.216.

The contracts currently employed in Utah create financial incentives for indigent defense attorneys that cause financial conflicts of interest. Utah should follow the lead of other states that have banned these practices, including:

- *Idaho*: Idaho Code 19-859 states that the board of county commissioners shall provide representation through a public defender office or 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."[251]

- *Michigan*: The Michigan Indigent Defense Commission is authorized to establish minimum standards, rules, and procedures for the delivery of right to counsel services, but 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."[252]

- *South Dakota*: SDCL 23A-40-7(2) requires local government in South Dakota to pay public defense lawyers "a reasonable and just compensation for his services and for necessary expenses and costs incident to the proceedings."[253] South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state Supreme Court, interpreted this statute to ban all flat fee contracts. In 2000, the court set public counsel compensation rates at $67 per hour and mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature."[254] In 2015, assigned counsel compensation in South Dakota stands at $90 per hour.[255]

- *Washington*: Washington Court Rule 1.8 states that such contractual arrangements create an "acute financial disincentive for the lawyer" and "involve an inherent conflict between the interests of the client and the personal interests of the lawyer."[256]

- *Nevada*: Announcing that the "competent representation of indigents is vital to our system of justice," the Nevada Supreme Court issued Administrative Order ADKT-0411 on July 23, 2015 banning the use of flat fee contracts that fail to account for extraordinary cases or trial-related expenses.

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251 IDAHO CODE §19-859.

252 MICH. COMP. LAWS ANN. §780.991-11(2)(b).

253 S.D. CODIFIED LAWS §23A-40-7(2).

254 SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM POLICY 1-PJ-10.

255 Memorandum from Kim Allison, 1st Circuit Court Administrator, to 1st Circuit Attorneys and County Commissioners (Dec. 16, 2014) *available at* http://www.ujs.sd.gov/uploads/firstcircuit/Court_Appointed_Attorney_Fee_Memo.pdf.

256 Washington Court Rule 1.8.

APPENDICES

. . . . . .

"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."

United States v. Cronic, 466 U.S. 648, 656-57 (1984).
[internal citations omitted]

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APPENDIX A
STUDY COMMITTEE STANDARDS

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THE CONSTITUTIONAL RIGHT TO COUNSEL
Evaluating the Health of Utah's Indigent Defense System

[A memorandum prepared for the Utah Judicial Council's Committee on Indigent Defense]

Fourth District Court Judge Derek P. Pullan
dpullan@utcourts.gov

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence.
--U.S. Const., Amend. VI

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.
--Utah Const., Art. I, Sec. 12

—oo0oo—

Enshrined in the United States Constitution and the Utah Constitution is the right of the accused to the assistance counsel.[1] This right is "necessary to insure fundamental human rights of life and liberty."[2] It is an "essential barrier against arbitrary or unjust deprivation of human rights."[3] "It embodies the realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty."[4]

The need of the accused for a lawyer was "no better stated than in [these] moving words" of United States Supreme Court Justice Sutherland:

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1 U.S. Const, Amend. IV; Utah Const., Art. I, Sec. 12. See also, Utah Code 77-1-6(1)(a) ("In all criminal prosecutions the defendant is entitled to appear in person and defend in person or by counsel.").
2 *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).
3 *Id.*
4 *Id.*, 304 U.S. at 463.

> 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.[5]

Sadly, not every person charged with a crime has equal opportunity to retain counsel. In *Gideon v. Wainwright*, the U.S. Supreme Court acknowledged this "obvious truth"—"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."[6] The ideal of equality before the law cannot be realized if the "the poor man charged with a crime [must] face his accusers without a lawyer to assist him."[7] Thus, the Sixth Amendment requires the States to provide indigent criminal defendants with legal counsel at public expense.[8]

The right to counsel at public expense is one that touches more Utah citizens than one might expect. In 2000, the U.S. Department of Justice estimated that "poor people account for more than 80% of individuals prosecuted."[9]

While the duty to provide legal counsel to the indigent ultimately rests with the State of Utah, the Utah Legislature has delegated this responsibility to counties, cities, and towns.[10] The Legislature has allowed political subdivisions broad discretion in determining how to provide indigent defense counsel.[11] Still, the Legislature encourages counties and cities to "enter into inter-local cooperation agreements . . . for the provision of legal defense."[12]

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5 *Gideon*, 372 U.S. 335, 344-45 (1963), quoting, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

6 *Gideon*, 372 U.S. at 796.

7 *Id.*, 372 U.S. at 796-97.

8 The Sixth Amendment right to counsel is a fundamental right made obligatory upon the State by the due process clause of the Fourteenth Amendment. Id., 372 U.S. at 795-96.

9 Backus, Mary Sue & Marcus, Paul, "The Right to Counsel in Criminal Cases, A National Crisis," 57 Hastings L. J. 1031, 1034 (2006).

10 Utah Code § 77-32-301(1).

11 Utah Code § 77-32-306(1)(2)(6) (permitting counties to [1] contract with a defense service provider, [2] authorize the court to appoint qualified attorneys, [3] create a legal defender's office, or [4] "provide for some other means which are constitutionally adequate for legal defense of indigents.").

12 Utah Code § 77-32-306(4).

Finally, consistent with U.S. Supreme Court case law,[13] the Legislature has recognized that the right to counsel encompasses more than representation at trial. It also includes the right to adequate defense resources at public expense. These resources include "a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary for an effective defense."[14]

Around the country, state indigent defense systems face a constitutional crisis.[15] Utah's own system has been the subject of recent public criticism.[16] The fundamental question presented to the Committee is how to assess the health of the Utah's indigent defense system— what factors or principles indicate constitutional health or disease? In different terms, through what lenses may one view an indigent defense system to determine its constitutional sufficiency?

In identifying relevant factors, the Committee should remember this observation from Professor Emily Chiang:

> Evidence of systemic shortcomings in the jurisdiction—such as violations of guidelines, checklists, or administrative standards on issues like caseloads, training, or access to investigators—is relevant insofar as it demonstrates the probability of harm that indigent criminal defendants face, but such probabilistic evidence does not in and of itself constitute constitutional injury. In other words, the fact that caseloads are high or that none of the public defenders receive any training in a given jurisdiction does not mean any injury has necessarily taken place—individual criminal defendants do not have a right to a public defender with a caseload below a certain limit or who has attended a certain list of training sessions.[17]

In assessing the health of a patient, the doctor considers a host of symptoms which together may indicate illness, injury, or disease—(i.e. temperature, blood pressure, elevated white blood cell counts, location and intensity of pain). In a similar way, the Committee has been tasked with assessing the health of Utah's public defense system.

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[13] See, *McMann v. Richardson*, 397 U.S. 759, 771 note 14 (1970) (Sixth Amendment right to counsel presumes the right to effective assistance of counsel); *Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment right to counsel envisions counsel's playing a role critical to the ability of the adversarial system to produce just results and a fair trial); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (Sixth Amendment required that defendants be afforded the right to consultation, thorough-going investigation, and preparation prior to trial); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (counsel engaged in deficient performance by failing to advise client that guilty plea to drug charges would result in client's automatic deportation); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (Sixth Amendment right to counsel extends to consideration of a plea bargaining).

[14] Utah Code § 77-32-101(3)(defining defense resources); 77-32-303(3) (outlining circumstances under which defense resources shall be provided at public expense when the accused has retained private counsel).

[15] See, Backus, 57 Hastings L. J. 1031 (2006); Chiang, Emily, "Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims," 19 Temp. Pol. & Civ. Rts. L. Rev. 443 (Spring 2010) (seen footnotes 30-38).

[16] "Failing Gideon—Utah's Flawed County-By-County Public Defender System," American Civil Liberties Union of Utah, www.acluutah.org.

[17] *Id.*

In examining the patient, the following factors are relevant to determining constitutional health:

1. **Independent representation.** The defense service provider must be free to defend zealously the client without concern for retaliation (i.e. termination of employment, reduction in pay, reduction in personnel, or reduction in defense resources).

2. **Representation without conflicts of interest.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice to the client when counsel is burdened with a conflict of interest.[18] These conflicts of interest can be personal to the defense provider, or systemic. Systemic conflicts of interest can arise in the contract terms of engagement, the manner of selection, funding, and payment of defense counsel.

3. **Representation without interference.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice if the state interferes with the assistance of counsel. State interference can take many forms. Obviously, it occurs when custodial authorities deny an attorney meaningful access to his or her client at the jail. However, interference can be more subtle. Delay in notifying the defender of appointment or the lack of a private place for consultation can interfere with effective representation.

4. **Representation at all critical stages.** The accused is entitled to legal counsel at all critical stages of the proceeding. The Sixth Amendment right extends to custodial interrogation, lineups, initial appearance, bail hearings, preliminary examination, arraignment, plea bargaining, sentencing, and the first appeal of right.[19]

5. **Representation That Ensures Meaningful Adversarial Testing Of The State's Evidence—"The Fair Fight."** In 1984, the United States Supreme Court held: "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . 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." The following factors materially impact the adversarial nature of proceedings:

    a. *Qualified Counsel—Ability, Training, and Experience.* The Sixth Amendment does not guarantee the individual right to a public defender with a certain number of continuing legal education hours. However, it does contemplate counsel with ability, training, and experience commensurate to the complexity and seriousness of the case. Public defenders fresh

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[18] *Strickland*, 466 U.S. 668 (1984).

[19] See, Chiang, E., 19 Temp. Pol. & Civ. Rts. L. Rev. at 452, footnotes 46-52.

from the bar exam should not be representing clients charged with rape of a child or aggravated murder.

b. *Access To Defense Resources.* By statute, counties and cities are required to provide defense resources at public expense. These include "a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary, for an effective defense."[20]

c. *Reasonable Caseload Standards.* The Sixth Amendment does not entitle the accused to a public defender with a particular number of cases annually. But the "fair fight" is clearly impacted by the amount of time a public defender can devote to each case. National caseload standards may be instructive, but not outcome determinative for Utah. As Professor Backus observed: "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."[21]

6. **Fair Compensation and Proper Incentives.** Public defenders should be fairly compensated for their work. The public defender system should not create incentives that undermine the effective assistance of counsel.

a. *Fair Compensation Rather Than Parity.* Some have argued for parity in compensation and benefits for prosecutors and public defenders. Examining the pay and benefits afforded to prosecutors may be instructive, but fair compensation, not parity should be the ultimate goal. This is true for several reasons. In a complex system, fair compensation can turn on a host of legitimate factors. The prosecution and defense functions are dissimilar in material ways. Parity in compensation with a prosecutor who is not herself fairly compensated achieves little. Finally, parity on its own is a principle that may be hijacked by self-interest.

b. *Proper Incentives.* Contracts for defense services should not create incentives that undermine the effective assistance of counsel. For example, a public defender may be paid a lump sum from which the costs of investigation, expert witnesses, scientific or medical testing, and appeal must be deducted. This defense contract creates a financial incentive not to investigate, hire experts, test evidence, and appeal. Concrete caps on total compensation per assigned case can have the same effect.[22]

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[20] Utah Code § 77-32-201(3).

[21] Backus, 57 Hastings L. J. at 1125.

[22] Section 77-32-305 of the Indigent Defense Act caps total compensation at: (1) $3,500.00 for each assigned attorney in felony cases; (2) $1,000 for each assigned attorney in misdemeanor cases; and (3) $2,500.00 for each assigned attorney in the representation of an indigent in an appellate court on a first appeal of right. Defense counsel can seek court approval to exceed these caps. However, the uncertainty

7. **Case-Specific and Systemic Quality Control.** Any public defense system should safeguard against both case-specific and systemic violations of the right to counsel. Individual public defenders should meet minimum performance standards and be meaningfully supervised. Data should be collected so that the health of the public defender system can be regularly evaluated.

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of having a request for excess compensation granted by the court may deter qualified attorneys from seeking defense appointments.

APPENDIX B

SALT LAKE COUNTY EARLY CASE RESOLUTION PROGRAM

The notion that certain cases are less serious than others, and thus require less attention and less time to dispose of, caused Salt Lake County to create an early case resolution (ECR) program.[1] ECR programs have been introduced in a handful of jurisdictions across the country. When considering its own ECR program, Salt Lake County looked to other jurisdictions for ideas (e.g., Spokane, Washington, Napa County, California, and Washington County, Oregon). Although, after four years, it was subsequently and independently terminated in 2015, Salt Lake County's ECR program serves as a cautionary tale for other jurisdictions looking to implement similar programs.

The theory behind most ECR programs is that there are certain cases that, if isolated, would resolve in a quick plea agreement but, when bundled with more serious cases, become lost in the shuffle and no one stands to benefit – not the prosecutor, the judge, the defense lawyer, the defendant who has to languish in jail pretrial, and not the taxpayers who bear the cost. ECR programs, therefore, seek to unbundle the criminal process whereby the prosecution flags for the defense certain cases for a quick one-time-only, take-it-or-leave-it plea offer.

Many criminal justice system stakeholders theorized there is no reason a case that resolves by plea on the eve of trial should not have been able to resolve right away.[2] In Salt Lake County's version of the ECR program, a defendant entered into the program had 30 days or three court appearances to have the case resolved in ECR. Failing that, the case got assigned to a trial judge, and it proceeded from there just like any other felony.

It is reasonable for the courts to seek ways of managing dockets more effectively, just as county officials seek the most efficient use of the taxpayers' dollars. But neither interest

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[1] "ECR was developed as a systemic approach to address challenges faced by the criminal justice system in Utah. ECR is a collaborative process that aims to: (1) increase the speed of processing for all cases filed in Third District Court; (2) reduce jail overcrowding; (3) reduce caseloads for judges, prosecutors, and defense counsel by early resolution of certain cases; and (4) provide criminal defendants with appropriate sentences in a timely manner." Robert P. Butters, et al, *Evaluation of Early Case Resolution (ECR): Year 2 Report*, Utah Criminal Justice Center (March 2014), at 1.

[2] Of course, some cases resolve on the courthouse steps the day of trial, because the defense has developed a strong case that the prosecutor has recognized, or a key witness does not appear or changes his testimony.

outweighs the Constitution's due process demands and the defendant's right to a fair day in court. The extraordinarily high demand on the public defenders to try to provide effective representation for each client was at the root of the problem with Salt Lake County's ECR program.

The Salt Lake Legal Defenders Association assigned a team of eight lawyers to a special ECR unit, supported by two secretaries. Together, the eight lawyers handled all cases flagged for the ECR program by the prosecution.

Some of the ECR defenders felt many of their clients were well served by the program. For some defendants, a quicker disposition meant earlier access to treatment for substance abuse. For others, it was the opportunity not to lose their jobs or housing. And for others still, sometimes the plea being offered was simply a good deal for the client. The defenders likely felt they were getting good outcomes for some of their clients, but they were certain they could never achieve good outcomes for all.

But, quick resolutions have built-in problems. Said one ECR attorney: "There is nothing worse than getting a case that morning, and the prosecutor offers the defendant to get out of jail today. If you feel they've overcharged to begin with, or it's a bad offer, the client's still begging to get out." An ECR program creates new artificial pressures that unfairly incentivize defendants to make bad choices. The prosecution's perspective is the defendant can opt out of the ECR program at any time. The defendant, however, understands that by opting out of ECR, he likely will remain incarcerated pending trial.

The compressed allotment of time – 30 days to resolve the case at ECR – is not necessarily problematic by itself. For a defense lawyer with only one client, 30 days may be plenty of time to handle the case effectively and achieve an effective plea agreement. But the utter volume of cases the ECR lawyers tried to handle within those time constraints created significant structural conflicts, as defendants vied with each other for their lawyers' time and attention.[3]

The structural conflicts caused by the volume of cases are compounded when the complexity of the cases are factored in. "My concern is that ECR would be okay if it were truly low hanging fruit, and mainly misdemeanors," said the LDA director. LDA was included in the planning process for the ECR program, which included site visits to Washington County, Oregon, and Spokane, Washington. "Those programs worked because they were hearing misdemeanors. We're almost exclusively felonies here." Furthermore, the LDA director suggested the ECR program was weighted toward drug cases. Drug cases in general require more time for the type of investigation and analysis than the 30-day time constraints allow.

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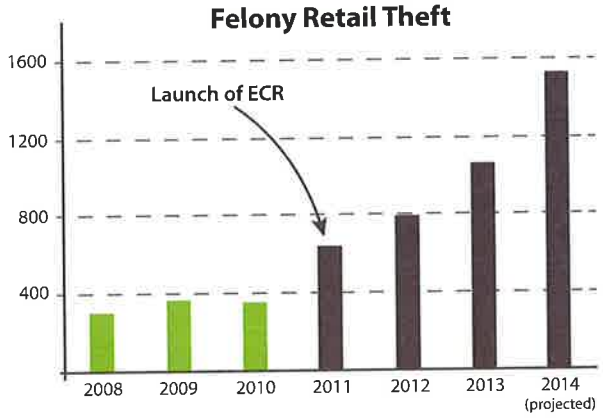
[3] "We've asked that it be capped at 60 cases per ECR calendar," said the LDA director, but such limits were never imposed upon the program. "We sometimes have more than 100 hearings in a morning," said the ECR unit supervisor. The supervisor kept track of her team's cases. The average calendar, which ran from 8:30am to noon, gave her lawyers approximately 10 minutes per client.

With so little time, the ECR program prevented the public defenders assigned to such cases from conducting the consultation, thoroughgoing investigation and preparation required to be truly effective. Through no fault of their own, the attorneys had too little time to be the zealous advocates that each defendant has as his privilege. What good is it then from the client's perspective that her ECR attorney is provided early in the process, if her attorney lacks sufficient time to assist her effectively?

As problematic as such a program might be for the clients directly involved in ECR, the Legal Defender Association felt the structural impact of the ECR program on the rest of its services. For example, LDA leadership expressed concern that the ECR program was relied upon to resolve a higher proportion of the total criminal caseload than was originally envisioned or proposed.

Additionally, LDA data suggests ECR might have caused a systemic change in the prosecution's charging practices. "There's been a notable increase in prosecutions of enhanceable offenses," said the LDA director.[4] (See charts showing increase in case filings, this page and next.)

Increase in case filings: Felony Retail Theft



But perhaps the most significant structural flaw is the program interfered with the early appointment of actual trial counsel. Because the ECR program was purported as a voluntary opportunity – opt out at any time – the trial court anticipated restarting the criminal process after 30 days. All the while, defense counsel was structurally prohibited from providing representation of the sort envisioned by the Constitution because of the high volume of cases and the extremely limited time available per client. And trial counsel – the lawyer truly prepared to take the case – was delayed from becoming active on that case until the defendant opted out or ran out of time.

A lawyer must be appointed early to represent the accused so that he can work with the client to develop the level of trust that is essential to his ability to be effective – what the Supreme Court has described as "those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[5] Some ECR proponents argued that, but for the ECR program, participating defendants would not have had access to early appointment of counsel.[6] The ECR program, however, forced LDA to provide representation in assembly-line fashion.[7]

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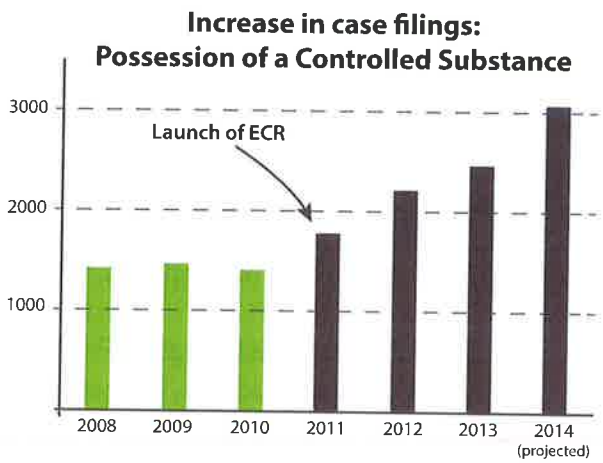
4 This means the ECR program increased the overall LDA caseload, and the intensity of that workload.

5 *Id.*

6 "We certainly have seen a reduction in incarceration," said a district court judge. "And LDA is receiving discovery [from the prosecution] much more rapidly than they would otherwise."

7 Commonly referred to nationally as horizontal representation – a system where one attorney rep-

The ECR unit supervisor said the defendant's case file was passed from the ECR team to the trial lawyer if the defendant opted out of the ECR program. "It shows: spoke with the client on this date, received this offer from the prosecutor, filed this motion." But what good is it from the defendant's perspective, however, if the lawyer provided early in the case is taken away, and replaced with someone else? After all, the "confessional" is not some article, like a sheet of paper, which can be passed from one attorney to another.



Indeed, there was increased concern that the ECR program interfered with the community's broader therapeutic goals that were institutionalized through prior initiatives of the district court, like its drug court program.[8] Many criminal justice stakeholders expressed concern that ECR's emphasis on accelerated outcomes diminished the likelihood of the defendants finding access to successful treatment. This, in return, may have negatively impacted recidivism rates of ECR participants. In fact, data showed disappointing returns on the recidivism of ECR participants.[9]

Furthermore, for judges there was a dual concern of the general increase in the total number of filings by the prosecution on the one hand, and the high volume of cases being handled by LDA attorneys at each ECR calendar.

Under the Constitution, there is only one measure of any criminal court program's effectiveness: due process. As long as the due process rights of the individual are preserved, then the courts have wide latitude to try new ideas and to seek cost efficiencies wherever they might be found. Unfortunately, Salt Lake County's early case resolution program failed to meet basic constitutional demands because there was not enough time for the lawyers to do their job effectively.

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resents the client during one court proceeding before handing off the client's case to another attorney to cover the next stage.

[8] "Drug court cases have dropped dramatically in the same time as ECR has been in existence," said the LDA director.

[9] "Around one-fourth of Pre-ECR (24%) and Non-ECR (27%) cases had a defendant who recidivated within one year of disposition, compared to one-third (33%) of ECR Resolved cases." *Butters*, et al, *supra* Appendix B note 1. (Their final report found recidivism was about the same.) Despite the negative outlook, the authors cautioned: "Although the percent of ECR Resolved cases with recidivism in the year following disposition is higher than that for Non-ECR and Pre-ECR cases, it is also known that the ECR group included qualitatively different cases (as well as defendants) who were processed through a qualitatively different process (e.g., plea offers, timelines, dispositions, and sentences)." *Supra* Appendix B note 1, at 34.

Studying U.S. Supreme Court case law, we can see a simple formula develop: the right to counsel at each critical stage plus the right to *effective* representation equals the right to effective representation at each critical stage. And, in case there was any doubt, the U.S. Supreme Court recently reaffirmed this notion. Citing *Powell*, *Cronic*, and countless other decisions, the Supreme Court confirmed with *Lafler v. Cooper*[10] and *Missouri v. Frye*[11] the defendant's right to "effective assistance of competent counsel" during plea negotiations.[12] "The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[13]

Salt Lake County's early case resolution program was set up to elicit rapid plea agreements. But with dozens of cases to handle, all at the same time, and only minutes to meet with each client, how could any lawyer be effective to *any* client? Where the "consultation, thoroughgoing investigation and preparation" that is so "vitally important" is absent, because the attorney is left trying to represent in plea negotiations clients they have only met for a handful of minutes that morning, the clients "do not have the aid of counsel in any real sense."[14] Providing counsel purely for the purpose of relaying the prosecutor's plea offer, but without providing that lawyer with the necessary time and resources to effectively represent that defendant at an artificially accelerated plea calendar is tantamount to providing the defendant with no lawyer at all.

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[10] *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

[11] *Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

[12] It is not necessary for the Supreme Court to revisit each critical stage and ask the question for each: *is the right to counsel here in this stage of the case in fact the right to effective representation?* Existing case law on this question is clear enough.

[13] *Frye, supra* Appendix B note 11, citing *McMann v. Richardson*, 397 U. S. 759, 771 (1970).

[14] *United States v. Cronic*, 466 U.S. 648 (1984).

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