ADKT 411

September 2, 2008

Chief Justice Mark Gibbons
Justice Michael A. Cherry
Justice Michael Douglas
Justice James W. Hardesty
Justice A. William Maupin
Justice Ron D. Parraguire
Justice Nancy M. Saitta

In Care Of:
The Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701
(775) 684-1600

FILED
SEP 03 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Re: Delegation of Indigent Defense Duties to Counties

Dear Justices:

The American Civil Liberties Union Foundation (ACLU), the Charles Hamilton Houston Institute for Race & Justice at Harvard University Law School, the National Association of Criminal Defense Lawyers (NACDL), the NAACP Legal Defense and Educational Fund, Inc. (LDF), and the National Legal Aid & Defender Association (NLADA) present the following white paper on the state's mandate to provide adequate indigent defense services and the permissible parameters of delegating that obligation to the counties. On behalf of our respective organizations, we are deeply concerned that Nevada's current statutory scheme, as implemented, fails to meet the state's constitutional obligations.

Sincerely,

Emily Chiang, Racial Justice Program
American Civil Liberties Union

Johanna Steinberg, Asst. Counsel
Criminal Justice Project, NAACP Legal Defense & Educational Fund, Inc.

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law &
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08-33198

The Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services

I. The Right to Counsel

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the United States Supreme Court stated that "reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." The Court then held that the Sixth Amendment applied to the states - not to county or local governments - by virtue of the Fourteenth Amendment and that the State of Florida thus had an obligation to provide Mr. Gideon with counsel for his defense. National standards incorporate this aspect of the decision, emphasizing that state funding and oversight are required to ensure uniform quality.[1]

II. The State Obligation to Ensure that *Gideon*'s Mandate is Met

The state of Nevada, like a number of other states, has chosen to delegate its obligation to provide counsel for the poor to the counties. *See Nevada v. Second Judicial District Court,* 85 Nev. 241, 245 (1969) ("The legislature has recognized its constitutional obligation, and while not appropriating state funds for these expenses has authorized and directed the various counties of the state to pay them.") (citation omitted). Counties with a population of over 100,000 must create a county office of public defender. N.R.S. 206.010. Counties with a population of less than 100,000 may either create a county public defender system or pay for the services of the state public defender. N.R.S. 206.010; N.R.S. 180.110.

Delegation of indigent defense function to the counties, however, does not end the state's obligations. 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." *Claremont School Dist. v. Governor*, 147 NH 499, 513 (2002). 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 (4th Cir. 1992) (holding that although administration of a food stamp program was turned over to local authorities, "ultimate responsibility . . . remains at the state level."); *Omunson v. State,* 17 P.3d 236 (Idaho 2000) (holding that 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).

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[1] The obligation of state government to fund 100% of indigent defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 2: *"Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide"*. See also: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976), Guideline 2.4.

If the counties cannot meet the delegated obligations, the state — as the original obligor — must step in. The state cannot be permitted to abdicate all responsibility to the counties; if a violation of constitutional rights of citizens' rights results, the state remains liable. It is for this reason that, despite statutory delegation of the right to counsel obligations to counties, courts in both Montana and Michigan have held that the state is an appropriate defendant in class actions alleging systemic right to counsel violations. *Duncan v. State of Michigan,* No. 07-242 CZ, Transcript of Hearing on Motion to Dismiss, at 35 (May 15, 2007) ("While it's true the defendants have delegated the responsibility for funding and administering the indigent defense programs to the counties, it does not mean that defendants are off the hook."); *White v. Martz,* No. CDV-2002-133 Memorandum and Order (Mont. Dist. Ct. July 24, 2002) (attached).

III. The National Trend toward State Funding of Indigent Defense Services

Today, a number of factors have led to the majority of states moving to state funding and oversight of the right to counsel services. Right to counsel obligations continue to expand, putting increasing burdens on counties to whom those obligations have been delegated. In 1967, the U.S. Supreme Court acknowledged that a child's loss of liberty "is comparable in seriousness to a felony prosecution," despite the civil nature of the delinquency proceeding, *In Re Gault,* 387 U.S. 1 (1967). Accordingly, the Court held that the due process clause of the Fourteenth Amendment guarantees the right to assistance of counsel at state expense in delinquency cases where the child or their parent cannot afford private counsel.

In *Argersinger v. Hamlin,* 407 U.S. 25, 33 (1972), the Supreme Court extended the right to counsel to misdemeanors where the defendant is facing a possible loss of liberty. More recently, in *Alabama v. Shelton,* 535 U.S. 654 (2002), the Court clarified that the potential loss of liberty included not only an immediately incarceratory sentence but also a proceeding in which the individual's liberty was jeopardized by a violation of a condition of probation on a suspended sentence.[2] The Court held that if the individual was not afforded counsel at the time of the original charges the judge was foreclosed from incarcerating that individual for failing to comply with one or more of the conditions stemming from probation or a suspended sentence.

The Court has also expanded the circumstances under which the right to counsel attaches, acknowledging that long before trial there are critical phases of a criminal investigation that require the accused to be provided counsel. Indeed, this year the Court again emphasized the early attachment of the right to counsel in *Rothgery v. Gillespie County, Tex.*, __ U.S. __, 128 S.Ct. 2578 (2008), holding that a defendant's right to counsel attaches at the initiation of the adversarial process regardless of when the prosecutor becomes involved.

[2] Examples of such conditions include attending drug treatment, observing a curfew, maintaining employment or paying court costs.

The right to counsel continues after conviction, as well. A person is constitutionally entitled to counsel in certain proceedings including sentencing,[3] appeals of right,[4] and in some probation and parole proceedings.[5] In *Halbert v. Michigan,* 545 U.S. 605 (2005), the court ruled that indigent defendants who plead guilty at the trial level do not give up their right to counsel on appeal to challenge their sentencing.

As the number of stages at which provision of indigent counsel is required has expanded, the number of cases that require public defense services has similarly risen dramatically. Furthermore, with the introduction of sentencing guidelines, expanded use of scientific evidence, alternative drug courts, and other criminal law developments, the amount of work a public defender must do on any given case has also increased.

Counties have proven ill-equipped to respond quickly to developments in Sixth Amendment law, the resulting growth in the need for public defense services, and the attendant demand for greater resources. In particular, counties with poor economic forecasts are hard-pressed to provide adequate services. They tend to have higher crime rates, a higher percentage of people qualifying for services, and less resources to spend on competent representation than counties of more affluence.

In 1969, the Nevada Supreme Court predicted with amazing precision the problems of the county-based indigent defense system. In *Nevada v. Second Judicial District Court, see supra,* this Court observed, "One serious criminal case could literally bankrupt one of our small, financially insecure counties." The Court went on to note, "No doubt the fixing of such a financial burden upon the several counties has and will cause serious problems in some cases."[6]

In 1969, only four states had state-funded indigent defense systems.[7] As a result of the problems and changes noted above, and those foreseen by the Nevada Supreme Court, however, many states that previously delegated responsibility have opted to take over the oversight and funding of indigent defense services directly. Today, thirty states directly administer and fund indigent defense services at the trial level.[8] Another three states

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[3] *McConnell v. Rhay,* 393 U.S. 2 (1968); *Mempa v. Rhay,* 389 U.S. 128 (1967).

[4] *Douglas v. California,* 372 U.S. 353 (1963).

[5] *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Morrissey v. Brewer,* 408 U.S. 471 (1972). *But see, Wolff v. McDonnell,* 418 U.S. 539 (1974).

[6] It is also noteworthy that this Court foresaw the potential for the state to have responsibility for county failings despite the delegation. The Court stated "Should a county be unable to meet an obligation ordered under this rule, a more perplexing constitutional issue would be presented."

[7] The county's two geographically smallest states - Rhode Island and Delaware - had established statewide public defender programs pre-*Gideon.* New Jersey and Maryland statutorily created statewide public defender programs in the years immediately after the *Gideon* decision.

[8] Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

assume the vast majority of funding their right to counsel systems.[9] Nevada's continued use of a county-based indigent defense system runs counter to this national trend.

IV. The Nevada Legislature's Historical Abdication of its Responsibilities under *Gideon* & Its Indifference to the Consequences

The Nevada Legislature took initial steps to move to a state funding and oversight of the various right to counsel obligations in 1971, creating a statewide commission to oversee services of the State Public Defender in the rural counties.[10] National standards call for the creation of such independent oversight commissions as a means of insulating the defense function from undue political and judicial interference.[11] Ideally, these commissions should have full regulatory authority to promulgate, monitor and enforce binding standards over the entire indigent defense system. Over the past twenty years there has been a slow but steady trend to the creation of statewide indigent defense commissions across the United States. In 1983, only 17 states had a commission. Today, 33 states have some form of oversight commission, an increase of almost 100%.

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[9] Kansas (state funds 77.3% of total $23.4 million expenditure); Oklahoma (state funds 61.6% of total $28.4 million expenditure); and South Carolina (state created statewide circuit public defender system in the 2007 legislative session. State now funds 63.8% of total $32.5 million expenditure). State expenditures and percentages are based on recent NLADA research and 2005 data collected by The Spangenberg Group under the auspices of the American Bar Association. See: *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005.* (November 2006).

[10] As originally designed, the Nevada indigent defense commission was composed of: 1) The chief justice of the supreme court or an associate justice designated by him; 2) Three members licensed to practice law in Nevada, no two of whom shall be residents of the same county, and not more than two of whom shall be members of the same political party - appointed by the board of governors of the State Bar of Nevada; 3) Three persons, not members of the legal profession, no two of whom shall be residents of the same county, and not more than two of whom shall be members of the same political party – appointed by the governor.

[11] See generally, ABA *Ten Principles* #1. NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards at either the state or local level. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states:

> "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.
> e. The Commission should not include judges, prosecutors, or law enforcement officials."

The Nevada Legislature, however, disbanded the state's commission in 1975, making the State Public Defender a direct gubernatorial appointment. The then-current State Public Defender subsequently resigned his post in 1979 stating: "The current scheme for financing the Public Defender's office renders accomplishing [the agency's] mission impossible," and that "[t]he 1975 Legislature changed the appointment scheme from that of the commission making recommendations to the governor to that of purely a political appointment."

The problems indicated in the resignation letter were confirmed by an independent assessment in 1980 by a private consulting firm, Abt Associates. The Abt report said that the State Public Defender at the time [Norm Herring] "inherited a disorganized and underfunded system" characterized by: a lack of investigators and social workers; unqualified attorneys; high turnover; a lack of money for experts and other trial-related expenses; little supervision; no training; no brief bank; late entry into cases (especially juvenile delinquency cases); inadequate record-keeping; a lack of independence from the judiciary; a lack of qualified attorneys to take eligible cases; and insufficient funding.

Though the State Public Defender was credited with making some improvements following the release of the Abt report, those changes were short-lived. A series of State Public Defenders were hired from 1981-1996, with the longest tenure being five years. In 1989, the State Public Defender was placed under the Department of Human Resources, which means: (1) to secure adequate funding the State Public Defender must first advocate amongst the various departments within Human Resources, and (2) the Human Resource budget must compete against the other executive branch funding priorities. After this re-organization, services continued to decline. With such undue political interference, the State Public Defender was ill-equipped to fight for appropriate resources.

The failure of the State Public Defender system led many rural counties to a Hobson's choice. They could continue to participate in the State Public Defender system and receive some financial assistance, but inadequate services, or they could shoulder the entire financial burden, but have greater input regarding the delivery of services. Nye and Lyon counties left in the aftermath of the re-organization of the State Public Defender system in the early 1990s. Douglas County soon followed.

In most instances, the rural counties settled on flat-fee contracting systems, in which a lawyer is paid a fixed amount to take all or a certain percentage of the county's indigent defense cases. The system sets up an inherent conflict between lawyer and client because the lawyer is motivated to maximize profit by disposing of the case quickly, while the client may wish for investigation and trial. It is for this reason that low-bid, flat-fee contracts violate national indigent defense standards[12] and increasingly are viewed as violating attorney ethical standards.

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[12] ABA Ten Principles of an Indigent Defense Delivery System, Principle 8 ("Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services."). *See also* National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (explicitly forbidding the use of low-bid, flat-fee contracts).

Also in the 1990s, the crisis in Nevada's indigent defense system had become a primary focus of the Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System (Task Force).[13] In 1997, after several years of study, the Task Force issued a report[14] that found, among other things, that there was inadequate financial support of public defender offices throughout the state to ensure: proper attorney, investigation and support staff; adequate training of indigent defense attorneys; and early contact with indigent defendants.

In the wake of the report, the Task Force formed an implementation committee to study and advocate the best way to institutionalize its recommendations including increased funding for public defender offices and establishment of a formal training program for new attorneys. This implementation committee merged with another Nevada Supreme Court task force studying gender issues in the justice system to form the Implementation Committee for the Elimination of Racial, Economic and Gender Bias in the Justice System (Implementation Committee). The Implementation Committee received technical assistance under a joint grant from the Department of Justice's Bureau of Justice Assistance and the American Bar Association's Bar Information Program to make recommendations for sustainable improvement to indigent defense services.[15]

The result was a joint report (DOJ/ABA Report) that looked at indigent defense services across the State of Nevada and concluded, among other things, that (1) indigent defendants throughout the state of Nevada are not afforded equal justice; (2) the state indigent defense system is in crisis; and (3) workload issues among public defenders have resulted in expedited procedures that jeopardize defendants' rights. By 2000, the majority of Nevada counties were not using the services of the State Public Defender and those that remained in the system were required to pay for the majority of services.[16]

Looking beyond the problems of the State Public Defender, the DOJ/ABA Report questioned the quality of services provided to those of insufficient means in Clark County. Chief among the concerns noted in the report were: the low trial rate; the lack of qualification standards for new attorneys handling serious indigent defense cases; poor appellate defender services; and inadequate defender services provided in District Courts

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[13] The Task Force was created in the winter of 1992-93 in response to a community movement alleging disparate treatment of people of color and/or of insufficient means. Though the Task Force mandate included study of a broad range of issues (including law enforcement and sentencing), much of the focus centered on inadequate access to justice for adults and juveniles facing criminal charges.

[14] *Recommendations of the Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System* (1997).

[15] The U.S. Department of Justice, Bureau of Justice Assistance (BJA) awarded the American Bar Association, Bar Information Project (BIP) a two-year grant to expand its technical assistance capacities to specifically help states with no statewide oversight of indigent defense services. BIP, a project of the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), provides limited technical assistance at no cost to indigent defense systems across the country. (For more information, see: www.abanet.org/legalservices/sclaid/defender.html.)

[16] Participating counties were required to pay 53% of the State Public Defender budget.

using video-arraignments. It was the professional opinion of the DOJ/ABA team that the issues raised throughout the state justified further study through such county-by-county public defender audits.[17]

Clark County retained the services of the National Legal Aid & Defender Association (NLADA) to conduct a management audit of the Clark County Public Defender Office (CCPDO). Released in March of 2003, NLADA found that the CCPDO has a longstanding institutional culture that places a priority on attorney autonomy over the collective health of the organization. This has fostered organizational isolationism that limits accountability, support and professional development of staff, and inhibits interactions between attorneys in the office, between attorneys and support staff, between the organization and its client-base, and between the organization and the national indigent defense community. All of this has hindered the organization's ability to change and evolve as circumstances dictate. The report also found that the CCPDO attorney caseloads are in serious breach of nationally recognized workload standards.

Clarke County is not the only county that has been subjected to external review as a result of concerns about the adequacy of its indigent defense system. In 1987, the National Center for State Courts (NCSC) released a study of indigent defense in Washoe County. The precipitating factor for the study was an "alarming" increase in the budget for the right to counsel of over 111%. The study noted, "The state has no income tax, property tax has been cut, and the county exists off its sales tax....Budgets have been carefully planned as non-growth, thus any increase such as the increase in expenses for court-appointed is perceived as "huge." In this instance, the Washoe County budget had been wildly affected by five "exceptional" cases, precisely as predicted by the Nevada Supreme Court in the 1969 case. These county and state reports consistently found that the provision of counsel for poor people accused of crimes failed time and again to meet national standards and ethical expectations.

Despite the obvious failures of the county indigent defense systems and the State Public Defender system, the state of Nevada has not fulfilled its obligation to intervene and ensure that the constitutional right to counsel is met. There can be no doubt, with the mounting catalog of reports and studies published on the subject, that for many years the State of Nevada has been aware of the problems with indigent defense. Nevertheless, neither the legislature nor the executive branches have taken the steps necessary to address the problems and, as a result, the state has failed to meet its constitutional obligation to provide adequate indigent defense services.

The state's disregard for its constitutional duty is most clearly evident in the inability of counties to provide the Nevada Supreme Court Task Force with even the most basic indigent defense data. Since the state does not even require data reporting, no less provide any form of oversight, counties have failed to build an infrastructure to record data. Indeed, the 2000 DOJ/ABA report stated: "[T]here is no central repository for indigent defense data in Nevada. Without uniform data, policymakers are left to make

[17] *Indigent Defense Services in the State of Nevada*, pp. 83-84.

critical funding decisions on the anecdotal testimony of defense providers, district attorneys, judges and other criminal justice representatives."

Despite the absence of considerable data, the record is replete with evidence of the system's failings. Since the DOJ/ABA Report was issued in 2000, the Nevada Legislature has cut spending even further and counties remaining in the system now shoulder 80% of the cost of running the State Public Defender. In 2007, two additional counties, Humboldt and Pershing, joined the growing majority of jurisdictions that are not using the services of the State Public Defender.

Also in 2007, a representative of the National Association of Criminal Defense Lawyers (NACDL) continued the history of independent assessments of indigent defense in Nevada. NACDL revisited White Pine County to see how services have changed since the DOJ/ABA report and concluded that, by every objective measure, the circumstances have actually worsened.[18] Years later, the office has the same number of attorneys, but caseloads have continued to increase. The bulk of this increase is comprised of felony cases, time-demanding cases from a newly-developed drug court, escalating cases out of the state's maximum security prison, and more cases from distant counties such as Eureka and Lincoln that require attorneys to spend extensive time traveling.

At the same time, the decrease in counties participating in the State Public Defender has resulted in a decrease in the efficiencies of shared resources within the state system. Investigators, technical support, and other services are more than 300 miles away in Carson City.[19] The office in White Pine County continues to be plagued by frequent turnover in staff, absolutely no attorney training, no performance standards, and negligible to no attorney oversight. Yet as the burden of representation grows, so does the county's obligation to fund the system. At the time of the DOJ/ABA Report in 2000, the state was paying approximately 40% of the costs for counties using the State Public Defender system. Next year, the state contribution will plummet down to a mere 20%.[20] Nevada's counties are further constrained in their ability to fund indigent defense due to the fact that Nevada is a "Dillon's Rule" state. "Dillon's Rule", named after the Iowa Supreme Court judge that penned it in 1868, holds that counties possess and can exercise only those powers expressly granted them by the legislature and no others.[21] As such, counties' authority to increase or add new revenue streams to pay for indigent defense is limited by the legislature.

In 2007, representatives from the ACLU and LDF returned to Clark County in response to renewed concerns about the adequacy of representation for indigent clients. During their assessment, it became clear that caseloads for public defenders were again exceeding national standards and that the contract attorney system continues to operate in

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[18] See NACDL Testimony before Nevada Supreme Court (Dec. 20, 2007).

[19] Id.

[20] Id.

[21] *City of Clinton v. Cedar Rapids and Missouri Railroad Company,* [24 Iowa 455 (1868)].

violation of well-established standards set by the ABA. As a result of the county's decision to increase dramatically the number of police officers, there has been a sharp increase in arrests and prosecutions without a corresponding increase in resources for public defenders to cover the additional caseload. As a result, Clark County public defenders currently handle an average of 370 misdemeanors and 140 felonies per year.[22] This far exceeds the limits proposed by the Federal Law Enforcement Assistance Administration's National Advisory Commission on Criminal Justice Standards and Goals, endorsed by the ABA, which indicate that a public defender should handle no more than 150 felonies *or* 400 misdemeanors per year. Furthermore, these standards assume appropriate levels of support. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be one paralegal, one secretary, and one investigator for every four attorneys.[23] No matter how dedicated the public defender, adequate representation is impossible faced with such overwhelming caseloads, especially where coupled with inadequate support services.

Finally, a troubling lack of oversight and management of the contract system of indigent defense representation continues. In fact, until the recent Supreme Court order of January 4, 2008, Nevada had no formal, standing oversight mechanisms for ensuring that counties provided adequate indigent defense services in their courts. There were no indigency standards, no attorney performance standards, no oversight or supervision. The Order has begun to fill these gaps, but the Order alone is not sufficient. Standards cannot work without an active and vigorous enforcement body. There must be sufficient funding to actually create an administration to monitor the provision of services and ensure compliance.

V. Nevada's Failure to Provide Adequate Indigent Defense Disproportionately Affects African Americans[24]

A state's failure to provide adequate indigent defense has a particularly significant impact upon the African-American community. A vastly disproportionate number of defendants who are arraigned - and particularly those in custody - are African American. Although African Americans comprise only 12% of the U.S. population, they make up over 40% of those persons going through the criminal justice system. African Americans are incarcerated at nearly six (5.6) times the rate of whites.[25] Furthermore, as compared to other groups, African Americans are more likely to require indigent defense services because they are more likely to live in poverty. A 2006 study by the United States Census Bureau found that the poverty rate amongst African Americans was 24.9%, compared to an only 8.3% poverty rate amongst whites. In Nevada, 10.3% of residents

[22] The authors of this white paper recognize that the Nevada Supreme Court has ordered a case-weighting study to help the Court, state and local policy-makers, defense attorneys, and others, understand the appropriateness of current caseload levels.

[23] Id. (citing Bureau of Justice Assistance Keeping Defender Workloads Manageable (January 2001), at 10.

[24] Although this section addresses the impact of indigent defense failures on African Americans, Latinos, both in Nevada and nationwide, are also disproportionately affected by inadequate indigent defense systems.

[25] Sentencing Project, *Uneven Justice: State Rates of incarceration by Race and Ethnicity.* (July 2007).

were living in poverty. Whereas 7.7% of those identifying themselves as white live in poverty, 15% of black Nevadans live in poverty. A 2005 study by the Sentencing Project confirmed the role of poverty, race, and access to counsel: the study found that whites were much more likely to retain counsel than blacks, and that the hiring of a private attorney tended to result in less severe sentences.

These national disparities are reflected in Nevada's criminal justice system, where the state's African American community will suffer most acutely from the failure to meet *Gideon*'s promise. Nevada's prison population has been among the fastest growing in the nation and was projected to grow significantly over the next five years.[26] Between 2006 and 2007 alone, Nevada saw a 5% increase in its prison population.[27] This is largely a result of the exponential growth in the resident population. In 2005, Nevada was the state with the fastest growing resident population for the 19th consecutive year, with an overall 56% increase in resident population between 1996 and 2006.[28] During this same time period, the Nevada prison population increased 58%.[29] The increase in incarceration has not been borne equally by all members of the Nevada community. For example, the African American population of Nevada is concentrated in Clark County. Even though the jurisdiction is less than 10% black, 30% of cases opened in the last calendar year by the public defender's office involved African American clients. Statewide, 627 of every 100,000 white people are incarcerated whereas 2916 of every 100,000 African Americans are incarcerated.[30] Nationally, Nevada has the 14th highest incarceration rate of African Americans.[31] Nevada incarcerates African Americans at nearly five (4.7) times the rates of whites.[32]

The consequences of an inadequate indigent defense system are well-documented and dramatic. A 2004 study identified 328 exonerations nationwide between 1989 and 2004. Of these persons, 55% were African American. The disproportionate consequences also extend beyond the jailhouse walls: in Nevada, 2.63% of whites are disfranchised as a result of felony convictions whereas 12.39% of African Americans have been similarly disfranchised. Without fail, African Americans - who are, on average, poorer than whites, and who are disproportionately represented in the criminal justice system and represented by state-provided counsel - will bear a disproportionate burden of any failures of indigent defense.

VI. Conclusion

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[26] Pew Center on the States, Public Safety Performance Project, Work in the States: Nevada at 1.

[27] Pew Center on the States, *One in 100: Behind Bars in America 2008* (February 2008), at 9.

[28] Pew Center on the States, *Nevada State Profile.*

[29] Id.

[30] Sentencing Project, see note 25, at 6.

[31] Id.

[32] Id. at 11.

Under the Sixth Amendment, the state has an obligation to provide counsel to all those facing criminal charges which could result in a deprivation of liberty who cannot afford to hire an attorney. While the state may delegate this obligation to the counties, it retains an obligation to monitor the counties and ensure that the obligation is met in a constitutionally sufficient manner. When it is not, the state is responsible for stepping in and rectifying the deprivation.

There is no doubt, from the many reports published on the subject, and the testimony of both public defenders and county officials before this Court, that the counties, and by extension the state, are not meeting the constitutional obligation. Despite the State of Nevada's failure to collect data and monitor the county systems, it has had more than sufficient notice of their failings. Therefore, unless the state of Nevada actively steps forward to rectify the situation, it is in violation of its Sixth Amendment obligations. There are urgent resource, training and monitoring issues that must be addressed, and the failure to do so erodes the integrity of Nevada's criminal justice system in a way that affects everyone in the State of Nevada, but has an especially pronounced effect on African-American residents who disproportionately bear the costs of the wholly inadequate status quo.