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ADKT 0411

# Reclaiming Justice

March 2013



SIXTH AMENDMENT CENTER

*ensuring fairness & equal access to justice*

13-08819



# SIXTH AMENDMENT CENTER

*ensuring fairness & equal access to justice*

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. We do so by measuring public defense systems against established standards of justice. When shortcomings are identified, we help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

Cover photo:  
Carson City, Main Street (c. 1870). Nevada Historical Society.

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Published in the United States of America in 2013 by the Sixth Amendment Center

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Printed in the United States of America  
Publication Number: 2013.001

# Reclaiming Justice:

Understanding the History of the Right to Counsel in Nevada  
so as to Ensure Equal Access to Justice in the Future

March 2013

Prepared for:

The Nevada Supreme Court  
Indigent Defense Commission

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In response to the Nevada Supreme Court's concerns about the manner in which poor defendants are provided the right to counsel in criminal and juvenile delinquency cases and the quality of services rendered, the Court created the Indigent Defense Commission (IDC) through administrative order ADKT-411, issued on April 26, 2007. The IDC is composed of judges, prosecutors, defense attorneys, county executives and other criminal justice stakeholders and is charged with studying how counties provide services and recommending to the Court appropriate changes.

# Preface

**S**erious problems exist today in rural Nevada when it comes to providing attorneys to poor people who face the potential loss of liberty at the hands of the criminal justice system. The indigent accused may sit in jail for several weeks or even months, waiting to speak to an attorney while witnesses' memories fade and investigative leads go cold. Once the defendant is appointed an attorney, that individual defendant may be one of several hundred who are all vying at the same time for the attention of that single attorney. Worse, the overburdened attorney will often have financial conflicts that pit his ability to put food on his family's dinner table against his ethical duty to zealously advocate solely in the best interests of his client.

In 2007, the Nevada Supreme Court established an Indigent Defense Commission ("Commission") to examine and make recommendations regarding the delivery of constitutionally required indigent defense services in Nevada. The following year, the Commission's Rural Subcommittee went on record that "rural counties are in crisis in terms of indigent defense," noting that one county in particular has an annual public defense attorney caseload of "almost 2,000 per contract lawyer." Not even the most competent lawyer on earth can effectively open, investigate, and dispose of cases at a rate of nearly five and a half cases per day,

every single day of the year, weekends and holidays included. If your family member or neighbor or colleague was accused of a crime, would you want them to have an attorney with no time to do anything other than simply pass along whatever plea deal the prosecutor has offered?

Since 2008, numerous Nevada Supreme Court administrative orders have improved the right to counsel in the state's urban centers. This is most notable in Clark County (Las Vegas), where public defender caseloads are now reasonable, the conflict assigned counsel panel is free of undue judicial interference, and attorney contracts do not impose financial incentives for attorneys to do as little work as possible on a case. But fixing the "crisis" in rural Nevada has proven to be more difficult. There are a wide variety of reasons for this, including a lack of attorneys to do the work, the geographic expanse of most rural counties, and limited infrastructure to train and evaluate attorneys. Perhaps most importantly, though, most rural Nevada counties have insufficient resources to keep pace with the United States Supreme Court as it continually clarifies and expands the responsibilities that attorneys owe to their clients under the Sixth Amendment.

In August 2012, Chair of the Commission and then-Chief Justice of the Nevada Supreme Court Michael Cherry asked the Sixth Amend-

ment Center ("6AC") to suggest a consensus approach toward achieving constitutionally required provision of the right to counsel throughout the state, and in the rural counties specifically. The 6AC originally envisioned advocating for the creation of a permanent indigent defense commission to administer right to counsel services in those counties where no public defender office is required under Nevada Revised Statutes 260.010. That is, Clark (Las Vegas) and Washoe (Reno) counties would be exempt from state oversight by a permanent commission, while the remaining counties would be relieved of the burden of financing the state's requirement to provide indigent defendants with effective lawyers in exchange for state supervision of local public defense services. And, though our final recommendations closely align with that projected aim, the reasons why Nevadans should support these recommendations changed significantly as we conducted our work.

The 6AC started out with the intent to place the right to counsel in its historical libertarian context. The argument goes: the Bill of Rights was created to protect the individual from overreaching by big government. Just as the Second Amendment guarantees the individual the right to bear arms to protect liberty and is a check against the potential tyranny of big government, so too does the Sixth Amendment protect an individual's liberty from overreaching by the massive machinery of governmental law enforcement. Our hope was that Nevada criminal justice stakeholders and policymakers would view the right to counsel as something well within Nevada's own uniquely libertarian worldview and support recommended changes.

But a funny thing happened on the way to making that argument. In researching the foundation of Nevada's libertarian culture, the 6AC discovered that the state's judicial and legislative history is rich with a commitment to equal access to justice for poor people in criminal proceedings; a state commitment that far pre-dates any federal action on the issue. Indeed, as early as 1875 to 1879 Nevada was the very first state in the union to authorize the appointment of attorneys in all criminal matters, including misdemeanors, and the required payment of attorneys for the services rendered.

The father of the right to counsel in Nevada, Thomas Wren, epitomizes the rugged individualism that is characteristic of Nevadans. Wren was a self-made man, who rose from abject poverty as an orphan to eventually serve as the state's lone U.S. Congressman from 1877 to 1879. Interestingly, Wren was a prosecutor from Austin, in Lander County, then Nevada's second largest city, before he became a state assemblyman from Eureka. And far from being a bleeding heart, Wren argued on the floor of the Assembly for the expanded use of capital punishment during the same legislative session that he cemented Nevada's commitment to the right to counsel. As Wren demonstrated, being a law-and-order prosecutor does not require one to resist indigent defense improvements.

Nevada also has its own Clarence Earl Gideon. Gideon was the man who challenged a Florida court's decision to deny him an attorney. His travails eventually led the United States Supreme Court, in March of 1963, to hand down the landmark case of *Gideon v. Wainwright* that requires all states to provide competent representation to poor people facing felony charges

in state courts. In Nevada, that man was Shepherd L. Wixom. His story, told in the following pages, did not result in his freedom (as Gideon's story did). However, it did lead the Nevada Supreme Court in 1877 to strengthen the right to counsel law that Wren had introduced two years prior.

The first part of our report, *Reclaiming Justice*, details the history of the right to counsel in Nevada. We believe this story shows that the people of Nevada have always viewed the right to counsel not as a federal mandate to be resisted, but as a bedrock principle upon which the state was founded. Nevadans should embrace this history and this view today.

The report also demonstrates that the serious systemic deficiencies plaguing rural counties, detailed in the second part of the report, are a relatively recent development (beginning in 1975) and a turning away from Nevada's longstanding history of ensuring equal justice to people of insufficient means. We hope the recommendations set out in *Reclaiming Justice* contribute to the restoration of Nevada's deep-rooted commitment to due process and that justice in rural Nevada will – once again – no longer depend on the amount of money one has in his pocket.

## Acknowledgements

**T**he Sixth Amendment Center (6AC) acknowledges the Nevada Supreme Court's Rural Courts Coordinator and Court Services Supervisor, John McCormick, for his supervision of this project. Mr. McCormick is one of a number of Nevadans providing significant assistance in the research and writing of this report.

Natacha Faillers, Archives Assistant of the Nevada State Archives, found the original and

amended versions of Thomas Wren's Assembly Bill 122 (1875), which authorized payment to appointed counsel, and she unearthed the prison records and pardon requests of Shepherd L. Wixom. She also tracked down biographical information on Thomas Wren contained in the only known copy of a short-lived Virginia City periodical, *Nevada Monthly*, at the Huntington Library in San Marino, California. We would have known little of the motivations of Wren for supporting the right to counsel had not Anita



Lawson Weaver, an Assistant in the Rare Book Department of the Huntington Library, generously copied the periodical for us.

Assembly Bill 122 (1875) took on new significance when the Nevada Supreme Court handed down *In re Wixom* in April of 1877. Paula Doty, Assistant Librarian at the Nevada Supreme Court Library, went through the Court's microfilm records to find the original briefs. Though there is a gap in the microfilm reel, Ms. Doty employed the assistance of Ms. Faillers at the State Archives and diligently found the original paper documents.

Our understanding of the political and social culture in Nevada's early days as the western part of the Utah Territory was greatly aided by materials sent by Michael Maher and Juil Dandini of the Nevada Historical Society. The 6AC is also significantly indebted to historian Michael Makley. Nevada's desire for statehood was in many ways triggered by a longing on the part of the populace of the Carson Valley for a justice system that was neither meted out by vigilance committees nor in the control of Mormon leadership seated some 500 miles away in Salt Lake City. Our knowledge of this dynamic was greatly enhanced by Makley's book, *The Hanging of Lucky Bill* (which he sent to us free of charge).

A 1991 article by Nevada historian Phillip I. Earl led the 6AC to question some of the facts surrounding the trial of Mr. Wixom. Mr. Earl spoke to us at some length about stagecoach and train robberies in 19th century Nevada, and

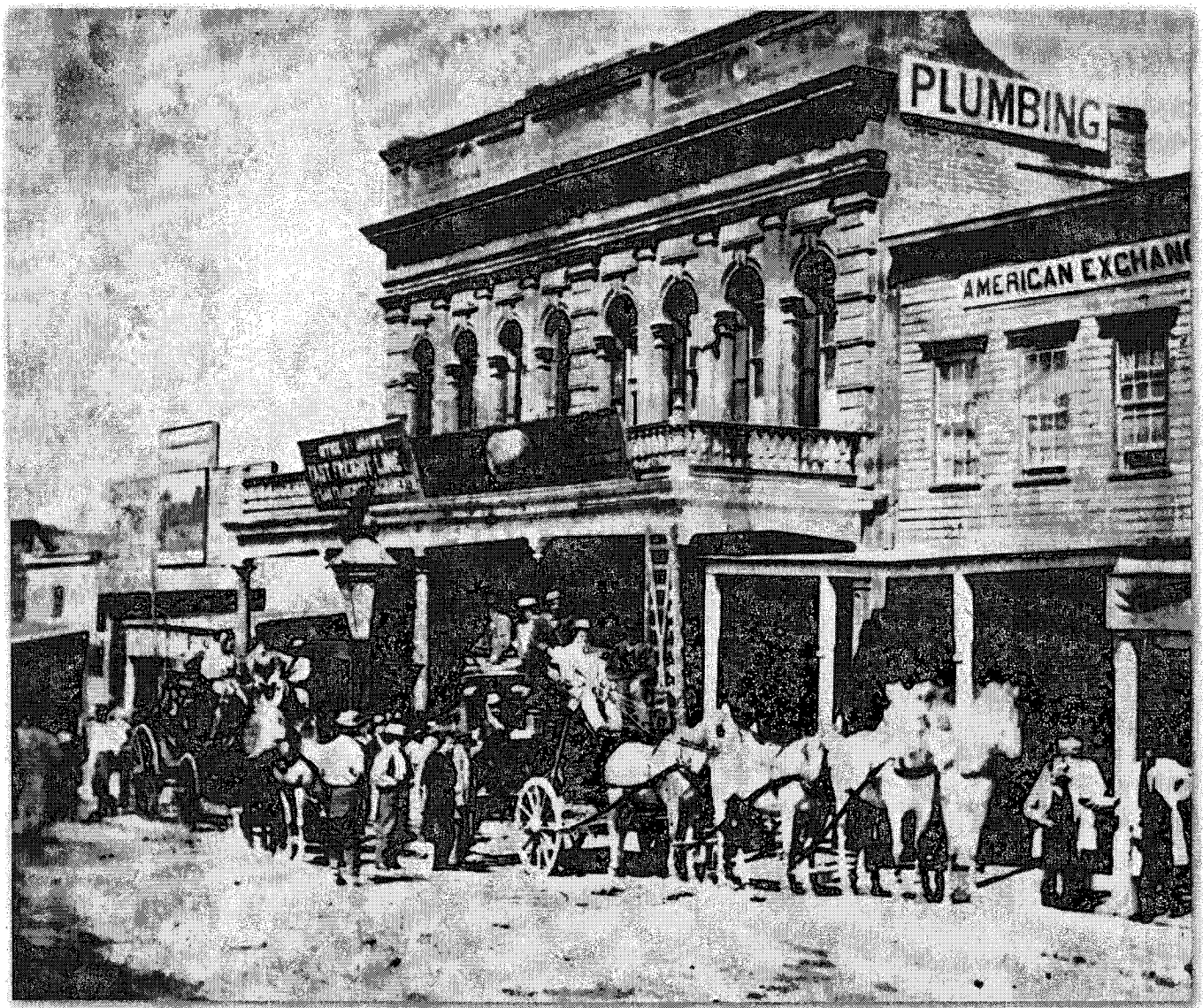
he assisted Mr. Maher of the Nevada Historical Society in tracking down local newspaper accounts of the Wixom trial that confirmed Mr. Earl's earlier work.

Finally, this report simply could not have been written without the support and guidance of former Nevada State Archivist Guy Rocha. Mr. Rocha provided us with key contacts throughout the state and suggested numerous avenues of research for us to trove. Most importantly, he gave generously of his time and energy during numerous phone calls and e-mail exchanges, where he not only acted as an objective sounding board, but also provided needed encouragement enabling the 6AC to connect the dots of what occurred in Lander County over a hundred and forty years ago.



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Wells Fargo Stage (c. 1870). Nevada Historical Society.

# Chapter 1

## An Arrest in Battle Mountain

On November 7, 1873, a thirty-year-old harness-maker was arrested in Battle Mountain, Nevada.<sup>1</sup> He was wearing a uniquely identifiable coat that was commissioned from a haberdashery in San Francisco, and destined for the Manhattan Silver Mining Company, before it was stolen during one of a series of stagecoach heists conducted over the prior two months.

Shepherd L. Wixom,<sup>2</sup> the man arrested, was no saint. He had already been charged with horse stealing once and spent time in the Nevada State Prison for helping an accused murderer to escape from the Lander County jail. He had

the stolen coat. He fit the general description. He was an ex-felon. He was guilty.

This was the height of the Wild West. And, though the October 7, 1873 edition of Virginia City's *Territorial Enterprise* reported that "stage robberies have become so common in Eastern Nevada that they are scarcely worth noticing,"<sup>3</sup> the citizenry of Austin was fed up. Between September 27 and November 1, 1873, the Woodruff & Ennors stagecoach line – the company carting passengers and cargo between such mining towns as White Pine, Eureka, and Virginia City<sup>4</sup> – had been held up five times. Each time, the robbers demanded and broke open the Wells, Fargo & Company "treasure box"<sup>5</sup> that often accompanied the driver of the stage. After the last of the five hold-

ups, Wells, Fargo & Company posted a \$500 reward for the capture of any "road agent"<sup>6</sup> associated with the thefts.

Upon his arrest at Battle Mountain, Wixom demanded to be brought before the nearest committing magistrate for a preliminary examination because he wanted to procure material witnesses that would help



Stagecoach outside the Warm Springs Hotel (c. 1860's). Hotel was used as the Nevada Territorial Capitol in 1861. Courtesy of the Nevada State Library and Archives.

to absolve him of the crime. Sheriff Emery denied his request. Instead, Wixom was brought to Austin and jailed.<sup>7</sup>

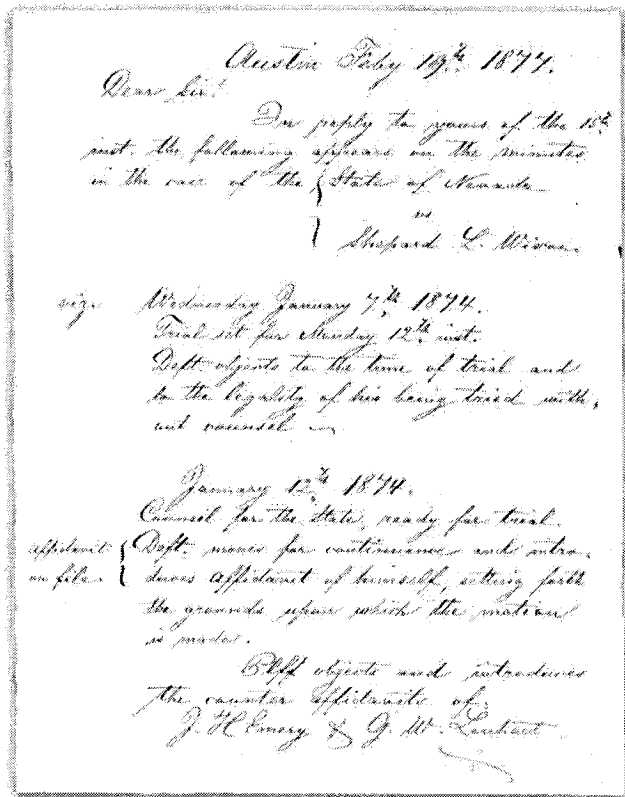
In 1873, the Nevada court system was still in its infancy. Less than ten years had elapsed since Nevada was accepted into the United States and had adopted its state constitution, so the Nevada courts were establishing precedent with every passing case. Under the laws of criminal practice of the time, Wixom was entitled to a "speedy and public

trial."<sup>8</sup> But these were the days when judges rode circuits by horseback and the thousands of miles of trails connecting the mining towns of eastern Nevada did not lend themselves to the dispensation of justice at anything approaching

a rapid pace. Besides, all felony prosecutions in Nevada had to occur by indictment, so there was the need to empanel

a grand jury of twenty-four men before Wixom could be arraigned.<sup>9</sup> Accordingly, Wixom sat in jail through Thanksgiving and into the dawn of 1874.

## Why would Shepherd Wixom think he had a legal right to an attorney in 1874 Nevada?



Official minutes of the Lander County District Court in the case of *State of Nevada vs. Shepard L. Wixan*. Courtesy of the Nevada State Library and Archives.

On January 7, 1874, Wixom finally got his day in court. He was arraigned on a Wednesday in front of the Honorable DeWitt C. McKenney. The judge scheduled the trial for five days out, on the following Monday. Besides his not guilty plea, Wixom only made one statement: "Defendant objects to the time of trial and to the legality of his being tried without counsel."<sup>10</sup>

Why would Wixom think he had a legal right to an attorney in 1874 Nevada? It would be nearly 90 years before the United States Supreme Court guaranteed poor people the right to counsel in felony cases, with its landmark decision in *Gideon v. Wainwright*.<sup>11</sup> Answering that question requires an historical understanding of both the Sixth Amendment to the United States Constitution as it was generally understood at the time of Wixom's arraignment and more specifically the state of criminal justice in the 1870's in Nevada.

# Chapter 2

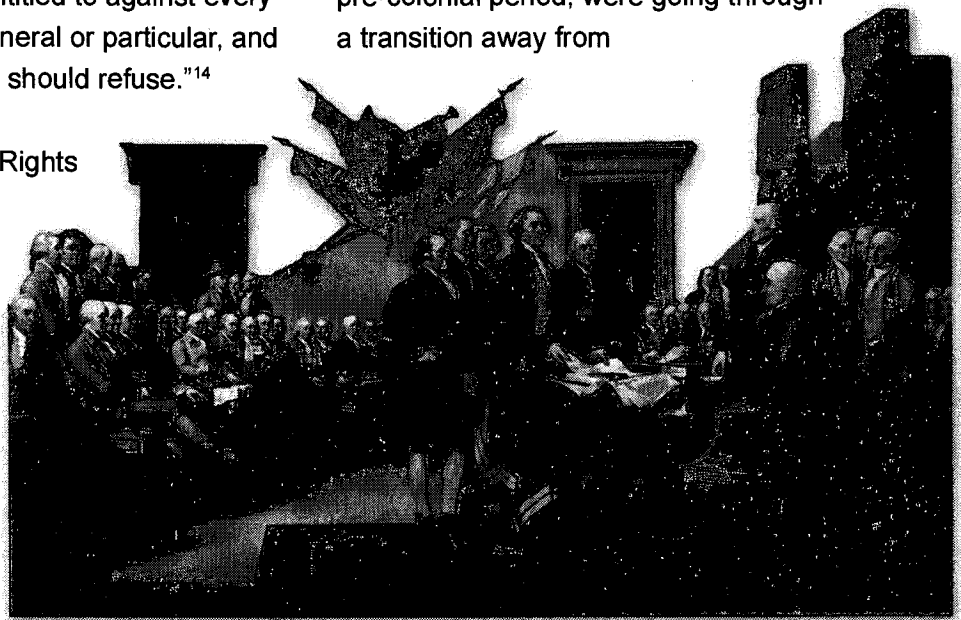
## The Sixth Amendment to the United States Constitution

**F**or the signers of the Declaration of Independence, liberty was the universal notion that every person should determine their own path to happiness, free from undue governmental control.<sup>12</sup> Patrick Henry preferred death to living without it.<sup>13</sup> In fact, liberty is so central to the idea of American democracy that the framers of our Constitution created a Bill of Rights to protect personal liberty from the tyranny of big government. All people, they argued, should be free to express unpopular opinions or choose their own religion or take up arms to protect their home and family without fear of retaliation from the state. As Thomas Jefferson wrote in 1787, "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse."<sup>14</sup>

Preeminent in the Bill of Rights is the idea that no one's liberty can ever be taken away without the process being fair. A jury made up of everyday citizens, protection against self-incrimination, and the right to have a lawyer advocating on one's behalf are all American ideas of

justice enshrined in the first ten amendments to the United States Constitution that were ratified by the states in 1791. Years earlier, John Adams had risked his reputation for these very ideals by defending in court the British soldiers involved in the Boston Massacre, stating that a defense lawyer ought to be the last thing a person should be without in a free country.<sup>15</sup>

Why did Adams and other patriots believe so fervently in the primacy of the right to counsel to due process? The answer comes from an understanding of the English common law system, out of which most American jurisprudence evolved. England's courts, during the American pre-colonial period, were going through a transition away from



John Trumbull, *The Declaration of Independence, 4 July 1776*. Yale University Art Gallery, Trumbull Collection, 1832.3.

what we today call the inquisitorial model of criminal justice. Still in use in France and elsewhere in Europe today, the inquisitorial model sets about finding the truth behind an alleged crime by having the judge who is in charge of all proceedings directly question the witnesses for both the victim and the defendant. Lawyers, if they were involved at all

in English courts during this time, generally played a limited role.

For example, there was no person we would recognize today as the

prosecutor. Instead, the victim of a crime or his family was permitted to hire a lawyer to act as prosecutor, but few could afford the cost. And so the judge dominated the proceedings.

Under the inquisitorial model, the judge acted as the chief investigator and oversaw the collecting of evidence, determining what was reliable and what was unreliable. And, because the judge made final verdicts based on the evidence he himself collected, there was a presumption of guilt inherent in the trial proceedings. In the pre-colonial English system of justice, therefore, the burden of proof rested with the defendant accused of a crime to establish his own innocence.<sup>16</sup> Making that task harder, defense lawyers were specifically banned in felony cases in England (and would continue to be until 1836).

Because the European people that arrived on the shores of America were, in many instances, those who had been subject to religious persecution in European courts, the presumption

of guilt was never going to work here. The Enlightenment was in bloom and people had begun questioning the tyranny of the crown, so the colonial settlers were, perhaps, predisposed to take a more adversarial approach to criminal justice. The people of the new American colonies were suspicious of concentrated power in

the hands of a few. An indi-

vidual's right to liberty

was self-evident,

and there need-

ed to be a high

threshold to allow

a court to take

away the liberty that

the Creator had endowed

to each and every individual. The new colonies were not going to set up justice systems that would railroad defendants simply because the accused was ignorant of the law.

As an example of the degree to which the New World Americans were committed to the right to counsel, the following preamble accompanied the right to counsel law passed on March 11, 1660 in the colony of Rhode Island and Providence Plantations:

*Whereas it doth appeaere that any person . . . may on good grounds, or through mallice or envie be indicted and accused for matters criminal, wherein the person is so [accused] may be innocent, and yett, may not be accomplished with soe much wisdom and knowledge of the law to plead his own innocencye, & c. Be it therefore inacted . . . that it shall be accounted and owned from henceforth the lawful privilege of any man*

*that is indicted, to procure an attorney to plead any point of law that make for clearing of his innocency.*<sup>17</sup>

As defense lawyers became increasingly involved in the early days of American jurisprudence, procedural rules started to be written down and codified. Evidence, including hearsay, could no longer be introduced without restraint. The presumption of guilt was increasingly contested. This was the birth of the adversarial system of justice that we recognize in our own country today.<sup>18</sup> The adversarial justice system is based on the simple notion that the truth will best be made clear through the back and forth debate of opposing perspectives. Indeed, this idea of competition soon became the basis of American capitalism too. So, when the North American colonies revolted from the crown, the right to counsel was quickly enshrined in all but one of the original thirteen state constitutions.<sup>19</sup>

If the right to counsel was state law, why was it important for the federal Congress to incorporate this same right as an amendment to the U.S. Constitution? The citizens of the newly independent republic had created a federal government to administer the union of their respective state governments. Having just liberated the Colonies from what they felt was the tyrannical rule of the British government, the framers of our federal Constitution were loath to create a new tyranny in the form of the Union's central government that could ignore – or worse, could abolish – these protections of personal liberty. Therefore, the Bill of Rights was created to protect the rights of the individual against an overreach of big government. With the ratification of the Bill of Rights, the right to counsel

became sacrosanct. The federal government was obligated to enforce it for all time.

At this point in history, the right to counsel was permissive. That is, the accused had the right to have a lawyer present if the accused could afford to hire one or could get one to represent him for free, but a state did not have to appoint an attorney if the accused could not obtain his own. The question of whether to appoint counsel to those of insufficient means was left up to each state. As United States Supreme Court Justice Louis Brandeis wrote in 1932: "It is one of the happy incidents of the federal system that a single courageous 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."<sup>20</sup> Nevada would become that courageous state in regard to equal justice for the indigent accused.





Map of Oregon and Upper California, from the surveys of John Charles Fremont and other authorities (1948).  
Special Collections, University of Nevada, Reno Library.

# Chapter 3

## Nevada Statehood & Its Emerging System of Justice

Until 1848, the vast area separating the Rocky Mountains and the Sierra Nevada – commonly referred to in the nineteenth century as the “Great Basin” – was claimed by Mexico.<sup>21</sup> Mexico ceded the area to the United States under the terms of the Treaty of Guadalupe Hidalgo that ended the U.S.-Mexican War. The Great Basin was described as the place “filled with what the Lord had left over when He made the world and what the Devil wouldn’t take to fix up hell.”<sup>22</sup> The combination of a desert terrain surrounded by harsh mountain conditions proved to be inhospitable to all but the Native Americans and a few hearty-souled pioneers. That is, until gold was discovered in California in 1849.

Between 1848 and 1850, the whole of the western United States was officially an unorganized territory. The region had no constitution or provisional government or justice system other than the law of “might makes right.”<sup>23</sup> As fortune-seekers flooded into this region by the thousands, two political forces took root that would forever shape criminal justice in Nevada. The first was the military provisional government running California at that time that, for the most part, allowed justice to be meted out by vigilance committees. The other was the group of political refugees known as the Latter Day Saints, or “Mormons,” that had settled in

and around the Great Salt Lake in 1847. While still technically Mexico territory, the Mormons had claimed most of the Great Basin as their own, calling their new home “Deseret.”<sup>24</sup> The Mormons would provide a more structured approach to government, albeit one that detractors claimed simply benefited the church.

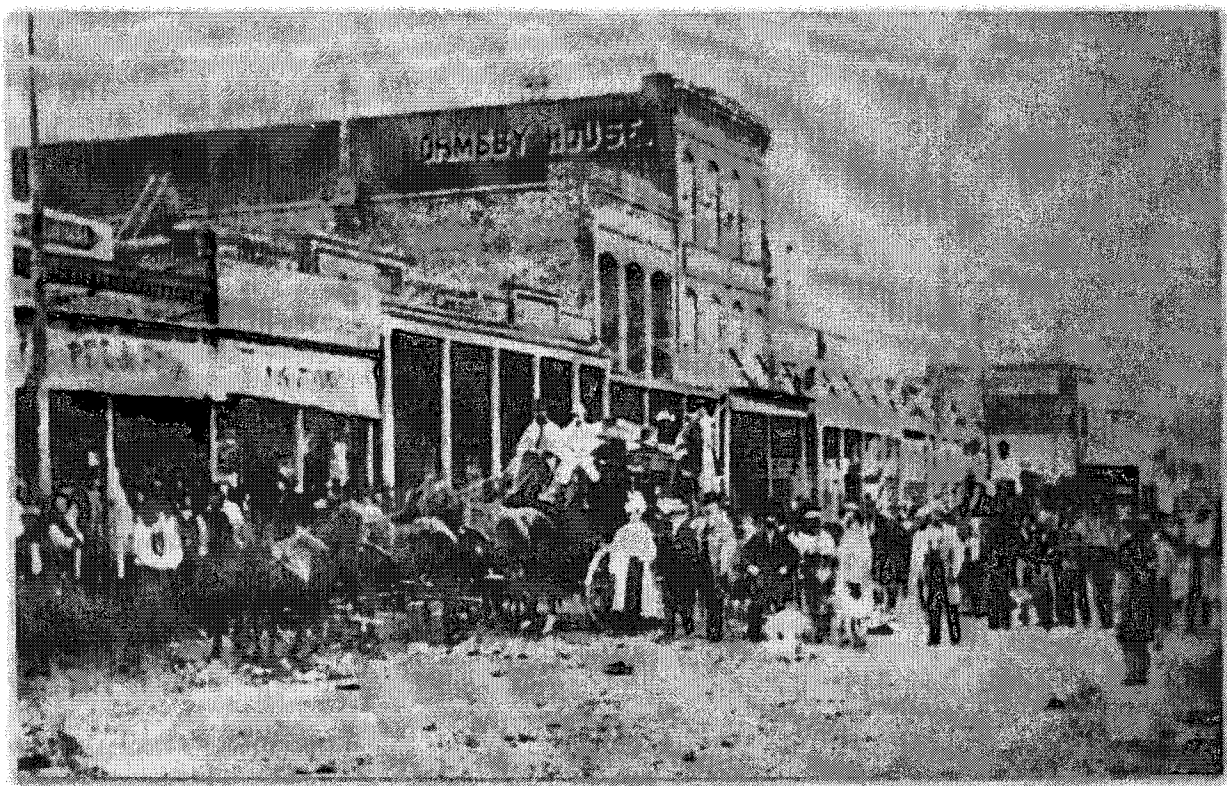
The people who had begun to settle on the eastern slope of the Sierra Nevada (in and around present day Carson City) had more in common with California than with the Mormons. Despite this, they found themselves under the rule of the Latter Day Saints when California became a state in 1850 and its official borders stopped short of the eastern slope. The land of what is now northern Nevada was instead included in the newly formed Utah Territory and its people were to be governed by the territorial government seated in Salt Lake City.

Suffice it to say, the Mormons were not, at least in the beginning, all too concerned with the happenings on the eastern slope, by this time referred to as “Washoe” after the local Indian tribe. In the void, “[t]here was little law in the territory,” and “treachery seemed to have been the controlling influence.”<sup>25</sup> One early settler described Washoe thusly: “All kinds of roguery is going on here; men are doing nothing else but steal horses, cattle, and mules.”<sup>26</sup>

In time, the Mormons would exert their authority by setting up various county structures and government systems, including courts. The Mormons named one of their own, Orson Hyde,<sup>27</sup> as the judge of the Carson region, but his authority was never truly recognized in Washoe. A series of failed attempts was made to annex the Carson region to California rather than be under the control of people who owed their allegiance to a religious structure over 500 miles away.<sup>28</sup> This was a time of heightened anti-Mormonism and most of the people of Washoe preferred handling local justice on their own. "Newcomers complained that they were not dealt with fairly under Utah's justice system" and "that

the Mormons received favorable treatment."<sup>29</sup> The people of Washoe also felt defenseless in the face of what they believed to be a biased justice system, as Brigham Young – the head of the Mormons – moved settlers into Washoe to "insure election results."<sup>30</sup>

The situation deteriorated in 1856 when an "armed mob of Mormons drove a U.S. District Judge from the territory"<sup>31</sup> and began to defy other United States laws. Believing the Mormons to be in open rebellion, then U.S. President James Buchanan sent troops toward Salt Lake expecting a war. Brigham Young called home all Mormons in anticipation of an epic



Wells, Fargo & Co's Express Office, Carson City (1865). Special Collections, University of Nevada, Reno Library.

battle. Though the United States/Mormon war never materialized, it did create a vacuum in how governmental affairs were being conducted. Washoe was again left alone, for the most part, to run its own affairs.

By 1858, a vigilante committee had been set up in the region to dispense justice. The leader of the group was Major Ormsby.<sup>32</sup> Ormsby was instrumental in the movement to free Nevada from the Utah territory. But his desire to take justice into his own hands was opposed by a number of anti-vigilante committees that, in turn, wanted either a more structured and dispassionate system of justice or some as-yet-undefined form of justice that did not give so much power to people like Ormsby. One of these anti-vigilantes was a man named "Lucky Bill" Thorington.<sup>33</sup>

By all accounts, Lucky Bill was a prototype Nevadan: flamboyant, gracious, and hard-working. He earned his nickname by running games of chance and winning almost every time a challenger put big money on the table. He invested his winnings in property, a toll road, cattle, a sawmill, and other endeavors in and around Carson City. One contemporary described Thorington as "both generous and brave and his sympathies were readily aroused in favor of the unfortunate: or which in frontier parlance would be termed 'the under dog in a fight' regardless of the causes that had placed the dog in that position."<sup>34</sup>

Lucky Bill had no problem taking money in games of chance from either horse-thieves or Mormon tithe-collectors, and he opened his house freely to each. "His station was a rendezvous where the weary found rest and

the hungry never were turned from his door."<sup>35</sup> Thorington's willingness to befriend Mormons put him at odds with the Ormsby-led vigilante committee that was squarely anti-Mormon. At the same time, more and more of the guests at Thorington's ranch were outlaws from the newly emerging California justice system – a factor that Ormsby's vigilante committee saw as contributing to the lawlessness in the Carson area. For Ormsby, Lucky Bill had become public enemy number one.

So, when Thorington allegedly abetted a murderer by letting him stay at his ranch, and allegedly helped to sell the stolen horse of the murdered man to – again allegedly – fund an assassination attempt on Ormsby's life, the vigilante committee struck.<sup>36</sup> On June 17, 1858, Thorington was arrested by a mob numbering close to a hundred. The mob had already hung one person they mistakenly identified as the alleged murderer, but that did not stop their on-going thirst for vengeful justice. A jury was quickly made up of twelve members of Ormsby's vigilante committee, while others acted as judge, sheriff, and prosecutor. The rest of the vigilante committee could be heard just outside the barn in which Thorington was being tried, constructing a gallows. Lucky Bill was executed shortly after the jury brought back the guilty verdict.

A modern reader cannot review the facts of Thorington's arrest, trial, and sentence without acknowledging the resounding truth of the U.S. Supreme Court's words in *Powell v. Alabama*, the country's first major right to counsel case. "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with

a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."<sup>37</sup>

Though the vigilantes successfully rid themselves of Thorington, the episode firmly turned the people of the Carson Valley against the vigilante committee. "[A]fter Thorington's hanging almost all the vigilantes faded from the scene, while many of his friends remained (some of whose descendants continue to reside in Carson Valley)."<sup>38</sup> Ormsby would die less than two years after Thorington's death, killed while undertaking one last act of vigilantism.<sup>39</sup> Nevada was poised for a different approach to justice.

Meanwhile, on the other side of the country, Abraham Lincoln assumed the office of the President of the United States and the nation was thrown into civil war. As the people of the eastern slope sought to create a system of government free from Mormon influence and free from the rush to judgment so core to the vigilante committees, the federal government desired new states to help ensure Lincoln a second term. Tapping Nevada's natural resources to help fund the war effort was an added benefit, and Nevada was placed on the fast track for statehood.

In 1861, the United States approved creation of a Nevada Territory, essentially splitting the Utah Territory in two. Slightly less than 7,000 people lived in the entire Nevada Territory at that time.<sup>40</sup> Still, in September 1863, approximately,

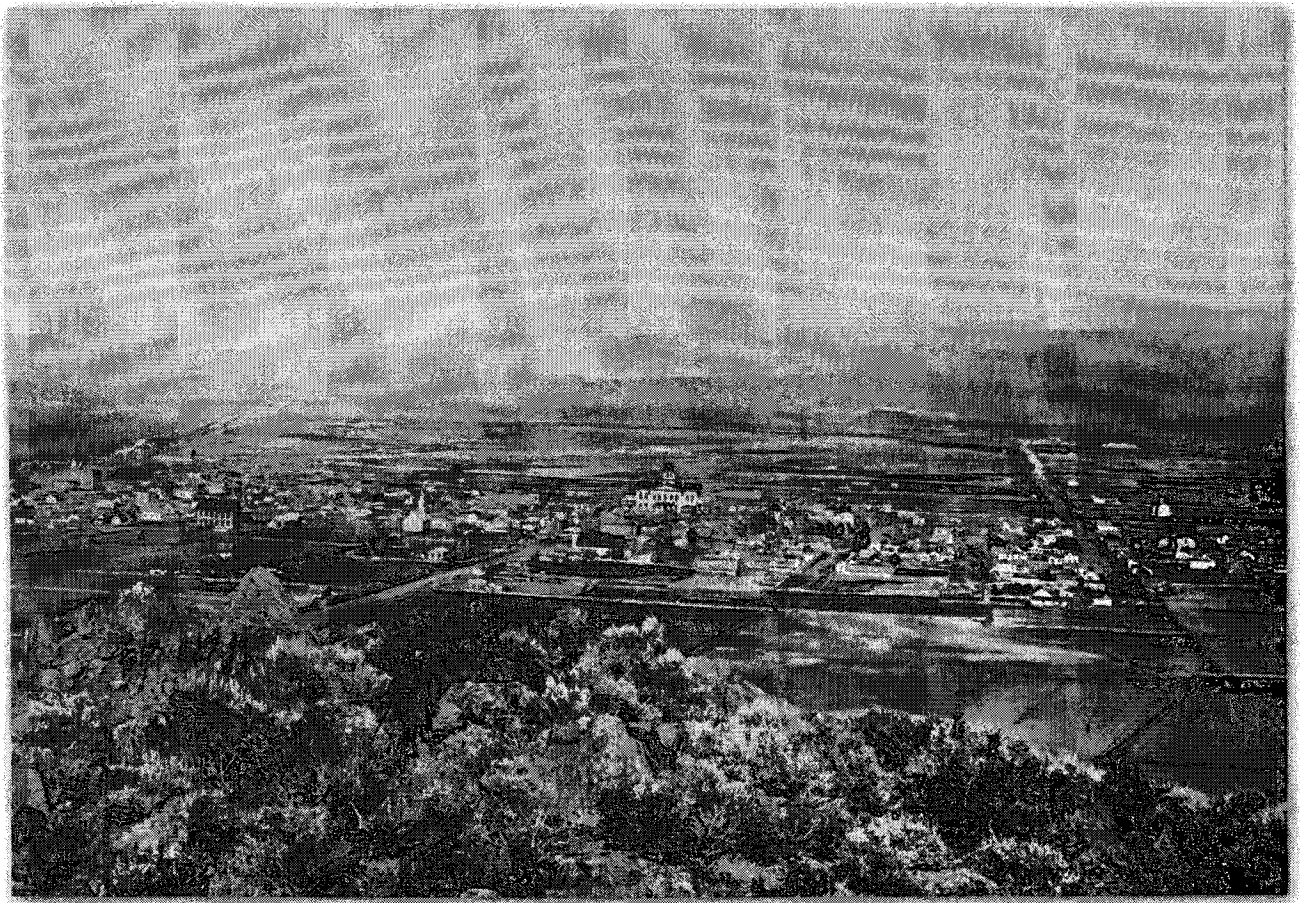
6,660 votes were cast in the territory in favor of making Nevada a state.<sup>41</sup>

A constitutional convention was called for November of the same year. On the second day, a committee of three people was appointed to work on the state constitution's preamble, the name of the state, the state seal and coat of arms, and the state's Bill of Rights.<sup>42</sup> Though the naming of the state underwent some debate, the right to counsel did not. On November 6, 1863, Section 8 of the Nevada Constitution was proposed and adopted with no debate, ensuring from that day forward that "in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel" and that under no circumstances shall the accused be deprived of "life, liberty, or property, without due process."<sup>43</sup>

There was one small hiccup unrelated to the right to counsel. The voters of Nevada summarily rejected the new constitution because it was thought its taxation plan could negatively affect the mining industry. Tax changes were made in a subsequent convention held in 1864. The voters of the Territory of Nevada approved the Constitution on September 1, 1864, and no changes were made to the right to counsel as it had been written the previous year.

Interestingly, the 1864 Constitution included a new "paramount allegiance to the Federal Government" clause vowing Nevadans support of federal powers "as the same have been or may be defined by the Supreme Court of the United States."<sup>44</sup> This same clause remains in the Nevada Constitution to this day, expressly commit-





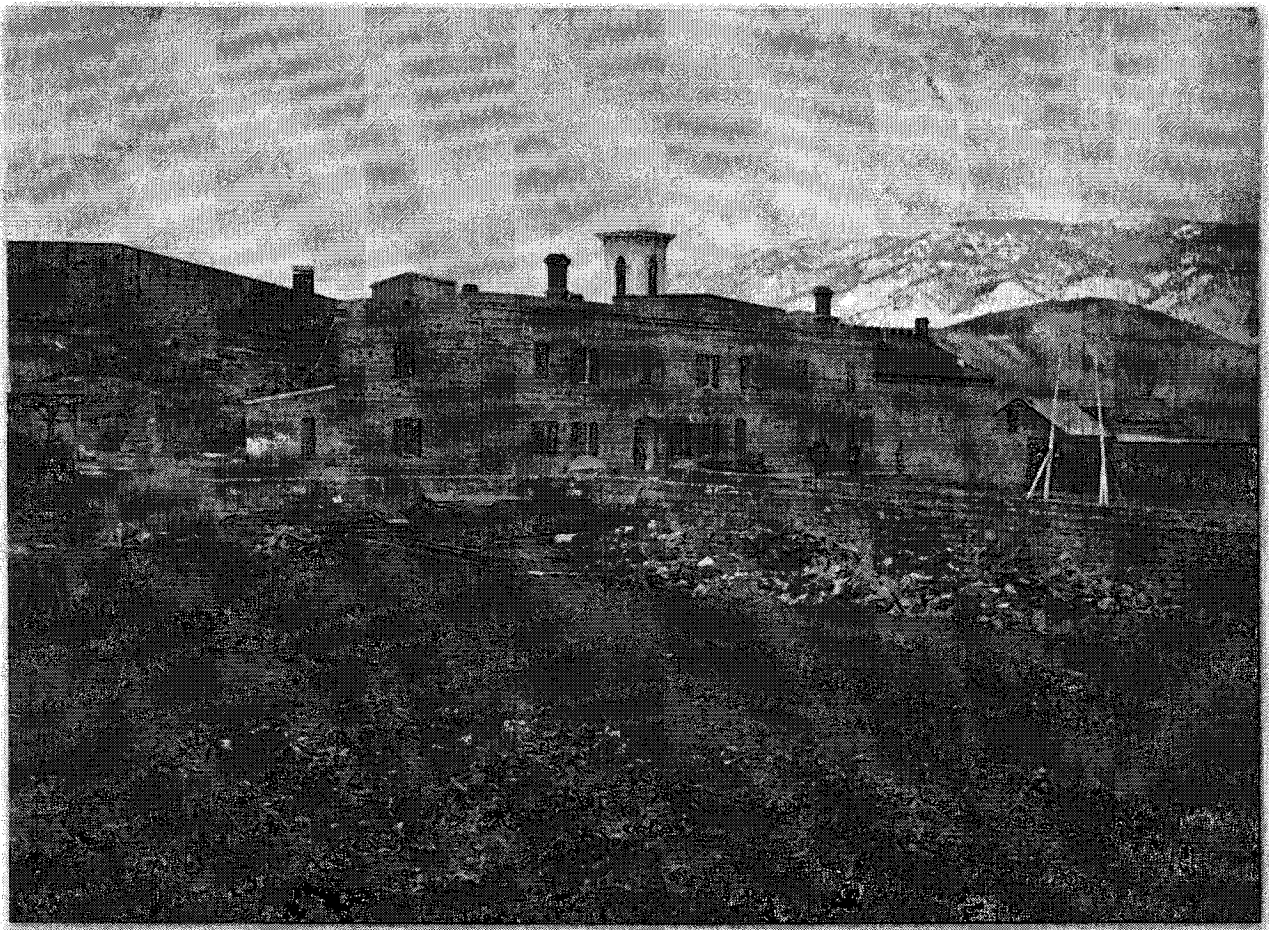
Birdseye panoramic of Carson City (c. 1870). Nevada Historical Society.

ting the state to support all right to counsel case law handed down by the U.S. Supreme Court.

Nevada was made a state on October 31, 1864, eight days before the Presidential elections and in time to help re-elect Lincoln. The American Civil War ended just months later, in early May 1865.

So what does all of this have to do with Shepherd L. Wixom? With the still fresh memories of Utah Territory justice that had lacked any semblance of due process, by the 1870s the norm in Nevada appears to have been for the

judge to appoint an attorney whenever requested by a defendant facing criminal charges. As a modern state attorney general ethics opinion observed in reflecting upon this tradition, because “an indigent defendant unversed in the law” might be deprived of due process, the Nevada courts “from the beginning” recognized their power to appoint lawyers for the poor.<sup>45</sup> Furthermore, to the extent that Nevadans saw themselves as closely aligned with California, that state had passed a sweeping right to counsel statute on February 14, 1872.<sup>46</sup>



Nevada State Penitentiary under construction (c. 1870). Nevada Historical Society.

There were also some quite practical reasons to appoint counsel. Though it is tempting for a 21st century mind to impose a modern-day notion of criminal justice on the events occurring in Lander County during the nineteenth century, in fact criminal justice then was much different in some very key ways. Criminal proceedings were actually quite rare in the 1870s. Trial judges would ride a circuit around the state, hearing cases in one town one day and the next town when he could get there, and any cases that required the judge's attention would simply have to wait until he next came to town. There were also relatively few attorneys, and those few often rode circuits side-by-side along with

judges. So, when a criminal case came up, it was frequently fairly convenient to appoint an attorney rather than have a defendant try to defend his own interests.

Indeed, as will be revealed in a later chapter, when Wixom's case reached the Nevada Supreme Court in 1877, the Court admitted that appointing attorneys for poor people in criminal proceedings was a "common" and "perhaps universal practice" in the state. It is no wonder Shepherd Wixom expected the judge to appoint him an attorney during his arraignment.



# Chapter 4

## The Right to Counsel in Nevada Established

**D**uring Shepherd Wixom's arraignment, Judge McKenney surveyed the courtroom as was the common practice in Nevada to see if any attorneys were present and willing to assist Wixom's defense.<sup>47</sup> But when there were no such attorneys present, Judge McKenney was not about to slow down justice to find one. Instead, he allowed Wixom to work with a non-lawyer to help prepare his defense as best he could.<sup>48</sup>

Five days later, on January 12, 1874 at 5 o'clock in the afternoon, the trial of Shepherd Wixom began. There is little that remains in the historical record about the trial, other than that "justice was swift."<sup>49</sup> We do know Wixom told Judge McKenney that he was not prepared for the trial because he had been denied a lawyer. We also know Wixom asked for the trial to be delayed, claiming as he had at the time of his arrest that there were witnesses who could provide testimony that Wixom was not the notorious road agent who had been terrorizing the stagecoach company. And, Wixom reminded the court again that his witnesses could not be reached because the court denied him counsel.<sup>50</sup>

Judge McKenney was not persuaded. He denied the continuance and proceeded to trial. A jury was empanelled, the trial occurred, and the jury deliberated for all of fifteen minutes before

reaching a verdict of guilty – all within a single evening.<sup>51</sup> The main testimony against Wixom came from Sheriff Emery. When the Sheriff examined a second coat ordered by the Manhattan Silver Mining Company and compared it to the coat Wixom was wearing when arrested at Battle Mountain, Sheriff Emery determined that "[t]hey were as like as two eggs."<sup>52</sup> The *Territorial Enterprise* reported that, although Wixom acted as his own defense counsel, he conducted his "case with marked ability, proving himself a perfect success as a cross-examiner, but his cunning availed him not."<sup>53</sup> There could be no conclusion but that Wixom had taken the coat along with other goods and money from the stagecoaches he had robbed.

The next morning the *Sacramento Daily Union* reported that highwayman Wixom was convicted and, rather than face a return to the Nevada State Prison, Wixom attempted to hang himself in his cell using his own socks. "The alarm was given by another prisoner, and officers cut the socks from Wixom's neck in time to save his life."<sup>54</sup> Wixom was promptly sentenced to ten years at hard labor at the state penitentiary.

Under the rules of criminal procedure in 1874 Nevada, "[a]n appeal must be taken within three months after the judgment was rendered."<sup>55</sup> Without a lawyer, Wixom was ignorant of this fact and was not able to challenge the constitu-

tionality of his trial on direct appeal because the deadline lapsed.

## Assembly Bill 122 (1875)

While Shepherd Wixom served time in prison without a lawyer, the Nevada legislature was at work in 1875. The Chairman of the Judiciary Committee in the Assembly was Thomas Wren. A self-made man, Wren was orphaned at a young age and what little property that was left to him was swindled away by a lawyer retained to look after his best interests.<sup>56</sup> Rather than ruining his life, Wren set off for California in the gold rush and worked tirelessly in the mines before apprenticing to become a lawyer. He eventually moved to Austin, in Lander County, Nevada, where he was the city attorney and prosecutor from 1864 to 1866. Subsequently, Wren was elected to the Nevada Assembly as



Thomas Wren. Nevada Historical Society.

the representative from Eureka. He would later serve as the Nevada's lone U.S. Congressman from 1877 to 1879, but in 1875 he was passionately and persuasively arguing in the Nevada Assembly.

"The love of life is the strongest feeling implanted in the breast of man. The fear of losing it tends to prevent the commission of crime, by bad men, far more powerfully than any other punishment that can be devised. It is certainly far more effective than imprisonment for life."<sup>57</sup> Thomas Wren uttered these words during debate on a bill that sought to curtail the use of the death penalty in favor of lifetime imprisonment. As a former prosecutor, it is not surprising that Wren took such a position in the debate. Wren was one of the day's leading Republicans and widely viewed as an expert on the law. His perspective, that "murders would not be so common if the death penalty, in punishment of the crime, was more certain and frequent," carried the day as the bill to curtail the death penalty was defeated.<sup>58</sup>

What is surprising, however, is that Wren, who was such a staunch proponent of tough criminal sanctions, authored another bill in the very same session to authorize the appointment and payment of defense counsel to assist those accused of crimes who could not afford an attorney. The bill presumed, as was the case, that attorneys were appointed regularly in Nevada and it sought to have them paid for their work. Assembly Bill 122 (1875) stated:

*Section 1. An attorney appointed by a Court to defend a person indicted for any offense, is entitled to receive from the County treasury the following*

fees: For a case of murder, such fee as the Court may fix, not to exceed fifty dollars; for felony, such fee as the Court may fix, not to exceed fifty dollars; for misdemeanor, such fee as the Court may fix, not to exceed fifty dollars. Such compensation shall be paid by the County Treasurer out of any moneys in the Treasury, not otherwise appropriated, upon the certification of the Judge of the Court, that such attorney has performed the services required.

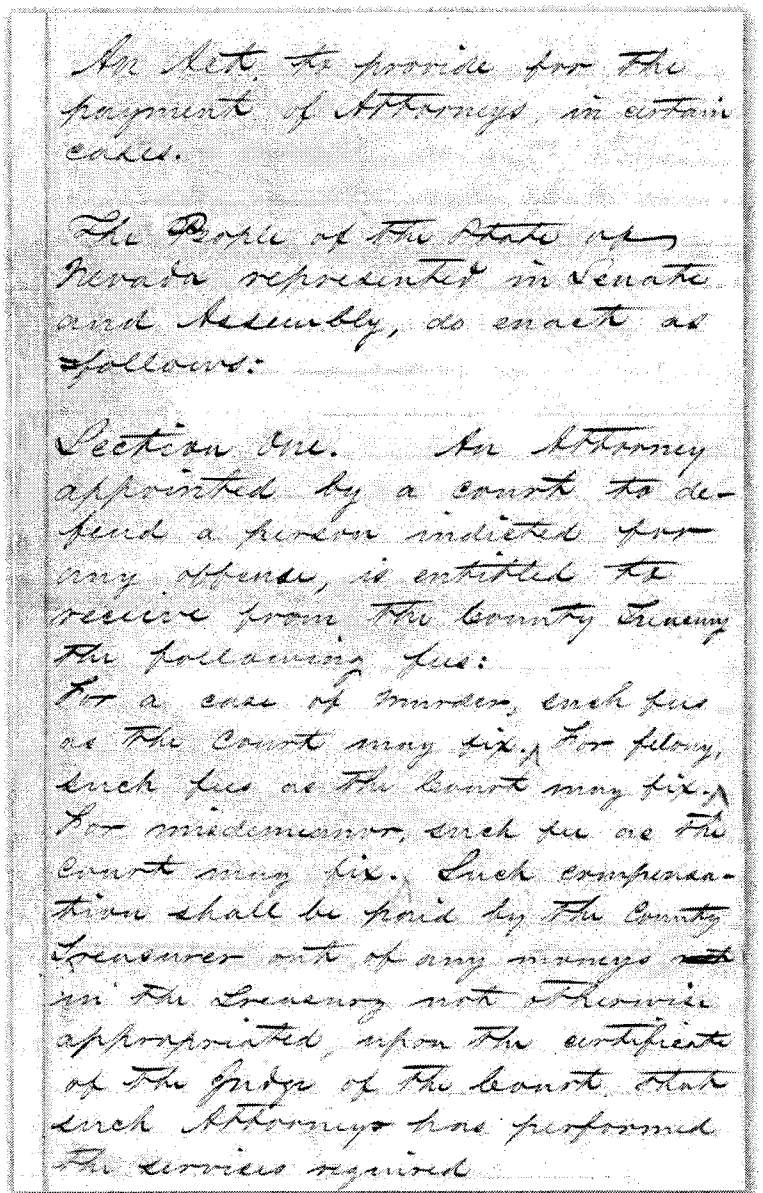
Section 2. An attorney cannot, in such case, be compelled to follow a case to another county or into the Supreme Court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices allowed.

Section 3. This Act shall take effect from and after its passage.<sup>59</sup>

According to the *Nevada Monthly*, Thomas Wren was one of the most successful and able lawyers in the state. "His honor is untarnished, and throughout the state his word is as good as his bond."<sup>60</sup> Under Wren's leadership, the bill passed the Assembly on a vote of 34 to 3 with 14 abstentions.<sup>61</sup> It passed the Senate on a similarly wide margin.<sup>62</sup>

Did Wren's time as a prosecutor make him understand the importance of a strong defense in an adversarial environment in order to reach the truth?

Perhaps it was Wren's own impoverished upbringing or the fact that an unethical lawyer swindled him out of what little money his parents left him that made him want to ensure poor people were treated fairly in the justice systems of Nevada. We cannot be sure, but a passage in a local journal published in 1880 hints that all of Wren's works were toward the goal of securing the rights of poor people: "[Wren's] purse



Thomas Wren's Assembly Bill 122 (1875). Courtesy of the Nevada State Library and Archives.

and services have always been at the command of honest poverty and distress, and hundreds of struggling and unfortunate men in this State have been aided and their rights secured through his exertions.”<sup>63</sup>

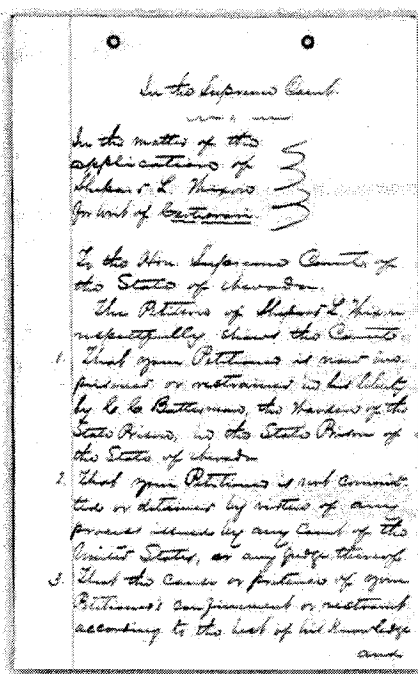
## *In re Wixom*

By the time Shepherd Wixom was able to make arrangements to sell what little property he owned and hire an attorney, the only legal action available to him was to petition the Supreme Court of Nevada for a writ of certiorari – a formal request asking a higher court to review the actions of a lower court in a specific proceeding to determine if there were any irregularities. On April 2, 1877, Wixom’s private attorney T.W.W. Davies<sup>64</sup> filed a writ of certiorari with the Nevada Supreme Court.

The petition filed on behalf of Wixom claimed that: a) the trial court “compelled your petitioner to plead to said indictment without the aid of counsel;” b) accommodations were not made to find his material witnesses; and c) the trial court ignored his objection “to proceeding with the trial of said cause without the aid of counsel, as he was totally unlearned in the law and unable to conduct his defense.” The petition characterized Judge McKenney’s failure to grant Wixom a fair day in court a “gross abuse” of power, stating that

“no appeal was taken in said cause for the reason that he was entirely ignorant of his rights as to appeal and the manner of taking an appeal, and that he had no counsel for his assistance or guidance in taking an appeal.”<sup>65</sup>

As previously noted, the Nevada courts were still in their infancy and the Nevada Supreme Court was keenly aware that every decision it rendered established precedent for future cases. When Nevada Attorney General John R. Kittrell responded to Wixom’s petition, the focus of the case turned to the Nevada Supreme Court’s jurisdiction in writ of certiorari cases.<sup>66</sup> Based on Nevada statutes and the Court’s own recent opinions, if the lower court had jurisdiction over the case and the person and did not exceed or depart from its jurisdictional authority, then the Supreme Court was without power to disturb its rulings on cert.<sup>67</sup>



Petition for Certiorari in *In re Wixom* (1877). Courtesy of the Nevada State Library and Archives.

There was no doubt that Judge McKenney had jurisdiction over the case and the person of the accused, so the only remaining question was whether the trial judge exceeded or departed from his jurisdiction during Wixom’s 1874 trial. In Nevada, it was certainly customary for judges to appoint counsel in just about every criminal matter before them, but at the time of Wixom’s arrest and trial there was no statute that required judges to appoint counsel. The Court observed: “If there was any



Capitol Building, Carson City (c. 1870). Special Collections, University of Nevada, Reno Library.

law which expressly required the district judges to assign counsel to the defendant in a criminal action at any particular stage of the proceedings, a failure to do so would be a departure from the forms prescribed to them by law, and would be ground of reversal on certiorari in cases where the remedy is available. But in this state there is no such law."<sup>68</sup> And the Court went on to declare: "In overruling the motion for a continuance, and compelling the petitioner to go to trial without professional counsel, the district judge . . . departed from no express provision of the law."<sup>69</sup> The Nevada Supreme Court found that it lacked authority to overturn Wixom's uncounseled conviction on certiorari, and his petition was dismissed.<sup>70</sup>

In a sad twist of legal irony, had Wixom been able to retain private counsel within the appellate filing deadline, it is likely his conviction would have been overturned and a new trial ordered. Through dicta in Wixom's case, the Court took pains to say that, in forcing the defendant to go to trial without a lawyer, "the district judge may have erred, and may have abused his discretion . . . His action may have afforded good grounds for granting the defendant a new trial, or for reversing the judgment on appeal . . ."<sup>71</sup> Wixom, however, had never filed an appeal.

The Court did not stop there. Justice William H. Beatty,<sup>72</sup> writing on behalf of the unanimous three-person bench, foreshadowed the view of the Nevada Supreme Court in cases to come.

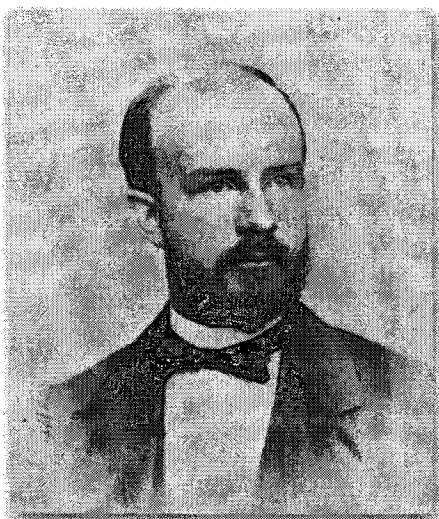
Referring to Wren's Assembly Bill 122, the Court concluded in *In re Wixom* that "a statute (Laws of 1875, 142) passed since the trial of this petitioner, has made provision for compensation of attorneys appointed to defend in such cases. Probably since this statute, if not before, a failure to assign professional counsel for a poor defendant would be deemed a fatal error on appeal . . ."<sup>73</sup> It was too late for Wixom, but Wren's 1875 bill and the 1877 Nevada Supreme Court assured that, from that day forward, the failure to appoint counsel to the poor in a criminal case was a valid reason to overturn convictions on direct appeal.

## Furthering the Right to Counsel in Nevada

To the extent that Wren's bill could have been construed as merely giving judges the discretion to pay appointed counsel, but without requiring them to do so, the Nevada Supreme Court eliminated any ambiguity two years later in the 1879 case of *Washoe County v. Humboldt County*.<sup>74</sup> The case involved, among other things, the payment of counsel in the controversial death penalty case of J.W. Rover.<sup>75</sup> The Nevada Supreme Court, citing Wren's 1875 law, concluded that it was their duty "to determine the real intention of the legislature." Noting the financial hardship some attorneys endured when

representing the indigent accused, the Nevada Supreme Court was "of the opinion that it was not the intention of the legislature to invest the courts with any such discretionary power." Instead, "[w]e are of the opinion that it was the intention of the legislature to provide for the payment of a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court."

The right to counsel in Nevada was formally codified in 1909 when the Nevada legislature granted the justices of the Nevada Supreme Court wide authority "to revise, compile, annotate and index the laws of the State of Nevada."<sup>76</sup> For the most part, the Court adopted the California Penal Code.<sup>77</sup> Once revised, Section 10883 of the Nevada code stated: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."<sup>78</sup>



Justice William Henry Beatty (c. 1870).  
Nevada Historical Society.

Most right to counsel scholars have marked this 1909 statute as the beginning of the right to appointed counsel for the poor charged with crimes in Nevada, simply because it was the first statute directly so providing. But the law championed by Assemblyman Thomas Wren and recognized by the Nevada Supreme Court in its ruling in the case of *Shepherd Wixom* firmly established the right in 1877, more than thirty years earlier.

# Chapter 5

## Would a Competent Attorney have helped Wixom?

**I**t is, of course, impossible to go back in history and see what a competent attorney would have been able to accomplish for Mr. Wixom, but some evidence suggests that a well-qualified lawyer could have made a difference.

### Circumstantial Evidence

From the records of the Wells, Fargo & Company detective agency, we know much about the stagecoach robberies in Lander County in 1873.<sup>79</sup> On September 27, 1873, a Woodruff & Ennor's stagecoach was traveling through a canyon near Vick's Station when a masked highwayman aimed his rifle at the stagecoach driver Eugene Burnett and ordered him to "halt." Two other bandits also appeared, one carrying a shotgun and the other holding a revolver. Each of the highwaymen obscured his face. Unlike the stereotypical bandana worn in Hollywood westerns, the would-be robbers' "heads were covered with masks made from barley sacks with eye holes cut out."<sup>80</sup> The gang broke open the treasure box with a hatchet and absconded with about \$200.

The coach was transporting two passengers.<sup>81</sup> Neither of the passengers nor the driver could identify the robbers and only gave vague descriptions that the gang was composed of "one tall, one medium-sized and one short robber."

We also know that the shortest robber was apparently "in-charge."

Four days later on October 1, 1873, another Woodruff & Ennor's stagecoach was robbed. The driver gave the same general description of three masked men carrying a rifle, a shotgun, and a revolver. "The Wells, Fargo & Company treasure box was demanded and this time it was taken a short distance from the road before being broken open. . . . This time the box was empty so it was expected that the robbers would strike again soon."<sup>82</sup>

The highwaymen waited four weeks before trying again. This time only two robbers were involved. On October 22, 1874, at about the "same point near the Reese River on the Battle Mountain stagecoach route,"<sup>83</sup> two highwaymen ordered driver Bill Monk to halt. Accompanying Monk was an armed guard named Lou Ferot. The appearance of the highwaymen scared the team of horses and the driver could not get the horses under control immediately. Amidst all the excitement, the robbers "simply disappeared into the brush"<sup>84</sup> without further incident. It was the third attempted robbery and the second with nothing to show for it.

Five days later on October 27, a lone road agent stopped another coach. He was carrying a shotgun. This may indicate that it was not



the “leader” – who generally carried a rifle – but one of the other two road agents or, of course, someone entirely different. In any event, the robber stopped the coach, was handed the box, and escaped. The driver was Eugene Burnett, who was also driving when the stagecoach was robbed on September 27. Additionally, there were “six passengers aboard, one atop and five inside, but they were not molested and there was no request for the U.S. mails.”<sup>85</sup> None could identify the road agent. “The amount taken from Wells, Fargo & Company’s treasure box was not disclosed but it was thought to be a very small amount so it was expected that the road agent would strike again soon.”<sup>86</sup>

**Surely a competent lawyer would have had much to say about whether an experienced stagecoach driver would stop to be robbed by a man carrying nothing but a stick.**

On November 1, 1873, yet another coach was stopped. This time the lone robber built a barricade with sagebrush covered by a blanket – an entirely different modus operandi from the other attempts. “Mike Kehoe was driving with ‘Major’ Stonehill and Road Superintendent W. Addington riding on top.”<sup>87</sup> All three men reported the “the robber has a decided ‘Yankee accent,’” something that was not reported by any of the witnesses in any of the other recent robberies. “There was nothing of value among the contents of the box” and “everything was still in the box when recovered, though it had been thoroughly rifled through.”<sup>88</sup> It was at that point that “Wells, Fargo & Company offered a reward of \$500 for the capture of the road agents.”<sup>89</sup>

Perhaps, not coincidentally, it was less than a week after the reward was offered that Wixom was arrested. Did someone want the reward money and frame Wixom in a tip to Sheriff Emery? A good lawyer would have demanded to cross-examine whoever the tipster was.

Wixom was only charged in three of the five stagecoach robberies: the last three occurring on October 22, October 27, and November

1. Wixom was not charged in the original September 27 robbery committed by three highwaymen and the only one involving any significant amount of money. Eugene Burnett was the driver

on both September 27 and October 27, and surely he would have been able to say if Wixom robbed him both times, so was it the case that Burnett knew Wixom was not involved in the September 27 robbery? After all, the three culprits from the September 27 and October 1 robberies were the most likely suspects for all five of the stagecoach robberies.

And what of the three robberies for which Wixom was arrested? Wells, Fargo & Company fired the two stagecoach employees, Bill Monk and Lou Ferot who were working during the October 22 robbery, for allegedly abetting other stagecoach robberies.<sup>90</sup> Maybe it was Monk or Ferot who pointed the finger at Wixom to hide their own treachery. Had a defense lawyer been present in the Lander County District

Court, perhaps both Monk and Ferot would have been subpoenaed and questioned.<sup>91</sup> The potential of an inside job was mentioned in the *Territorial Enterprise*, as during one of the stagecoach robberies for which Wixom stood accused the road agent did not even carry a gun, but used a stick as if it were a rifle.<sup>92</sup> Surely a competent lawyer would have had much to say about whether an experienced stagecoach driver would stop to be robbed by a man carrying a stick.

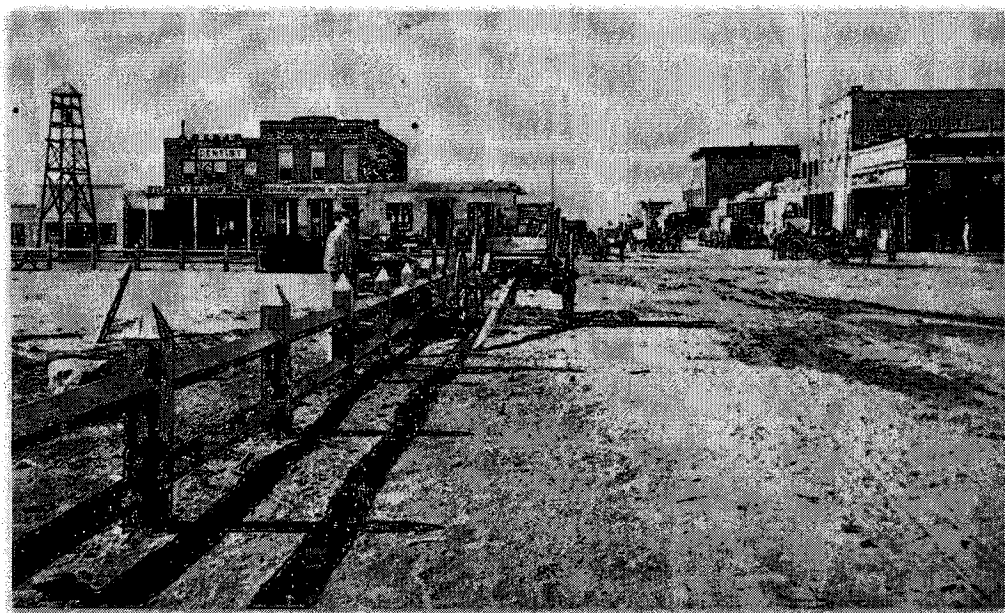
During the October 27 robbery, one passenger was riding on top of the stagecoach and surely got a good look at the lone robber. Though no one was able to identify the road agent that day, a defense lawyer would have wanted to question that passenger. After all, the passenger might have testified that Wixom did not resemble the man who robbed the stagecoach on October 27.

An attorney would also likely have taken measures to have the jury hear the testimony of eye-witnesses Kehoe, Stonehill and Addington from the heist on November 1, stating that the highwayman had a decidedly “Yankee accent.” From the 1860 United States census, we know that Shepherd L. Wixom was born in 1843 in Canada

and was raised in Lexington, Michigan – not necessarily an area known for its “Yankee” accents.

But the richest trove of all for a defense attorney, had Wixom had one to represent him, was probably the evidence about the allegedly stolen coat. The *Sacramento Daily Union* article on Wixom’s arrest notes that there were other “suspicious circumstances,” but the principle charge was simply that Wixom had the coat.<sup>93</sup>

Wixom had married Gusta Frazier in Utah a short time before his arrest and trial. According to the press of the day, Wixom told “conflicting stories” regarding the coat, “first saying he had bought it in Salt Lake City for his wedding and then said that it had been given to him as a gift.”<sup>94</sup> One possibility is that Wixom did indeed purchase or receive the coat for his wedding, as he said.<sup>95</sup> Interestingly, the *Territorial Enterprise* of January 17, 1874 reported the following: “It is too bad that a great, rich and powerful corpora-



Carson Street, Carson City (c. 1865). Special Collections, University of Nevada, Reno Library.

tion like Wells, Fargo & Co. should descend so low as to put up a job on an innocent individual to rob him of his wedding coat."<sup>96</sup> Certainly the local reporter got the impression that the coat in question was Wixom's. The jury might well have reached the same conclusion if guided to it by a defense attorney.

Could it be that Wixom was given the coat by one of the three real bandits or had happened across the coat, but after learning that it was stolen just did not know how to explain that to the jury for fear that it would make him look guilty of the robberies? Again, we do not know, but these were all avenues rich with potential defenses in the hands of an attorney.

Perhaps Wixom's witnesses could have corroborated how he came into ownership of the coat or could have given him an alibi for the time of one or all of the three robberies. We simply do not know because Wixom did not have a lawyer challenging his indictment or questioning witnesses or arguing his defense.

## Wixom's Criminal Record

Past behavior is often considered to be a good indicator of future actions. It is easier to believe that someone who has committed crimes in the past is likely to commit them in the future. Wixom was branded in the press as a "notorious highwayman"<sup>97</sup> and an ex-felon. His prior criminal record seemed to make him guilty in the eyes of public opinion.

Here is what is known of Wixom's criminal record. In 1871, Wixom was arrested and jailed

on felony charges of horse stealing. While waiting for his trial, he befriended another detainee, Ms. Hattie Funk.<sup>98</sup> Funk was charged with the murder of her husband, James, in Eureka. Wixom was fully acquitted of the horse stealing charge and was released from jail.

Later, Wixom went back to visit Mrs. Funk at the Lander County jail. He took her a package of men's clothing, and Funk proceeded to walk out of the jail's front door. Wixom was soon discovered and arrested, even as Funk fled, but she quickly turned herself in. Though Wixom was convicted of abetting Hattie's escape from jail, he received a full pardon from the Governor of Nevada after serving less than eight months in prison.<sup>99</sup>

Hattie Funk too was eventually acquitted of all the charges she faced. It is purely speculative as to why she was acquitted of murder, but a newspaper account at the time suggested that the death of James Funk was the result of a domestic dispute involving "whiskey" and allegations of "domestic infelicities."<sup>100</sup>

A lawyer might well have been able to prevent people from serving on Wixom's jury who had been influenced by tales of his alleged criminality carried in the newspapers. Even if the jurors had read or knew of the accounts in the press, the lawyer could have reminded the jury that Wixom was not guilty of the horse-stealing charge and thus had no prior conviction other than aiding Funk's escape. And, Hattie Funk may have merely been defending herself against her husband James in what we would today consider to be a case of domestic violence. If so, a good lawyer may have been able to por-



Gravestone of Sheppard Wixon in Tuttle Gulch Cemetery. Courtesy of April Salinas, Redding, California.

tray Shepherd Wixom as an honorable man willing to stand up for a down-trodden innocent woman who should never have been arrested in the first place. In any event, a lawyer would most certainly have told the jury that the Nevada Governor had seen fit to fully pardon Wixom for the crime of abetting Hattie's escape from jail.

## A Differing Theory of the Case

While Wixom was in the Nevada State Prison before the Governor pardoned and released him from abetting the Funk escape, 29 other prisoners staged a large-scale escape attempt on September 17, 1871. The prisoners overtook the guards, broke into the armory, and stole weapons. After an "epic gun battle," twenty prisoners made it free.<sup>101</sup>

Some time later after Wixom was released from prison and before his arrest on the stagecoach robberies, Wixom became aware that one of

the escapees, Chris Blair, was living in Ogden, Utah, under the alias Charles H. Clark. Wixom told Sheriff Emery where Blair could be found. Blair was captured and returned to Nevada State Prison.<sup>102</sup> In the hands of a competent lawyer, such actions could be used either to demonstrate that Wixom was of good character or, perhaps, to show motive why a true outlaw like Blair may have wanted to set up Wixom as the fall guy for the stagecoach robberies.<sup>103</sup>

## Character

Although the Supreme Court decision in *In re Wixom* strengthened Wren's bill and protected the rights of indigent defendants from 1875 onward, it did nothing for Shepherd Wixom personally. Wixom's only available course of action was to petition the Board of Pardons for his release. In numerous pardon requests Wixom insisted on his innocence, reminded the Board that he was denied counsel, that the Nevada Supreme Court had enforced the right to coun-

sel on behalf of future defendants in his name, and that he should be released.<sup>104</sup> Though it is lost to the historical record, Wixom even claimed he had received a letter from Judge McKenney admitting that the judge forced him to trial without a lawyer and that it had been an "injustice" to do so.<sup>105</sup> Judge McKenney did ultimately recommend Wixom for a pardon, but it did no good. Wixom never received a pardon from the Board. Instead, he was released from the Nevada State Prison in 1882 after serving out his sentence and left the state for good. He settled in Shasta County, California, where he died in 1894 at the age of 51.<sup>106</sup>

Wixom is buried at the Tuttle Gulch cemetery.<sup>107</sup> Thanks to the electronic information age in which we now live, a photograph of Wixom's headstone is publicly available. The headstone indicates that Wixom was a Union Civil War

veteran. He enlisted in Detroit on February 5, 1863, at the age of 20 and was a private in Company H of the Michigan 9th Cavalry Regiment.<sup>108</sup> Wixom's regiment fought numerous battles with the Confederate Army as they wound their way through Ohio, Kentucky, and on into Tennessee and Georgia. There, Wixom's regiment was one of the few that stayed with General Sherman on his famous march to the sea that many historians credit with breaking the backbone of the Confederacy.

Two months before Robert E. Lee would surrender in April of 1865, Shepherd L. Wixom was wounded in one of the final battles of the Civil War. Rather than abandon the cause, Wixom transferred into the 17th Regiment Veteran's Reserve Corps, also known as the "invalid" corps. Despite their injuries, the men of the Reserve Corps aided the front lines with com-

munication and supplies to the extent possible. Wixom remained in the Reserve Corps until November 1865.

With a competent attorney, Wixom's military career could have been used during his trial to show his good moral character and to counter the public perception that he was a "notorious highwayman." This might have gone a long way with Wixom's jury, given Nevada's reputation as the "battle born" state that achieved statehood, in part, to help Lincoln win the war effort.



The 9th Michigan Cavalry at Lookout Mountain in Chattanooga, Tennessee (July 1864). Courtesy of Richard Bishop, Michigan.

# Chapter 6

## The Current Indigent Defense Crisis in Rural Nevada

Nevada's commitment to equal justice that began in the 1870s reached its zenith in 1971. The U.S. Supreme Court handed down its *Gideon v. Wainwright* decision in 1963, mandating that states – not counties or local governments – must assure competent counsel to poor people accused of felonies in state courts. In the wake of that decision, in 1970 the National Conference of Commissioners on Uniform State Laws, funded by the U.S. Department of Justice, published a Model Public Defender Act that it recommended all state governments adopt. Following that recommendation, in 1971 the Nevada Legislature created the State Public Defender as an executive branch agency charged with administering the constitutional mandate to provide competent lawyers to the poor in all counties other than Clark (Las Vegas) and Washoe (Reno).

The State Public Defender Act created an independent seven-member commission appointed by a diversity of factions<sup>109</sup> to ensure that no single branch of government could exert undue interference on the work of the agency dedicated to representing poor people. The commission was charged with overseeing the State Public Defender system, hiring and firing the executive of the system, and setting uniform policies for the delivery of indigent defense services. If created today, the State Public De-

fender Commission of 1971 would meet virtually every national standard related to the independence of the defense function.

### The Preeminent Need for Independence of the Defense Function

In 1981, the United States Supreme Court determined in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”<sup>110</sup> Observing 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 concluded in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”<sup>111</sup>

Independence of the defense function is especially necessary to prevent undue judicial interference.<sup>112</sup> As far back as the Scottsboro Boys case (*Powell v. Alabama*<sup>113</sup>), the U.S. Supreme Court questioned the efficacy of judicial oversight and supervision of right to counsel services, asking: “[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."<sup>114</sup>

National standards of justice reflect the aims of the U.S. Supreme Court. In February 2002, the American Bar Association (ABA), House of Delegates adopted the *Ten Principles of a Public Defense Delivery*

System, noting that

the *Principles* "constitute 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."<sup>115</sup> In 2012, the U.S. Attorney General stated that the ABA "literally set the standard"<sup>116</sup> for indigent defense systems with the promulgation of the *Ten Principles*.

The first of the ABA *Ten Principles* explicitly states that the "public defense function, including the selection, funding, and payment of the defense counsel, is independent."<sup>117</sup> In the commentary to this standard, the ABA explains that the public defense function "should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel," noting specifically that "[r]emoving oversight from the judiciary ensures judicial indepen-

dence from undue political pressures and is an important means of furthering the independence of public defense."<sup>118</sup> Likewise, the public defense function should also "be independent from political influence."<sup>119</sup> To "safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems."<sup>120</sup>

Footnotes to ABA *Principle 1* refer to the National Study Commission on Defense Services'

(NSC) *Guidelines for Legal Defense*

*Systems in the United States*

(1976). The *Guidelines* were 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 that a "special Defender Commission should be established for every defender system, whether public or private," and that the primary consideration of appointing authorities should be "ensuring the independence of the Defender Director."<sup>121</sup>

Independence of the defense function is the first of the ABA *Principles* because without it most of the other ABA *Principles* are unobtainable. Fearing a loss of their jobs if they do not please either a judge or a county/state executive, defenders are at risk of taking on more cases than they can ethically handle (in violation of *Principle 5*), inappropriately delaying work on

**Each state has a constitutional obligation to respect the professional independence of the public defenders whom it engages."**



a case (in violation of *Principle 3*), not meeting the requirements of ethical representation as a result of triaging services (*Principle 10*), and agreeing to work under low-bid, flat-fee contracts (*Principle 8*).

## About face: Nevada's turn away from its commitment to equal justice

In 1975, only four years after creating the State Public Defender Commission, the Nevada Legislature did away with it and voted instead to make the State Public Defender a direct appointment by the Governor.<sup>122</sup> Chief public defenders who are direct political appointees often take into account what they must do to please the Governor, rather than doing what is solely in the best interest of the defendants as ethics require, or they risk losing their jobs.

Say, for example, that a Governor calls for all executive branch departments to take a 10% cut in their budgets. The problem is that public defenders are constitutionally required to defend all people appointed to them from the court. Unlike other aspects of government, the defense practitioners do not control their own workload. Therefore a 10% budget cut is impossible to implement if it is not met by a 10% cut in workload — at least it is impossible if one is concerned about providing ethical representation. But, despite the ethical considerations, the public defender that is a direct gubernatorial appointee is likely to cut 10% rather than risk being replaced by someone who will do what the Governor says.

Not surprisingly, the Nevada State Public Defender resigned in 1979, stating that the undue political interference, institutionalized by the Nevada Legislature in 1975, made it impossible to fulfill the agency's mission. A subsequent independent review marked the State Public Defender system as "disorganized and underfunded."<sup>123</sup>

In 1989, the legislature further compromised the ability of the State Public Defender to render effective services by demoting the position from a gubernatorial cabinet-level position to one of several intra-agency positions within the Department of Human Services. This move resulted in the State Public Defender having to argue for adequate budgetary resources amongst several other Human Service agencies. From there, the director of Human Services would have to argue for all of their needs against the needs of all the other executive branch departments.

Without an independent voice to advocate for appropriate resources, the state's commitment to the rural counties deteriorated further. As originally conceived, the state paid for 80% of all public defender costs in the rural counties and the counties funded the other 20%. The state's financial commitment slowly eroded to the point where counties, at first, had to pay the majority of the costs and, eventually, 80% of the entire cost. Counties quickly learned that, by simply opting out of the state system, they could spend less money to provide the services and exercise local power over their public defense systems.

Unfortunately for those too poor to hire their own counsel, this movement out of the State

Public Defender system was done with no guidance whatsoever by the state. There were no standards as to how the counties must set up their systems. There were no standards to say what training or experience attorneys must have to take indigent defense cases or what on-going training was required for them to continue to take cases. In most instances, the county

governments established systems in which the lowest bidder was contracted to provide representation in an unlimited number of cases for a single flat fee. The attorneys were not reimbursed for overhead or for out-of-pocket case expenses such as mileage, experts, investigators, etc. The more work an attorney did on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible.

The impact of this devolution was keenly felt during a survey undertaken by the Nevada Supreme Court Indigent Defense Commission in 2008. Since no state agency was responsible for the representation given to poor defendants in rural Nevada, the commission had to ask each county to self-report information such as indigent defense expenditures and number of cases. Some counties could not or would not provide this basic information to Nevada's highest Court.

Douglas County self-reported that it spent \$383,683 in 2007 on primary defender services (or, \$191,845 each for two separate attorneys)

and \$46,661 on conflict counsel, with an additional \$23,036 spent on case-related services. Though that may sound like a lot of money, the county reported that in the same year they had 202 felony cases including one murder

case, 3,249 misdemeanors, and 341 juvenile delinquency cases.<sup>124</sup> So, on average, there was only \$119.56 available on each of these

cases to pay the attorney a fee, and to pay the attorney's overhead, and to pay for all of the necessary out-of-pocket expenses in the case. One hundred and forty years ago the Nevada Legislature first set attorney compensation at a rate not to exceed \$50 dollars per case. The relative historical value of \$50 in 1874 is estimated to be about \$12,200 in 2007 dollars,<sup>125</sup> yet Douglas County public defenders in 2007 earned less than 1% of that.

ABA *Principle 5* states that national "caseload standards should in no event be exceeded."<sup>126</sup> National caseload standards were first developed in 1973 under a grant from the United States Department of Justice.<sup>127</sup> They state that no attorney should handle more than 150 felonies in a single year if that is the only type of case handled. Similarly, an attorney handling only misdemeanors should have no more than 400 per year; juvenile delinquency matters no more than 200 per year; and, appellate matters no more than 25 per year.

Using these national standards, Douglas County should have had over eleven full-time

## There were no standards guiding Nevada's county governments as to how they must set up their systems.

attorneys when, in fact, they operated with just three part-time attorneys. And, the situation is actually far worse. National standards require indigent defense practitioners to have adequate support staff. For example, national standards require indigent defense systems to have one investigator for every three attorneys. A state like Indiana lowers the maximum number of cases a public defense attorney is allowed to handle in a year if the attorney is not provided with the required number of support staff. No such support staff was reported in Douglas County.

Additionally, the part-time conflict attorney handled only those cases where the other two attorneys had conflicts (and, again, Douglas County was unable to provide a simple count of the cases that went to this part-time conflict attorney). We know the conflict attorney was paid only  $\frac{1}{4}$  of the amount paid to each of the other two attorneys, so from that we can reasonably estimate that the conflict attorney received 1 case for every 4 cases that each of the primary attorneys received, or 1 of every 9 cases. This would mean that each of the part-time primary attorneys handled an average mixed caseload of 1,685 cases (or the equivalent of the caseload of nearly five full-time attorneys that would be allowed under national standards). And, this does not include other work the attorneys were required to do under their contracts, such as family court work and parole and probation violations.

Douglas County is not alone. The *Las Vegas Review Journal* investigated the indigent defense system in Lyon County, and they found even more problematic conditions.<sup>128</sup> When a

contract defender there was appointed to the bench, his pending cases needed to be transferred to another attorney. A 27-year-old attorney who had only passed the bar exam a few weeks prior inherited the \$105,000 contract. He also began day one of his tenure as a public defense attorney with 600 cases, 200 of which were felonies and some of those were murder cases. So a brand new part-time attorney with no experience or training was expected to jump into a caseload that under national standards should have been handled by more than three experienced full-time attorneys.

And, all case-related expenses had to be paid out of that same flat fee. The *Review Journal* article reports that one public defense attorney in Lyon County must “travel 400 to 600 miles a week to courthouses in Fernley and Yerington, travel time that cuts into the time he can spend with clients.”<sup>129</sup> With gasoline prices in 2007 at approximately \$3.10 a gallon, the attorney was spending at least \$4,000 out of that \$105,000 flat fee just for gas.<sup>130</sup> Factor in overhead costs (e.g., insurance, bar fees, training, Internet, office space, etc.) and anything needed to properly defend the accused (e.g., experts, investigation, etc.), and it becomes obvious that, under flat fee contracts, public defense attorneys have financial interests to dedicate as little funding to case-related expenses as possible.

For these reasons, ABA *Principle 8* specifically bans flat fee contracts: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or

complex cases, and separately fund, expert, investigative and other litigation support functions."<sup>131</sup>

## Sorting it all out on appeal

When a defendant is convicted and sentenced in a trial court, he has the right to have the decision reviewed by a higher authority. During this review process, the defendant

can claim that his trial lawyer performed so poorly that it negatively and unfairly affected the outcome of the case. These claims are called

"ineffective assistance of counsel claims" (IAC claims), and if found meritorious the case will be sent back to the trial courts to be re-tried. Throughout the work of the Supreme Court Indigent Defense Commission, the Court heard that there is no problem in the rural counties because there have been few successful ineffective assistance of counsel claims.

However, upwards of 90% of all criminal cases in the nation are resolved through plea bargains, not trials.<sup>132</sup> Douglas County, for example, self-reported that of the 3,793 indigent defense cases assigned in 2007, only four (4) cases went to trial. This is a trial rate of less than one half of one percent (0.11%). More astonishing still, none of the 3,249 misdemeanor cases were ever brought to trial. And, Nevada limits the issues that can be raised on direct appeal from a guilty plea. Finally, only a tiny fraction of the cases that do go to trial ever move on to the appellate system. Therefore, it is simply unsound to gauge the health of an entire

indigent defense system based on but a small fraction of the few cases that do go to trial and are appealed.

In certain circumstances (e.g., if all the facts necessary for an IAC finding are contained in the trial record), an IAC claim can be brought on direct appeal. But, in rural Nevada, the same attorney who represented the defendant at trial is also responsible for handling the direct appeal. What are the chances that

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## **What are the chances that overworked, unprepared, financially conflicted, public defense attorneys will ever raise ineffective assistance of counsel claims against themselves in a direct appeal?**

1874, Shepherd L. Wixom may have had no appellate review because of a lack of counsel, but poor defendants in rural Nevada today continue to have no meaningful review because the system is structured so as to, in effect, give them no direct appeal.<sup>133</sup>

The first real chance of raising ineffective assistance of counsel claims occurs at the post-conviction stage of a criminal proceeding, where a defendant may raise new issues about the constitutionality of his conviction beyond what is in the trial record. But, of course, there is no federal right to counsel in post-conviction proceedings, and Nevada only appoints counsel in post-conviction death penalty cases. So, if there is no counsel, there is no investigation, and there is no ability to develop the factual basis for an IAC claim.

Further, to the extent that ineffective assistance of counsel claims are raised on either direct appeal or

post-conviction in cases arising out of rural Nevada courts, they are then typically subjected to an inappropriate standard of review. *Strickland v. Washington*<sup>134</sup> established a two-pronged test for ineffective assistance of counsel, requiring that a defendant prove his trial attorney's actions were outside of the bounds of generally accepted norms of practice and that the failure of the attorney was prejudicial in the outcome of the case. This is most often the test applied by reviewing courts.

On the very same day, the U.S. Supreme Court handed down *United States v. Cronin* as a companion case to *Strickland*.<sup>135</sup> Cronin concluded that the right to the effective assistance of counsel is "the right of the accused to require the prosecution's case

to survive the crucible of meaningful adversarial testing." Referencing *Strickland*, the *Cronin* Court noted that 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."<sup>136</sup> However, the Court continued, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."<sup>137</sup> So, if there is a complete breakdown in the adversarial system, then it is entirely appropriate to "[conclude] that, under these circumstances, the likelihood that counsel

could have performed as an effective adversary was so remote as to have made the trial inherently unfair."<sup>138</sup>

The *Cronin* Court gave criminal justice stakeholders an example of systemic deficiencies that prevent a meaningful adversarial process -- the case of the so-called Scottsboro Boys in *Powell v. Alabama*. Reviewing *Cronin* and *Powell* together, it is clear that the U.S. Supreme Court has defined a meaningful adversarial process as one in which the system has both appointed an attorney and also given that attorney the time and resources to do an effective job. Reflecting on the lack of advocacy given the Scottsboro Boys, the *Powell* Court said: "from the time of their arraignment until the

beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense."

Moreover, "[i]t is vain

to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Thus, if a defendant is not given an attorney with the time to conduct a thorough investigation, the system is inherently defective. This is true whether the lack of time is caused by being

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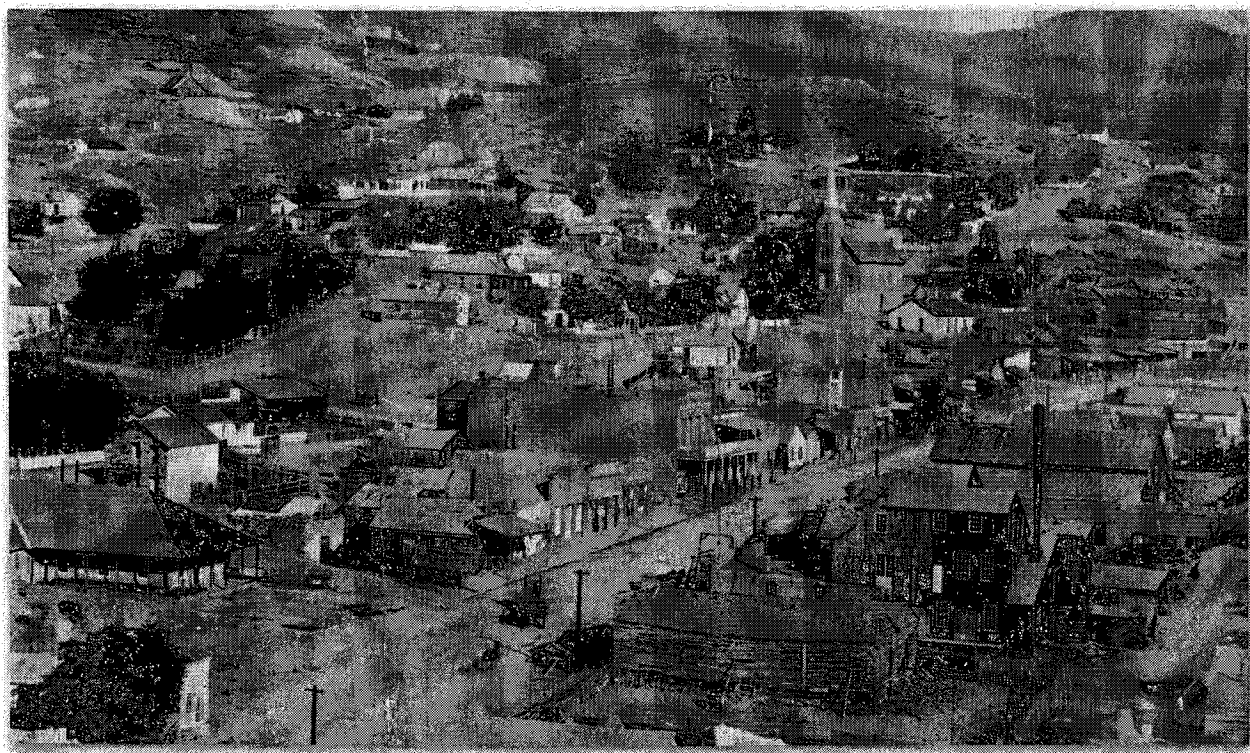
formally appointed too late in a case or by an excessive caseload that precludes the attorney from spending the appropriate amount of time on a case. When an attorney agrees to handle 1,400 cases in a year, or has 600 cases on his very first day with no prior experience, or is willing to sacrifice zealous advocacy to please a judge or executive, the defense system is no longer capable of subjecting each prosecution to "the crucible of meaningful adversarial testing." The system is inherently deficient.

## Conclusion

Was Shepherd L. Wixom guilty of robbing stagecoaches in Lander County in 1873? Did the real perpetrator of the crime remain at large to wreak havoc on public safety in Nevada while an innocent man languished at the state

penitentiary for ten long years at tax payer expense? Or, did Wixom receive his just punishment? The simple answer is that no one will ever know for certain because Wixom did not get to subject his indictment to meaningful adversarial testing.

The fact that the criminal courts in rural Nevada today do not, in every instance, provide an adequate right to counsel, means that the same mistakes are still being made that threaten public safety. The state of Nevada must make every effort to restore a meaningful right to counsel to ensure that its criminal courts are doing the very best to convict the guilty while preventing the wrongful conviction of the innocent.



Austin, Nevada (c. 1870). Special Collections, University of Nevada, Reno Library.



# Chapter 7

## Recommendations

Since January 2008, the Nevada Supreme Court has handed down a number of administrative orders aimed at providing a constitutionally adequate right to counsel. Though the orders have had significant impact on urban Nevada, and in particular Clark County (Las Vegas), the administrative orders have had little impact in rural counties. The reason for this is not very complicated. As the largest county in the state, Clark County has the resources and indigent defense structure to respond to the Court's mandates, whereas rural Nevada does not.

So, for example, when the Court ordered the judiciary to be removed from the oversight and administration of indigent defense services in January 2008, Clark County could easily hire an independent assigned counsel coordinator to run the conflict panel. But the rural counties had no financial ability to hire independent contractors to administer their services. In many rural counties, two or three attorneys provide all right to counsel services, and hiring a fourth to supervise is cost-prohibitive. For this reason, the Court accepted what became known as the "Wagner Compromise," a so-called temporary fix for jurisdictions where there are three or fewer district or limited court judges within a single township. In these jurisdictions under the "Wagner Compromise," appointments

and approval of trial-related expenses must be carried out by another judge within the district or by the district judge who has served longest in the district. This temporary fix has become institutionalized over the past four years and, of course, it never remedied that problem of judicial interference exerting undue influence on an appointed lawyer. In other words, this fix is no solution at all.

We begin our recommendations with a simple observation: Nevada's rural counties cannot shoulder the state's financial responsibilities under *Gideon* and its progeny. An examination of U.S. Supreme Court case law on the right to counsel since 1963 reveals that county responsibilities for funding indigent defense in Nevada are only going to expand in future years unless the state steps in. Because the right to counsel is a core foundation of individual liberty, the United States Supreme Court has time after time expanded the right to counsel whenever a question has arisen regarding how, when, and where counsel must be provided to an individual facing a loss of liberty at the hands of government. This has been true regardless of whether the U.S. Supreme Court of the time was viewed as liberal or conservative. The right to counsel established for felony cases in *Gideon* now applies as well to direct appeals,<sup>139</sup> juvenile delinquency proceedings,<sup>140</sup> misdemeanors,<sup>141</sup>

misdemeanors with suspended sentences,<sup>142</sup> and appeals of sentences resulting from guilty pleas.<sup>143</sup>

Although *Gideon* required the “guiding hand of counsel at every step in the proceedings (emphasis added),” it took the Court a number of cases to delineate the specific steps in a case at which the right to counsel must be provided. These steps now include at least police interrogations,<sup>144</sup> post-indictment police line-ups,<sup>145</sup> preliminary hearings,<sup>146</sup> and plea negotiations.<sup>147</sup> It was the Roberts Court in 2008 that extended the right to counsel to its earliest point yet. When a person is arrested on a criminal charge, the accused is brought before a magistrate to be told of the accusation against him and learn whether and under what circumstances he can be released from jail, if at all. This appearance before a magistrate often occurs long before prosecution is formally instituted and often even before any prosecutor is aware that a crime has occurred or that a person has been arrested for it. In *Rothgery v. Gillespie County*, the Roberts Court reaffirmed two earlier decisions of the Court holding “that the right to counsel attaches at the initial appearance before a judicial officer. This first time before a court, also known as the ‘preliminary arraignment’ or ‘arraignment on the complaint,’”<sup>148</sup> said the Court, “marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”<sup>149</sup> At that point, the state is obliged “to appoint counsel within a reasonable time once a request for assistance is made.”<sup>150</sup> The Court made clear that it does not matter “whether the machinery of prosecution was turned on by the local police or the state attorney general,”<sup>151</sup> and it refused to countenance any “distinction between initial

arraignment and arraignment on the indictment” even though strongly urged to do so.<sup>152</sup>

The United States Supreme Court has also consistently held that the right to a lawyer means more than just the right to a warm body with a bar card. In *McMann v. Richardson*,<sup>153</sup> the Court declared that “the right to counsel is the right to the effective assistance of counsel.” In 2010 in *Padilla v. Kentucky*, the Court said “(i)t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.”<sup>154</sup> And in 2012, the Court made clear with two more cases – *Missouri v. Frye* and *Lafler v. Cooper* – that the right to effective assistance of counsel applies not just to trials but also to the plea-bargaining process.<sup>155</sup> The *Frye* and *Cooper* decisions greatly increase the exposure of those governments that are responsible for paying the cost of meritorious ineffective assistance of counsel claims, because the overwhelming majority of cases are resolved through plea deals. Nevada’s rural counties just cannot keep up with the cost of this ever-evolving right to counsel case law.

Moreover, the U.S. Department of Justice has begun to enforce the right to counsel. On December 18, 2012, the U.S. Department of Justice announced an agreement with Shelby County (Memphis), Tennessee, to usher in major reforms of the county’s juvenile court system and the method for representing children in delinquency proceedings. Sweeping changes are afoot, including systemic safeguards such as independence, reasonable caseloads, attor-

ney performance standards, and training for the juvenile defense function, among others – basically the majority of the standards envisioned by the ABA *Ten Principles*. Should the Department of Justice turn next to rural Nevada, it could become very costly for the counties to try to defend a federal lawsuit.

For all these reasons, the 6AC makes a single recommendation:

**Recommendation #1:** *A state-funded public defender commission is established to oversee and administer all right to counsel services in every county other than those that are required under Nevada Revised Statutes 260.010 to have a local public defender agency. The commission is authorized to establish and administer rules and standards for the effective and efficient delivery of indigent defense services in those counties that it oversees.*

The Nevada Supreme Court should either make permanent the indigent defense commission envisioned in the January 4, 2008 ADKT-411, but exclude those counties required to have a public defender under Nevada Revised Statutes 260.010 (Clark and Washoe Counties), or the Court should actively engage the legislature to do so. Several states have similar systems. For example, the Oklahoma Indigent Defense Services oversees and administers services in rural counties, while Oklahoma County (Oklahoma City) and Tulsa County (Tulsa) remain outside of the state system. In Kentucky, Jefferson County (Louisville) remains independent of the Kentucky Public Advocate. And in Tennessee, both Davidson County (Nashville) and Shelby County (Memphis) operate independent of the

state system, although both receive some state funding.

Though it is always best to have local stakeholders determine the most appropriate make-up of such commissions, we note how two states have set up their Commissions:

- a. **Louisiana Public Defender Board:** La R.S. 15 § 146 creates a 15-member commission. Appointing authorities: Governor (2 appointees); Chief Justice (2 appointees: one a juvenile justice expert; one a retired judge with criminal law experience); President of the Senate (1); Speaker of the House (1); Four Deans of accredited law schools (Louisiana State University, Loyola, Southern, and Tulane – 1 appointment each); State Bar Association (2); Louis A Martinet Society (African-American Bar: 1); Louisiana State Law Institute's Children Code Committee (1); and, the Louisiana Interchurch Conference. "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."

**b. North Carolina Commission on Indigent Defense Services:** NC G.S. § 7A-498.4 creates a thirteen-member commission. Appointing authorities are as follows: Chief Justice (1 appointment); Governor (1); Senate President (1); Speaker of the House (1); North Carolina Public Defenders Association (1); State Bar (1); North Carolina Bar Association (1); NC Academy of trial lawyers (1); NC Association of Women Lawyers (1); the Commission makes three more appointments. "Persons appointed to the Commission shall have significant experience in the defense of criminal ... or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section. No active public defenders, active employees of public defenders, ... may be appointed to or serve on the Commission."

In large geographic areas with relatively small populations, staffed public defender offices are often not the best method for delivering services. The new commission should therefore be authorized to administer, set standards for, and oversee a rural assigned counsel and/or contract attorney system, should the commission deem these to be the most suitable for a particular jurisdiction. This is precisely what Montana does, because the statewide commission determined that most of rural Montana only has enough cases to merit hiring private attorneys to handle the

cases on a hourly pay or contract basis. With a coordinated rural system, a single state commission can gauge the ability of private attorneys to appropriately handle cases in more than one county, thus maximizing the efficient use of the relatively few attorneys in rural Nevada who are willing to do this work. Such a commission may even be able to contract with the Clark County Public Defender to provide training for the hourly or contract attorneys, so as not to reinvent the wheel nor have duplicative services in a state where most of the cases arise from a single jurisdiction.

The problem, of course, is what should be done with the current State Public Defender office. The 6AC recommends that the State Public Defender office be brought under the auspices of the new commission and turned into a rural appellate office. In this way, Nevada can ensure that every indigent client receives a new and independent attorney to handle the direct appeal. This location can likewise serve as the central administrative office for the entirety of the rural trial and appellate system. A central staff can pay vouchers, administer contracts, handle attorney-qualification certifications, provide supervision, be a state defender help desk, etc.

# Endnotes

1. Hume, James B. and John N. Thacker. *Wells, Fargo & Co. Stagecoach and Train Robberies, 1870-1884: The Corporate Report of 1885 with Additional Facts about the Crimes and their Perpetrators*. Revised Edition. Edited and expanded by R. Michael Wilson. McFarland & Company, Inc. Jefferson, North Carolina. 2010. Pages 234-237. This report relies for the most part on the Wells, Fargo & Company reports for the facts surrounding the arrest of Shepherd L. Wixom and the stagecoach robberies he is alleged to have committed. The 6AC notes original source materials – like newspapers of the day – whenever the narrative deviates from the Wells, Fargo & Company reports.
2. Shepherd L. Wixom is the official name on the Nevada Supreme Court petition for certiorari entered in 1877 and is the one used throughout this report. However, as is typical with reporting of the day, Mr. Wixom's name is not spelled consistently throughout the historical record. The Wells, Fargo & Company records list him as "Shep Wixon." His first name is spelled at times as "Sheppard" or "Shepard," and his last name is spelled as "Wixon," "Wixam," and "Wixson." The 6AC researched genealogical records trying to see if Shepherd Wixom was related to one of Austin's leading families of the day. After all, in a mining town quite small by today's standards, how many Wixom families could there be? William Wallace Wixom was the town doctor for Austin and the father of Nevada's first worldwide celebrity, Emma Nevada – an opera singer who played for many of the crowned heads of Europe. However, we were not able to make that connection and now believe that Shepherd L. Wixom is "Sheppard Wixon" of Lexington, Michigan, who was born in 1843.
3. *Territorial Enterprise*. October 7, 1873.
4. See generally: Beito, David T. and Linda Royster Beito. *Rival Road Builders: Private Toll Roads in Nevada, 1852-1880*. Nevada Historical Society Quarterly. Volume 41, Number 2. Summer 1998. Available at: <http://history.ua.edu/html/faculty/beitorivalroadbuilders.pdf>.
5. The famous green Wells, Fargo & Company "treasure boxes" were made of "sturdy Ponderosa pine, oak and iron" and were "prized by highway bandits" because they often carried "gold dust, gold bars, gold coins, legal papers, checks and drafts." Though they were difficult to break open, "the real security of the treasure boxes came from who was guarding them – the Wells Fargo shotgun messengers." "If thieves were foolhardy enough to try and steal a treasure box in transit, they would find themselves staring down the barrel of a sawed-off shotgun, loaded with 00 buckshot, and possibly held by Wyatt Earp himself." Information on Wells, Fargo & Company treasure boxes comes from the Wells Fargo website at: [www.wellsfargo.com/about/history/stagecoach/treasure\\_box](http://www.wellsfargo.com/about/history/stagecoach/treasure_box).
6. A "road agent" was a common term used in the 1870s for a "highwayman," "bandit," or "robber." The terms are used interchangeably throughout the report.
7. That Wixom requested to be brought to a committing magistrate, and the subsequent denial of that request, was not part of the record in the Wells, Fargo & Company records. This information is contained in Wixom's petition for certiorari submitted to the Nevada Supreme Court on April 2, 1877 by his privately retained attorney, T.W.W. Davies of Carson City.
8. For all questions related to criminal procedure in Nevada at the time of Wixom's trial, the 6AC used *The Compiled Laws of Nevada in force from 1861 to 1900 (inclusive): with annotations from Volumes I to XXV of the Decisions of the Supreme Court of Nevada*. The laws were compiled and annotated by Henry C. Cutting of the Nevada Bar. Printed by Andrew Maute, Superintendent of State Printing, 1900.
9. *Ibid*.
10. In preparation for submitting the writ of certiorari, Wixom's lawyer T.W.W. Davies requested the official minutes of the Lander County District Court in the case of *State of Nevada vs. Shepard L. Wixan*. On February 19, 1877, the District Court responded to the request. It is included in the submission to the Court

and now resides in the Nevada State Archives.

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
12. This section borrows language from the afterward drafted by 6AC Executive Director David Carroll for the forthcoming book *Chasing Gideon: The Elusive Quest for Poor People's Justice* by Karen Houppert. To be published March 18, 2013 by New Press, New York, New York.
13. Henry, Patrick. *Speech before the Virginia House of Burgesses at St. John's Church*. March 23, 1775: "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! -- I know not what course others may take; but as for me, give me liberty or give me death!"
14. Jefferson, Thomas. *A Letter from Thomas Jefferson to James Madison*. December 20, 1787. The Thomas Jefferson Papers Series 1. General Correspondence. 1651-1827. Available at: <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page008.db&recNum=726>.
15. Adams, John. *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations*, by his grandson Charles Francis Adams (Boston: Little, Brown and Co., 1856). 10 volumes. Volume II: *Diary, Notes of Debate, and Autobiography*.
16. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England* (July 2009), as published in Widener Law Review. Available at: <http://widenerlawreview.org/files/2009/06/01-jonakait-final-323-356.pdf>. See also: [http://broomerslaw12.weebly.com/uploads/6/2/8/1/6281119/the\\_adversarial\\_and\\_inquisitorial\\_trial\\_system1.pdf](http://broomerslaw12.weebly.com/uploads/6/2/8/1/6281119/the_adversarial_and_inquisitorial_trial_system1.pdf); <http://mercantilelaws.blogspot.com/2012/07/difference-between-adversarial-and.html>; and [http://www.lawcom.govt.nz/sites/default/files/adversarial\\_and\\_inquisitorial\\_systems\\_2.pdf](http://www.lawcom.govt.nz/sites/default/files/adversarial_and_inquisitorial_systems_2.pdf).
17. II *Rhode Island Colonial Records 1664-77* (Bartlett, 1857), p. 239. [As noted in William M. Beaney, *The Right to Counsel in American Courts* (U. of Mich. Press, 1955), at note 47, pp. 17-18.]
18. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England* (July 2009), as published in Widener Law Review. Available at: <http://widenerlawreview.org/files/2009/06/01-jonakait-final-323-356.pdf>.
19. Virginia was the lone state without the right to counsel in its constitution. See Beaney, pp. 14-26.
20. Dissent of Justice Louis Brandeis. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Available at: <http://supreme.justia.com/cases/federal/us/285/262/case.html>.
21. Much of the history in this section takes its information from two sources: (1) Rocha, Guy Louis. *Nevada's Emergence in the American Great Basin: Territory and State*. Nevada Historical Society Quarterly. Volume 38, Number 4. Winter 1995. Pages 255- 280; and (2) Heller, Dean, Secretary of State of Nevada. *Political History of Nevada, 2006 (11th Edition)*. Edited by Renee Parker and Steve George. State Printing Office, Carson City, Nevada (2006).
22. Makley, Michael J. *The Hanging of Lucky Bill*. Eastern Sierra Press. Woodsfords, California. 1993. Page 17.
23. *Ibid.* Page 18.
24. Heller. *Political History of Nevada, 2006 (11th Edition)*. Page 66-68.
25. Makley. *The Hanging of Lucky Bill*. Page 18.
26. *Ibid.* Page 18.
27. Orson Hyde was one of 12 apostles of the Mormon Church. Heller. *Political History of Nevada, 2006 (11th Edition)*. Page 79.
28. *Ibid.* Page 87-88.
29. Makley. *The Hanging of Lucky Bill*. Page 47.
30. *Ibid.* Page 47.



31. Ibid. Page 47.
32. Ibid. Page 55.
33. Ibid. Page 55.
34. Ibid. Page 22.
35. Ibid. Page 22.
36. The facts of Lucky Bill's arrest and trial are compiled from Makley's book, *The Hanging of Lucky Bill*, Pages 90-94.
37. *Powell v. Alabama*, 287 U.S. 45 (1932).
38. Makley. *The Hanging of Lucky Bill*. Page 55.
39. Ormsby died gearing up one last vigilante committee to attack a Paiute tribe that had killed five white men while rescuing two kidnapped Paiute children.
40. United States Census Bureau. See: <http://www.census.gov/dmd/www/resapport/states/nevada.pdf>.
41. Heller. *Political History of Nevada*. Page 102.
42. All information on the Constitutional Convention of 1863 is taken from the following: Marsh, Andrew J., and Samuel L. Clemens (Mark Twain). *Reports of the 1863 Constitutional Convention of the Territory of Nevada*. Edited by William C. Miller and Eleanore Bushnell. Published by Legislative Counsel Bureau, State of Nevada.
43. Ibid. Page 30-31.
44. Section 2 of the Constitution of the State of Nevada.
45. Dickerson, Harvey, Attorney General State of Nevada. *Official Opinions of the Attorney General - 1964*. Available at: [http://ag.state.nv.us/publications/ago/archive/1964\\_AGO.pdf](http://ag.state.nv.us/publications/ago/archive/1964_AGO.pdf)
46. *California Penal Code of 1872*, Section 987: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him." Enacted February 14, 1872.
47. Nevada Supreme Court. *In re Wixom*. (Number 842 ½, April 1877). Pages 219-224.
48. Ibid.
49. Hume, James B. and John N. Thacker. *Wells, Fargo & Co. Stagecoach and Train Robberies, 1870-1884*. Pages 234-237.
50. Minutes of the Lander County District Court in the case of *State of Nevada vs. Shepard L. Wixan*. February 19, 1877. Submitted in petition of Shepherd L. Wixom in *In re Wixom*. Available at the Nevada State Archives.
51. Hume, James B. and John N. Thacker. *Wells, Fargo & Co. Stagecoach and Train Robberies, 1870-1884*. Pages 234-237.
52. *Sacramento Daily Union*. Volume 46, Number 7056. November 14, 1873.
53. *Territorial Enterprise*, January 17, 1874. Page 2.
54. *Sacramento Daily Union*. January 14, 1874.
55. *The Compiled Laws of Nevada in force from 1861 to 1900 (inclusive): with annotations from Volumes I to XXV of the Decisions of the Supreme Court of Nevada*. The laws were compiled and annotated by Henry C. Cutting of the Nevada Bar. Printed by Andrew Maute, Superintendent of State Printing, 1900.
56. All biographical information on Thomas Wren is from *The Nevada Monthly*. Volume 2, Number 1.

September 1880. Page 46-47.

57. *Journal of the Assembly for the State of Nevada, 1875.* Page 48.

58. *Ibid.*

59. *Ibid.* Wren's original bill did not limit attorney compensation. The Nevada Senate amended Wren's bill to add the \$50 caps.

60. *The Nevada Monthly: A Book of Reference and Information, Devoted to the Mining, Agriculture, and Industrial Interests of the State and Literature.* Volume 2, Number 1. September 1880. Page 39. Available at the Huntington Library, Rare Books Department, in San Marino, California.

61. *Journal of the Assembly for the State of Nevada, 1875.*

62. *Journal of the Senate for the State of Nevada, 1875.*

63. *Ibid.*

64. Tamerlane William Whiting Davies was a graduate of the United States Naval Academy before becoming a high-ranking military officer in the Army of the Confederate States of America. He moved to Carson City two years after the end of the Civil War and became a highly acclaimed lawyer. Biographical material on T.W.W. Davies available at: <http://autaugaatwar.multiply.com/journal/item/186/Lt.-Col.-T.W.W.-Davieshttp://daviesofpebbleton.org/bios/HamDavies.htm>.

65. *Petition of Shepherd L. Wixom for Writ of Certiorari.* April 2, 1877.

66. *Response of the Attorney General to Petition for Certiorari on Behalf of Shepherd L. Wixom.* Available at the Nevada State Archives.

67. Nevada Supreme Court. *In re Wixom.* (Number 842 ½, April 1877). Page 223.

68. *Ibid.* Page 224.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

72. Justice William H. Beatty most assuredly knew of Wren and his work. Wren took over the office of the City Attorney in Austin upon Beatty being appointed to the District Court bench in White Pine.

73. Nevada Supreme Court. *In re Wixom.* (Number 842 ½, April 1877). Page 224.

74. *Washoe County v. Humboldt County*, 14 Nev. 123, 133 (1879).

75. J.W. Rover was tried for murder in Humboldt County, but twice had his convictions overturned on appeal by the Nevada Supreme Court. A change of venue to Washoe County was needed for the third (and fourth) trials because of a depleted jury pool. The question in *Washoe County v. Humboldt County* was which county had to pay for all the associated costs of the third trial. For an excellent history of the trials, see: Rocha, Guy, *True Confessions: The J.W. Rover Case* at [http://nsla.nevadaculture.org/index.php?option=com\\_content&task=view&id=805&Itemid=418](http://nsla.nevadaculture.org/index.php?option=com_content&task=view&id=805&Itemid=418).

76. Nevada Stats 1909, 330-33.

77. That Nevada turned to California for assistance in revising the Criminal Code is not surprising given the history of the two states. It is worth noting that Justice William H. Beatty, having ascended to be Chief Justice of Nevada Supreme Court, later stepped down and moved to Sacramento to be with his family. Beatty would go on to serve as Chief Justice for the State of California for 25 years.

78. Nevada Stats 1909, 330-33.

79. Hume, James B. and John N. Thacker. *Wells, Fargo & Co. Stagecoach and Train Robberies, 1870-1884: The Corporate Report of 1885 with Additional Facts about the Crimes and their Perpetrators.* Revised

Edition. Edited and expanded by R. Michael Wilson. McFarland & Company, Inc. Jefferson, North Carolina. 2010. Pages 234-237.

80. Ibid.
81. Ibid. The passengers were "Mrs. Soule of Virginia City and Charles Sutherland of Palisade."
82. Ibid.
83. Ibid.
84. Ibid.
85. Ibid.
86. Ibid.
87. Ibid.
88. Ibid.
89. Ibid.
90. Earl, Phillip I. *This was Nevada: Perils of the Stagecoach in Nevada Reviewed*. Henderson Home News. March 28, 1991. Available at: <http://digitalcollections.mypubliclibrary.com/digital/11/4100/1/24.pdf>
91. Ibid.
92. *Territorial Enterprise*, January 17, 1874.
93. Ibid.
94. *Sacramento Daily Union*. Volume 46, Number 7056. November 14, 1873.
95. In Nevada's earliest days, the vast majority of the population were male, as prospecting or mine working was a very tough life. Most expected to strike it rich and then return to their native state to settle down. Shepherd Wixom was different in that he was married at the time of his arrest. That does not, of course, prove anything other than he did not fit the stereotype of an outlaw.
96. *Territorial Enterprise*, January 17, 1874
97. *Sacramento Daily Union*. January 14, 1874.
98. The Wells, Fargo & Company report identifies the defendant as "Hattie Frank." Newspaper accounts referenced later in the report confirm her name as "Hattie Funk."
99. *Records of Pardons Granted in 1871-72*. These records are available at the Nevada State Archives. Wixom was committed to the Nevada State Prison on July 15, 1871. He was pardoned on February 2, 1872. See records of the Nevada Board of Pardons available at the Nevada State Archives.
100. *Sacramento Daily Union*. Volume 41, Number 7155. April 19, 1871.
101. This information is a synopsis of the escape described in <http://www.historynevada.com/tw/1871+Nevada+State+Prison+Escape>. For a fuller understanding of the prison escape, see: Delaney, Richard. *Quest for Freedom: Historical Account of the Daring 1871 Nevada State Prison Escape*. Talahi Media Arts. Prather, California. 2007. Available at: <http://www.questforfreedom.net/Quest-for-Freedom.pdf>.
102. *Territorial Enterprise*. January 21, 1874.
103. Indeed, maybe the thought of returning to prison with a history of being a snitch and knowing Blair was there was the real reason Wixom attempted suicide after his conviction.
104. Pardon applications of Shepherd L. Wixom available at the Nevada State Archives.
105. Ibid.
106. Shasta County genealogy and historical records. Available at: <http://www.cagenweb.com/shasta/cem->

etery/tuttlcem.html

107. That the person buried in Tuttle Gulch is indeed Shepherd L. Wixom was confirmed through Shasta County voting records available through genealogy.com. The voting records have Wixom arriving after his release from Nevada State Prison and record the same exact physical descriptions that are contained in the Wells Fargo crime records. That is, Wixom's age, height, hair color, eye color, and complexion all match.

108. Wixom's military records were recovered through genealogy.com.

109. The State Public Defender Commission as originally created had three appointments by the governor, three by the State Bar of Nevada, and one by the Chief Justice (1).

110. *Polk County v. Dodson*, 454 U.S. 312 (1981). Available at: [http://www.oyez.org/cases/1980-1989/1981/1981\\_80\\_824](http://www.oyez.org/cases/1980-1989/1981/1981_80_824).

111. *Ibid.*

112. Much of this section is taken from a June 20, 2012 letter to the Nevada Supreme Court written by Sixth Amendment Center Executive Director David Carroll, in reference to the Washoe County early case resolution program.

113. *Powell v. Alabama*, 287 U.S. 45 (1932). Available at: [http://www.oyez.org/cases/1901-1939/1932/1932\\_98](http://www.oyez.org/cases/1901-1939/1932/1932_98).

114. *Ibid.*

115. American Bar Association. *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

116. Holder, Eric, United States Attorney General. *Speech before the American Bar Association National Indigent Defense Summit*. New Orleans, Louisiana. February 4, 2012. Speech available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

117. ABA. *Ten Principles*. February 2002.

118. *Ibid.*

119. *Ibid.*

120. *Ibid.*

121. The *Guidelines* are available at: <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=41494>.

122. This section is a synopsis of the work of the Nevada Supreme Court Indigent Defense Commission, Rural Subcommittee. Its report and recommendations are available at: <http://www.nevadajudiciary.us/index.php/indigentdefensecommission>.

123. *Ibid.*

124. *Ibid.*

125. Historical currency conversion was done on the following website: <http://www.measuringworth.com/ppowerus/>.

126. ABA. *Ten Principles*. February 2002.

127. Available at: [http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_The\\_Defense](http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense).

128. This section relies on the following article: Maimon, Alan. "Lyon County Attorney Handles Massive Indigent Defense Caseload". *Las Vegas Review Journal*. August 25, 2007. Available at: <http://www.lvrj.com/news/9370346.html>.

129. *Ibid.*

130. The calculation is based on the attorney driving an average of 500 miles a week in a car that gets

20 miles to the gallon. That would be an average of 25 gallons of gas per week. At \$3.10 per gallon, that is \$77.5 per week. At 52 weeks per year, that is \$4,030.

131. ABA. *Ten Principles*. 2002.

132. Ostrom, Brian J. and Roger A. Hanson. *Efficiency, Timeliness, & Quality: A New Perspective from Nine State Criminal Trial Courts*. U.S. Department of Justice, Office of Justice Programs, National Institute of Justice. June 2000. Available at: <https://www.ncjrs.gov/pdffiles1/nij/181942.pdf>.

133. Perhaps the most compelling argument against using ineffective assistance of counsel claims as the measure of the adequacy of a right to counsel system comes from a September 2010 report by the Innocence Project. That report states that one out of every five people exonerated through DNA evidence had filed IAC claims against their lawyers, and yet the reviewing courts rejected 81% of those claims. If factually innocent people cannot win IAC claims, what chance does that leave everyone else who has no chance of DNA evidence coming to their rescue?

134. *Strickland v. Washington*, 466 U.S. 668 (1984). Available at: [http://www.oyez.org/cases/1980-1989/1983/1983\\_82\\_1554](http://www.oyez.org/cases/1980-1989/1983/1983_82_1554).

135. *United States v. Cronin*, 466 U.S. 648 (1984). Available at: <http://supreme.justia.com/cases/federal/us/466/648/>.

136. Ibid.

137. Ibid.

138. Ibid.

139. On the same day that *Gideon* was decided, the Warren Court also mandated, in *Douglas v. California*, 372 U.S. 353 (1963), that states must provide lawyers during the first stage of the appeals process – the court hearing where a defendant may ask a court to set aside a trial verdict or imposed sentence – noting that “there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.”

140. Four years after *Gideon*, the Court again picked up the theme of potential government tyranny, this time in relation to children facing juvenile delinquency charges. “Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise,” the Court asserted in *In re Gault*, 387 U.S. 1 (1967), determining that children too were entitled to a lawyer. To underscore the point that children needed more protections than adults, not less, the Court famously added; “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court.”

141. The 1972 decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), may have had the greatest impact on criminal justice systems in America. The Court’s *Gideon* decision had only expressly applied to felony cases. Because of the utterly massive volume of misdemeanor cases charged every year, the lower trial courts hearing those cases had developed “an obsession for speedy dispositions, regardless of the fairness of the result.” And without publicly available lawyers to assist accused persons in their defense, misdemeanor courts became places of “futility and failure” rather than justice. “We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more,” the Court declared in *Argersinger* as it expressly extended the right to counsel to misdemeanor cases.

142. Rather than spend public funds on attorneys in misdemeanor cases, many jurisdictions throughout the country America decided that the *Argersinger* mandate could be avoided. If the threat of jail time were not made imminent, perhaps the Sixth Amendment right to counsel no longer applied. A “suspended sentence” is a jail term that a judge delays imposing upon a guilty defendant, while ordering the defendant to serve a period of probation or fulfill some set of conditions. The defendant only goes to jail if they fail to meet the terms of the probation or conditions. Some jurisdictions would tell defendants they were only facing a suspended sentence and thus were not entitled to a lawyer. Of course without the aid of counsel, the conditions of probation were often so restrictive as to make it almost impossible to comply. So in 2002, the U.S. Supreme Court took up the issue of, “Where the State provides no counsel to an indigent defendant, does the Sixth Amendment

permit activation of a suspended sentence upon the defendant's violation of the terms of probation?" The Court concluded in *Shelton v. Alabama*, 535 U.S. 645 (2002), that it does not and required that states provide access to effective representation even in those cases where the trial judge does not intend to impose a jail sentence right away.

143. By far the largest majority of criminal cases will never make it to trial, and instead they will be resolved much earlier through pleas. But in the plea-bargaining process, the judge is not bound to impose the sentence negotiated between the prosecution and defense. For many years, states and counties would not provide lawyers to poor people who pled guilty to a crime but who then wanted to appeal the judge's sentence imposed pursuant to that guilty plea. In *Halbert v. Michigan*, 545 U.S. 605 (2005), the Roberts Court determined that to be improper. Recognizing that the majority of people facing criminal charges are indigent and that most people in prison are undereducated, mentally-ill, or both, the Court reasoned that "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments."

144. Most people familiar with crime dramas know that when you are arrested you have the right to remain silent and to have counsel appointed for police interrogations. These are your so-called "Miranda" rights established in the landmark 1966 case of *Miranda v. Arizona*, 384 U.S. 436 (1966).

145. A year after *Miranda*, the Court also made attorneys available to those in police line-ups in *United States v. Wade*, 388 U.S. 218 (1967).

146. A "preliminary hearing" is the point when the prosecution must establish probable cause that a crime has likely been committed and that the defendant likely did it. In 1970, the U.S. Supreme Court made clear that a defendant has the right to public counsel at preliminary hearings in *Coleman v. Alabama*, 399 U.S. 1 (1970).

147. Usually plea negotiations occur to determine whether the case can be settled without a trial. *Brady v. United States*, 397 U.S. 742, 748 (1970), established the right to an attorney during plea negotiations.

148. *Rothgery v. Gillespie County*, 554 U.S. 191, \_\_\_\_; 07-440, at p.6 (2008).

149. *Id.* at p.20.

150. *Id.* at pp. 5-6.

151. *Id.* at p.15.

152. *Id.* at p.9.

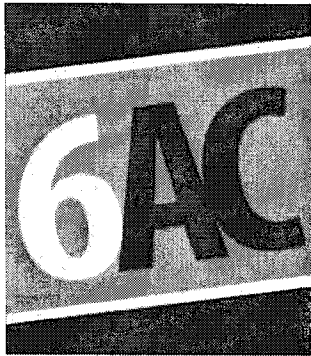
153. *McMann v. Richardson*, 397 U.S. 759 (1970).

154. 30 U.S. 1473 (2010).

155. *Missouri v. Frye*, 10-444, 566 U.S. \_\_\_\_ (03/21/2012); *Lafler v. Cooper*, 10-209, 566 U.S. \_\_\_\_ (03/21/2012).







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