

FILED

DEC 01 2014

Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

November 25, 2014

RE: ADKT 0411, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA

601 S. RANCHO DRIVE
SUITE B11
LAS VEGAS, NV 89106
P/ 702.366.1536
F/ 702.366.1331

1325 AIRMOTIVE WAY
SUITE 202
RENO, NV 89502
P/ 775.786.1033
F/ 775.786.0805

WWW.ACLUNV.ORG

Dear Justices of the Nevada Supreme Court:

Last minute travel has interfered with my ability to attend the ADKT 0411 hearing in Las Vegas on December 4, 2014. This letter outlines what would have been my testimony.

Nevada is in an indigent defense crisis. According to the Sixth Amendment Center, our rural counties suffer “serious systemic deficiencies...and a turning away from Nevada’s longstanding history of ensuring equal justice to people of insufficient means.”¹ We must immediately address this crisis through legislation and court rules, or litigation will be the only option that remains to find a solution.

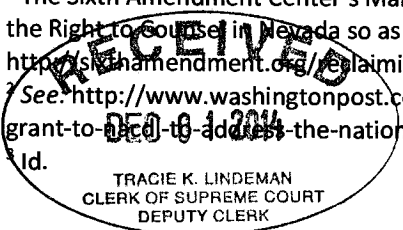
Reforming indigent defense is a bipartisan issue, with conservative Koch Industries, Inc. funding the National Association of Criminal Defense Lawyers to both provide training for attorneys representing indigent individuals, as well as evaluate state defender systems across the country.² Koch’s General Counsel recently noted: “We unconditionally support the Bill of Rights, which is the blueprint for our free society, and the rule of law. [T]he Sixth Amendment specifically identifies criminal defense lawyers as a right and necessity for individuals accused of crimes. [W]e hope to strengthen the Sixth Amendment and protect the freedom and rights of all Americans, including those who are most negatively impacted by lack of access to a competent defense lawyer.”³ Nevada’s three branches of government, regardless of political party, must similarly work together to craft a constitutionally adequate solution.

¹ The Sixth Amendment Center’s March 2013 report, “Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future” is available at: <http://sixthamendment.org/reclaiming-justice/>.

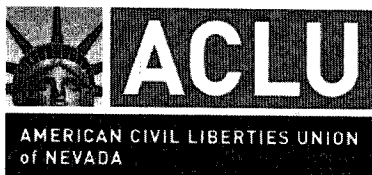
² See: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/21/koch-industries-gives-grant-to-ndc-to-address-the-nations-profound-indigent-defense-crisis>.

³ Id.

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DEPUTY CLERK



11-29-14



For the reasons that follow, we endorse the Rural Subcommittee's recommendation that the State of Nevada fully fund indigent defense and the Supreme Court prohibit the use of flat fee contracts and develop a uniform contract with the details outlined in Recommendation 2. As an alternative to alleviate financial burdens on the counties, we urge the Court to have the State Public Defender handle all misdemeanors as opposed to death penalty cases, as was suggested in Recommendation 3 of the report. We believe the misdemeanor crisis is particularly acute in rural Nevada, and also where the state may be most vulnerable to constitutional litigation.⁴ The legislature may consider removing some misdemeanors from our statutes, which would greatly lessen the burden of indigent defense attorneys in our rural counties and decrease the funding necessary to reach an adequate system. We encourage all branches of government to support these misdemeanor reforms as part and parcel of solving our indigent defense crisis.⁵

ACLU has been at the forefront of indigent defense reform advocacy, whether through legislation or litigation, around the country. In Montana, the ACLU filed a 2002 lawsuit against the state and seven counties, alleging that failure of adequate funding and supervision of county indigent defense programs.⁶ Allegations regarding high attorney caseloads, the inability of attorneys to develop adequate defenses, the lack of investigatory and expert witnesses, and excessive plea bargaining eventually led to a settlement when the Attorney General agreed to work on legislation instead of continuing to defend the lawsuit, at taxpayer expense. The 2005 Montana legislation resulted in the creation of a statewide public defense system much like the one the Subcommittee is seeking.

Two ACLU lawsuits in Michigan⁷ were ultimately addressed through legislation, after thousands of dollars of litigation costs on the part of the state.⁸ On June 19, 2013, the Michigan Legislature passed two bills establishing a permanent commission to create and enforce statewide indigent defense standards and requirements. It is worth noting that Representative McMillin, who introduced the companion HB 4529 bill, is a self-proclaimed Tea Party Libertarian who, according to a fellow Republican Legislator,

⁴ This belief is based in part on the reporting required under NRS 260.070, the findings of the Rural Subcommittee, and anecdotal information and intakes provided to the ACLU.

⁵ For more information regarding the toll that misdemeanors take on indigent defense systems, see the National Association of Criminal Defense Lawyers' April 2009 report "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," which was previously provided to the Court in our October submission.

⁶ Complaint available here: <https://www.aclu.org/racial-justice/white-v-martz-complaint>.

⁷ See <https://www.aclu.org/criminal-law-reform/appeals-court-allows-aclu-lawsuit-seeking-fix-public-defense-system-proceed>.

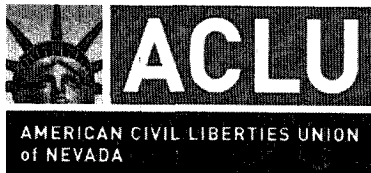
⁸ See <http://www.aclumich.org/issues/criminal-justice/2013-06/1845>.

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“expects you to respect, promote and uphold every part of the Constitution, not just the parts you agree with.”⁹ Michigan has demonstrated a path that Nevada can follow.

In an ACLU lawsuit in Washington State, *Wilbur v. Mount Vernon*,¹⁰ a federal court found that the indigent defense systems at issue violate the constitutional rights of individuals in the two enumerated towns.¹¹ Similar to our situation in rural Nevada, the suit asserted that the cities were aware of excessive caseloads but did not act to remedy the problem or provide meaningful oversight. Further allegations included that public defense attorneys failed to reasonably investigate charges against their clients and spend sufficient time on their client’s cases, thus forcing plea deals.

Four weeks ago, and after seven years of litigation, the New York Civil Liberties Union settled the *Hurrell-Harring* class action litigation alleging New York’s violation of the U.S. Constitution, the state constitution, and the laws of New York.¹² In that lawsuit, the ACLU charged that New York’s choice to force counties to pay for indigent defense resulted in “a patchwork of often understaffed, poorly resourced and largely dysfunctional public defense systems” where plea bargains were forced on defendants and misdemeanors resulted in excessive incarceration.¹³ Again, the facts at issue in the New York litigation do not differ significantly from the findings of the Rural Subcommittee we are discussing today.

Idaho, in an effort to avoid protracted an unnecessary litigation, created through 2014 legislation an indigent defense commission to reform their system.¹⁴ The passage of this legislation was aided in part by the National Legal Aid & Defender Association, which in a 2010 report found that “state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts.”¹⁵ We applaud Idaho’s efforts to proactively address indigent defense reform without litigation, as well as the efforts of the Nevada Supreme Court, and hope that in

⁹ See <http://bridgemi.com/2014/02/tom-mcmillin-tea-party-conservative-aclu-sympathizer/>.

¹⁰ The Complaint for Injunctive and Declaratory Relief was provided to the Court through our previous October submission.

¹¹ Decision and additional materials available here: <https://www.aclu.org/criminal-law-reform/federal-court-finds-public-defense-system-violates-constitutional-rights>.

¹² See <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state>.

¹³ *Id*

¹⁴ See <http://www.publicdefenders.us/?q=node/351>. See also <https://acluidaho.org/issues/criminal-justice/indigent-defense/>. The legislation also prohibited flat fee contracting.

¹⁵ See http://www.nlada.net/library/documents/id_guaranteeofcounseljseri01-2010_report.

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Nevada we are able to work together to craft a solution that does not continue to deny rural Nevadans constitutionally adequate indigent defense representation.

The findings of the NLADA report on Idaho, as well as the facts at issue in all of the litigation above, are not dissimilar to those analyzed by The Indigent Defense Commission's Rural Subcommittee¹⁶ or the Sixth Amendment Centers "Reclaiming Justice" report.¹⁷ Nevada's use of flat fee contracts, disparity in fee contracts, lack of transparency in employing conflict counsel, extraordinarily high caseloads, inclusion of appellate work in flat fee contracts, requiring the court's approval for expert witnesses and investigation, lack of clarity regarding fees in death cases and, perhaps more than any other factor, shifting of the majority of the cost for these systems from the state to the counties, all contribute to grounds for potential litigation. There is no legal reason or justification for an indigent individual accused of a crime to receive unconstitutional representation, merely based on the fact that s/he lives in rural Nevada as opposed to Washoe or Clark counties.¹⁸

The State of Nevada, and its counties, are on notice that the state of our indigent defense system, particularly in our rural counties, is constitutionally inadequate. We urge the Supreme Court to issue policies, rules, and guidelines to improve the system; the Nevada legislature to adopt legislation forming and funding an Indigent Defense Commission to rectify these problems; and the Governor to sign such legislation into law.

Sincerely,

Vanessa Spinazola
Legislative & Advocacy Director

¹⁶ On file with the Court, through October 24, 2014 submission of Mr. John Lambrose, Esq.

¹⁷ See FN 1.

¹⁸ While Washoe and Clark may have addressed flat fee contract and caseload issues, the lack of state funding for these services remains an issue in Nevada's two largest counties.

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