



LEAGUE OF WOMEN VOTERS®  
OF UTAH

# 2016 Study Public Defense in Utah

The **League of Women Voters of Utah**, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major political issues, and influences public policy through education and advocacy. Membership is open to anyone at least 16 years of age. To learn more about the League, to join, or make a donation, contact us at [lwwutah.org](http://lwwutah.org)

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## EXECUTIVE SUMMARY

The League of Women Voters study of Public Defense in Utah is based on the Sixth Amendment to the United States Constitution which guarantees those accused of crimes the right to a speedy, public trial by an impartial jury with the assistance of counsel for their defense. United States Supreme Court decisions related to this amendment guarantee the right to counsel in all cases that may have incarceration as a consequence.

The American Bar Association and the Utah Judicial Council have developed criteria to judge the quality of legal representation provided to defendants. These standards can be used to determine the adequacy of the defense being provided to indigents.

Our study reviewed recent published studies by the Sixth Amendment Center and the American Civil Liberties Union of Utah. They presented evidence that under the present implementation of legislation those accused of crimes in Utah often go to trial without counsel or with counsel that does not meet these criteria. This is in spite of the fact that Utah Code currently sets forth a requirement to provide defense counsel for each indigent who faces the potential deprivation of liberty.

As currently implemented, public defense in Utah is the responsibility of each separate county. The previous studies and our interviews of local officials found great disparities between counties and many perceived inadequacies in the public defense as provided. A review of data from neighboring states also found great disparities among the states as well.

Awareness of this problem has resulted in two actions. First, in the 2016 general session, the Utah Legislature created the Utah Indigent Defense Commission (UIDC) to find methods to remedy the current inadequacies and to develop means of oversight of the system. This Commission has been staffed and is beginning to address these concerns.

Second, the American Civil Liberties Union of Utah filed a class action suit in June of 2016 against the State of Utah and the Attorney General on behalf of six plaintiffs. The claim made in the suit is that the UIDC does not meet the minimum requirements for representation of indigent defense.

Citizens interested in equity for all citizens and in the implementation of the Constitution will need to follow the Utah Legislature to determine if appropriate actions are taken to guarantee adequate public defense in Utah in the future.

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## Introduction

Senate Bill 155, the Indigent Defense Act, was passed by the 2016 Utah Legislature to begin to address concerns about access by Utahns in poverty to legal defense. The Sixth Amendment to the United States Constitution guarantees every defendant in criminal prosecutions the right to counsel, particularly in cases that may have incarceration as a consequence. However, studies in Utah dating back to a report by the Utah Judicial Council<sup>1</sup> in 1994 have raised serious questions about whether Utah is fulfilling its constitutional obligations. More recently, a report commissioned by the Utah Judicial Council and conducted by the Sixth Amendment Center (2015), a report titled *Failing Gideon* by the American Civil Liberties Union of Utah (2011), and a lawsuit brought by the ACLU (2016) have focused enough attention on the issue to result in the passage of SB155. The League of Women Voters of Utah has no position from which to lobby in future sessions of the legislature. Therefore members at the League's 2016 annual convention voted to study the issue of public defense in Utah with a view toward coming to consensus. This study is intended to inform development of the League of Women Voters of Utah's position on the issue. It addresses the following questions:

What rights does the Sixth Amendment to the Constitution guarantee?

What standards can tell us whether Utahns' constitutional rights are being protected?

How does Utah measure up to these standards?

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<sup>1</sup> The Utah Judiciary Council is the policy-making body of Utah's judiciary. It has the constitutional authority to adopt uniform rules and set standards for the administration of all the courts in the state. It is chaired by the Chief Justice of the Utah Supreme Court, and its members include District Court judges, Juvenile Court judges, Justice Court judges, a state bar representative and the State Court Administrator.

How does Utah compare to other states in its provision of indigent defense?

What is currently being done to alleviate problems?

### **The Sixth Amendment of the United States Constitution**

The Sixth Amendment of the U. S. Constitution states

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

State code (*UT Code Ann. 77-32-202*) defines an indigent person as someone who does not have sufficient means to provide for the payment of legal counsel and other necessary expenses of representation without depriving that person or person's family of the necessities of life; or has an income level below 150% of the U.S. poverty level.<sup>2</sup> The indigent defendant must appear in court and fill out an Affidavit of Impecuniosity to apply for a court appointed defense attorney. But, according to Open Legal Services, a non-profit legal defense provider (<http://saltlakelegaldefenders.org/faqs/>), courts have quite a bit of discretion as to whether to designate a defendant as indigent within the parameters set out by state code.

Three prominent U.S. Supreme Court cases tested the practical meaning of providing counsel for indigent defendants and shaped how we now consider public defense. These three cases are *Powell v. Alabama*, *Betts v. Brady*, and *Gideon v. Wainwright*.

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<sup>2</sup> See Glossary for the full statute.

**Powell v. Alabama, 1932** Nine young black men (later called the Scottsboro Boys) were arrested in March, 1931, for raping two white women. They were not informed that they had a right to counsel until shortly before the trial, leaving no time to prepare an adequate defense. The nine young men were tried in a series of three 1-day trials. Eight of them were sentenced to death. They appealed to the U.S. Supreme Court.

The U.S. Supreme Court ordered new trials, arguing that in capital cases (usually murder prosecutions, often called death penalty cases) defendants must “have reasonable time and opportunity to secure counsel.” In addition, if the defendant could not afford to pay an attorney in such cases, the court’s failure to “make an effective appointment of counsel” was a denial of due process under the 14th Amendment (*Powell vs. Alabama*, 287 U.S. 45 1932).

**Betts v. Brady, 1942** The path of U.S. Supreme Court decisions sometimes zigs and zags. *Betts v. Brady* is a case in point. While *Powell v Alabama* established the right to counsel in state courts for capital offenses, the Court in *Betts v. Brady* ruled that the right did not extend to lesser offenses. Betts, indicted for robbery, requested he be assigned counsel. The judge refused to do so. Betts was found guilty, appealed his conviction, and eventually was heard by the U.S. Supreme Court. The U.S. Supreme Court (in a 6 to 3 vote) decided the 14th Amendment extension of Bill of Rights protections to the states was not abridged by Betts' lack of counsel in his trial. Thus *Betts v. Brady* is seen as a step backward in the application of right to counsel for indigents.

Justice Owen Roberts wrote, "The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right...we cannot say that the amendment ...[requires] that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by

counsel." In other words, *Powell v Alabama* applied the right to counsel to states and not just federal cases in egregious circumstances like those of the Scottboro Boys, but did not necessarily apply it to states otherwise (*Betts v. Brady*, 316 U.S. 455, 1942).

**Gideon v. Wainwright, 1963** *Gideon v Wainwright* is the Court's zag to *Betts'* zig. Gideon, who had an eighth grade education, was arrested for breaking and entering a pool hall with the intent to commit a misdemeanor. Breaking and entering with intent is a felony under Florida law. He appeared in court alone since he was too poor to afford counsel. The judge said that Florida law stated the court could only appoint counsel in capital cases.

Gideon claimed, "The United States Supreme Court says I am entitled to be represented by counsel" ([https://en.wikipedia.org/wiki/Gideon\\_v\\_Wainwright](https://en.wikipedia.org/wiki/Gideon_v_Wainwright)) Gideon's claim was denied. He appealed his felony conviction to the U.S. Supreme Court, which appointed Abe Fortas (later a U.S. Supreme Court justice) as counsel. Gideon received a new trial, this time with counsel. This case applied the right to counsel to the states in all cases that *may have incarceration as a consequence (italics ours.)* (*Gideon v. Wainwright*, 372 U.S. 335, 1963). The criterion that incarceration may result from the court procedures became the standard for appointment of counsel for the indigent.

The Sixth Amendment to the Constitution, which guarantees representation by counsel, the Fourteenth Amendment, which guarantees the same rights to defendants in state courts, and the case law described above form the basis of current interpretations of defendants' rights in both federal and state courts.

### **Standards for Judging Quality of Representation**

How do we judge whether the defense provided to indigents is adequate? Both the American Bar Association and the Utah Judicial Council's Study Committee on the

Representation of Indigent Criminal Defendants (RICD) have developed operational criteria for judging the quality of legal representation a defendant receives. The American Bar Association's criteria appear in Appendix A of this study. We quote the RICD standards here, because they are the ones applied by Utah officials.

1. *Independent Representation*
2. *Representation Without Conflicts of Interest*
3. *Representation Without Interference*
4. *Representation at all Critical Stages*
5. *Representation that Ensures Meaningful Adversarial Testing of the State's Evidence*

Specifically:

*Qualified Counsel*

*Defense Resources*

*Reasonable Caseloads*

6. *Fair Compensation and Proper Incentives*

*Fair Compensation, not Parity*

*Proper Incentives*

7. *Case-Specific and Systemic Quality Control*

As we examine the results of recent studies of indigent defense in Utah, we should refer back to these standards to judge whether Utah is doing an adequate job of providing services.

The concepts are further developed with questions to apply to particular situations to determine how adequate the defense provided is. The standards with the “demonstrative questions” are included in Appendix B.

### **Recent Studies of Indigent Representation in Utah**

In the last decade both the Utah Judicial Council, an arm of the Utah Supreme Court, and the ACLU have conducted studies into the current delivery of defense services to Utah indigents.

In 2008 the Utah Judicial Council formed the Appellate and Post-Conviction Representation Study Committee (The Appellate Committee.), which was charged with considering issues related to indigent defendants at the appellate level, that is, when a defendant appeals a verdict from a lower court. While the Appellate Committee recommended changes to improve representation for defendants who appeal, it also noted that representation at the original trial influenced appeals. Therefore, in 2011 the Judicial Council formed the RICD to study the quality of defense indigents received at their original trials. This study committee hired a consultant, the Sixth Amendment Center (6AC), whose work was financed by a grant from the U.S. Department of Justice. The Sixth Amendment Center reported back to the RICD Committee in the document *The Right to Counsel in Utah, an Assessment of Trial-level Indigent Defense Services* in October, 2015.

Meanwhile, the American Civil Liberties Union of Utah published its own study, *Failing Gideon: Utah's Flawed County-By-County Public Defender System*, in 2011. We will focus on the latter two studies: the Sixth Amendment Center's *The Right to Counsel in Utah, an Assessment of Trial-level Indigent Defense Services* (2015) and the ACLU's *Failing Gideon: Utah's Flawed County-By-County Public Defender System* (2011). The Sixth Amendment Center's more recent study in many aspects reinforces the findings of the ACLU's study.

**Methods** Both organizations concentrated on the delivery of defense services at the county level. This is because has Utah turned all responsibility including funding for indigent defense over to the counties.

The ACLU, concluding that investigating all 29 Utah counties would be unwieldy, sent requests for information to each of 9 diverse counties: Box Elder, Daggett, Duchesne, Iron, Kane, San Juan, Sevier, Uintah, and Weber. They asked about each county's

- Qualifications for public defenders;
- Procedures for advertising and evaluating bids for public defender contracts;
- Public defender contract terms;
- Public defender budgets; and
- Systems to track public defender caseloads, quality of services provided, and actual or potential conflicts of interest.” (ACLU 2011, p.5)

Their report *Failing Gideon* was based on their analysis of the responses they received from the counties.

The Sixth Amendment Center devised an evaluation also based on a sampling of counties, chosen to represent diversity of population size, indigent defense delivery service models and geographic regions. The ten counties were Cache, Davis, Salt Lake, Sanpete, San Juan, Tooele, Uintah, Utah, Washington and Weber. Three components comprised the methodology of their study. The first was data collection, which utilized Utah's unified court data collection system, a warehouse of information on indigent defense services as well as local caseload data. Second, individual court observations included what individual defendants experienced as a case proceeded as well as what the attorney experienced. District courts in each of the ten counties and more than 29 justice courts were observed. Third, more than 175 interviews of a broad cross-section of stakeholder groups formed the final component (Sixth Amendment Center, p. 6).

**Findings** The Sixth Amendment Center’s *The Right to Counsel in Utah, an Assessment of Trial-level Indigent Defense Services* (2015) organized the shortcomings it found in the delivery of defense services to the indigent into two categories. They are “Actual Denial of Counsel” and “Constructive Denial of Counsel.” *Actual denial of counsel* means that a defendant goes through his/her court experience with no counsel present at critical points in the procedures. The Center found that this form of denial most often happened in justice courts. Unlike courts of record, where a court clerk or recorder keeps a record of proceedings, justice courts in Utah are not required to record their proceedings.<sup>3</sup> Their jurisdiction is restricted to class B and C misdemeanors, violations of ordinances, small claims and infractions. Actual denial of counsel in Utah counties can take any of the following forms:

The defense attorney is appointed so late in the proceedings that he/she is not present for early critical procedures like arraignment.

No counsel is appointed in misdemeanor cases with suspended sentences if breaking the terms for suspending the sentence might result in incarceration.

The defendant is not properly informed of his rights when presented with the choice to waive counsel.

Prosecutors enter into pre-trial plea agreements with the defendant without a defense attorney present.

However, the mere presence of a defense attorney does not guarantee that the defense meets constitutional standards. There are many conditions that can result in ineffective

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<sup>3</sup> See Appendix Xxxx, *Understanding Utah’s Unique Legal History*, for an explanation of the development of Justice Courts in Utah.

representation, or *constructive denial of counsel*. In Utah they begin with the structure of the system itself. Utah Code 77-32-302 provides for three indigent defense delivery models:

Defender office:

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

Contracts:

Individual attorneys, consortia of attorneys, or law firms paid a set rate to provide primary or conflict services, or paid to represent specific case types.

Assigned Counsel:

Where no contract system or defender office exists, the court appoints a private attorney paid at an hourly rate established by the court. However, Utah Code 77-32-304.5(2)(f) establishes caps on total compensation: \$3,500 for a non-capital felony case; \$1,000 for a misdemeanor; and \$2,500 for the direct appeal (6AC 2015, p. 45-6).

The Sixth Amendment Study found that these delivery modes vary across district courts and justice courts, and are not mutually exclusive. Additionally, they may vary between district and justice courts within a county and may vary between counties and municipalities within the county. Variation also occurs among counties. For instance, while both Salt Lake and Utah Counties have defender offices, the roles of the offices are different in the two counties (6AC 2015).

These delivery models carry in their DNA the framework of their inadequacy. Here is why, according to the Sixth Amendment Center's report:

Utah is one of just two states requiring local governments to fund and administer all indigent defense services. Though [delegating its responsibilities] is not believed to be unconstitutional, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so. The State of Utah, however, has no institutional statewide presence, and a limited statewide capacity, to ensure that its constitutional obligations under the Sixth and Fourteenth Amendments are being met at the local level (6AC 2015, p. 46).

The structure of delivery of indigent defense services in Utah can fundamentally undermine the effectiveness of the services. While all obligations for public defense are delegated to the counties, including funding, the State of Utah exerts no oversight or supervision over their fulfillment of their constitutional obligations. Nor does it provide guidance or standards for local entities to apply on their own to evaluate their provision of services. The Sixth Amendment Center Study concludes, "This void on the state's part has allowed systemic deficiencies to take root that infringe on a defender's independence and cause constructive denials of counsel" (6AC 2015, p. 49-50).

The study details many effects of these shortcomings on the adequacy of the defense services indigents receive. Here are some instances:

1. In the more rural parts of the state, county attorneys are involved to varying degrees in the selection of defense counsel, the negotiation of defense attorney

compensation, and the oversight of defense counsel performance (6AC 2015 p. 50).

Since the county attorneys are the very people prosecuting the person the defense attorney is appointed to defend, the potential conflict of interest for the defense attorney is clear. If defense attorneys defend too zealously, they may jeopardize their own livelihood. According to the Study, "Defense attorneys, either consciously or unconsciously, take into account what they think they must do to please a prosecutor when balancing their own financial self-interest with what is required of zealous advocacy" (6AC 2015, p. 51).

2. Other types of conflicts of interest include representing two clients whose interests may conflict; already representing a client in another case who is a potential witness in the new client's case; or having personal interests at odds with the client's.

Every defendant has the constitutional right to independent counsel. Any of these circumstances might negatively affect the attorney's independence.

3. The contract option, whereby an individual or firm might be paid a flat fee for services over the contracted period, can serve as a financial disincentive for assiduously pursuing defense options. The reason is again obvious. If the defense attorney is paid the same fee no matter how many hours he/she spends on the client, the incentive is to spend as few hours as possible. Likewise, the incentive is to skimp on services such as hiring outside investigators or expert witnesses.

4. In some Utah counties, the appointed defense attorney must seek funding for trial related expenses from the county attorney's office or in open court. In

either case, the prosecution is unduly involved in the performance of the defense attorney's duties.

5. A defense attorney on a flat fee contract may object to the court's finding a defendant indigent because it will simply add to the workload without providing any more income.

6. Almost universally, the Study found the caseloads of defense attorneys excessive. Too little time to spend on a case obviously affects the quality of defense that can be provided.

The American Civil Liberties Union's study, *Failing Gideon: Utah's Flawed County-By-County Public Defender System*, in 2011, found much the same results as earlier studies, indicating that these are long-standing problems. The ACLU said

Public defenders appear to be chronically underfunded and overworked, with some handling caseloads that, based on the contract fee, result in \$400 (or less) per felony or felony equivalent. Those same caseloads may result in an average of less than 10 hours to spend on each case." (ACLU 2011, p. 7) Because they are contract workers, in most counties no money is added for overhead, expenses, and continuing education.

Information from the ACLU study has been summarized in the chart below.

Comparison of Selected Data from Nine Utah Counties from *Failing Gideon*

County	Box Elder	Daggett	Duchesne	Iron	Kane	San Juan	Sevier	Uintah	Weber
<b>Largest City</b>	Brigham City	Manilla	Roosevelt	Cedar City	Kanab	Blanding	Richfield	Vernal	Ogden
<b>Population</b>	49,975	1,059	18,607	46,163	7,125	14,746	20,802	32,588	231,236
<b>Poverty Rate*</b>	9.60%	6.60%	10.67%	18.30%	11.70%	28.30%	12.50%	10.10%	12.50%
<b>Felonies</b>	216	3	417	233	161	64	210	522	1,969
<b>Misdemeanors **</b>	1,417	140	822	1,744	634	635	627	982	7,128
<b>\$ per capita***</b>	\$3.43	\$3.96	\$9.41	\$4.42	\$8.63	\$5.19	\$4.90	\$8.52	\$4.81
<b>% of Nat.Avg.***</b>	29%	33%	79%	37%	73%	44%	41%	72%	41%
<b>Selected</b>	Contract	Assigned Council	Contract (2)	Contract (3)	Contract	Contract	Contract (2)	Contract (2)	Contract (16)
<b>Budget</b>	\$171,500	\$50/hr.	\$175,000	\$204,000	\$50,000	\$88,124	\$83,894	\$229,932	\$1,113,000
<b>Expenses****</b>	\$2,000	some	N/A	\$19,000	\$5,700	\$18,124	None used	N/A	N/A
<b>County Attorney Budget</b>	\$563,954	\$95,032	\$488,532	\$884,600	\$353,029	\$259,165	\$356,707	\$1,071,688	\$2,606,608
<b>Overhead *****</b>	unlimited	N/A	N/A	\$285,700	\$186,887.20	\$42,696	\$112,340	N/A	703,874
<b>Travel</b>	N/A	200 miles	2 Hrs.	N/A	180 miles	N/A	118 miles	N/A	N/A
<b>Hrs./Case</b>	9.79	N/A	13.15	9.3, 6.7, 9.9	9.9	N/A	7.3	N/A	N/A
<b>Contract Award</b>	County atty.	N/A	County comm.	County atty.	N/A	County comm.	N/A	County atty.	N/A

Compiled by Janice Gygi

\* State of Utah poverty rate is 11.77%

\*\* This number includes misdemeanors that were filed in District Court and County Justice Courts.

\*\*\* Nation average spent on public defender services is \$11.86. Utah state average is \$5.22.

\*\*\*\* Expenses for public defenders come from the total contract amount. No overhead is provided.

\*\*\*\*\* Overhead is usually included in the overall budget and includes such items as employee benefits and office expenses.

The ACLU report did not have any specific recommendations, but it did conclude “The State of Utah’s county-by-county public defense system is constitutionally inadequate.” (ACLU 2011, p. 10) The hope was that “this report will add to--or, for some, spark the beginning of--important discussions by and among the stakeholders throughout the state who, like the ACLU

of Utah, care deeply about finding a solution to Utah’s constitutional failures.” (ACLU 2011, p. 11)

### **Sixth Amendment Study Conclusions**

The Sixth Amendment Study concluded the following:

Utah’s trial courts do not uniformly provide counsel to indigent defendants at all critical stages of criminal cases as required by the U.S. Supreme Court, with many defendants – particularly those facing misdemeanor charges in justice courts – never speaking to an attorney. Those defendants that do receive representation too often receive an attorney who operates under multiple conflicts of interest arising from unfair contractual arrangements that produce incentives to curtail zealous representation. The challenge of providing effective representation for each client can be exacerbated by an excessive caseload that reduces the time a lawyer can spend on an individual case. And, these attorneys generally lack the appropriate independence from undue state and local government interference in securing the necessary resources to put the state’s case to the test. The primary cause for the institutionalization of these practices is the lack of accountability inherent in the system (6AC 2015, p 89).

The Sixth Amendment Center made the following recommendations:

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

qualifications, training, supervision, contracting, and ensuring independence of the defense function (6AC 2015, p. 90).

2. Prohibit contracts that create financial incentives for attorneys to fail to provide effective representation (6AC 2015, p. 97).

### **Additional County Information**

The League study members interviewed individuals involved in public defense to provide current information about three diverse counties, Salt Lake, Weber and Grand. The information describes how each county's public defenders system operates.

**Salt Lake County.** In an interview (July 2016), Mark Augustine, Substance Abuse Coordinator at the Salt Lake Legal Defenders Association (SLLDA) stated Salt Lake County contracts with and funds the non-profit SLLDA. The SLLDA has 117 employees, including 62 county-funded and 9 city-funded attorneys. Eight of the 71 attorneys are supervisors who, in addition to their regular caseload duties, seek to ensure quality control within the trial and appellate divisions. It also has a team of investigators, social workers, paralegals, law clerks, and secretaries. The SLLDA office also has representatives that oversee mental health court, a specialty court that adjudicates criminal cases for individuals who have been determined to be Severely and Persistently Mentally Ill (SPMI). It has 5 social service coordinators and 2 substance use disorder treatment coordinators who attempt to connect individuals to substance use disorder treatment resources.

The SLLDA provides defense for crimes ranging from minor misdemeanors to aggravated homicide.

SLLDA strengths include its ongoing training and supervision of its staff, which results in high-quality felony representation. Although it does not have a training director or formal

training division, it does provide orientation and training for new attorneys assigned to the misdemeanor department, which is viewed as the training ground. Attorneys spend three or four years trying misdemeanors before handling felonies. SLLDA ensures that attorneys are sufficiently qualified for cases to which they are assigned.

The SLLDA is contracted to provide conflict resolution, but a panel from the district court selects private attorneys for conflict cases. These attorneys do not receive training or supervision. The county has no mechanism to ensure minimum supervision for conflict cases.

Another concern is that there is no guarantee that the operational independence of the non-profit SLLDA can be maintained. The SLLDA contract is renewed annually, and the county could choose to cancel the contract and abandon the non-profit model.

SLLDA attorneys provide excellent representation for felony cases. For justice court misdemeanor cases, the SLLDA is handling more than double a reasonable workload. The SLLDA needs a 38% staffing increase to handle the current trial-level case load.

According to Administrative Office of Courts (AOC) data, SLLDA provided representation in 7,440 felonies and 1,843 misdemeanors in 2013. This would require a felony staff of 54.21, slightly more than the 54 attorneys SLLDA had assigned to the district court that year. However, some of the attorneys are also supervisors, which increases their workload.

**Weber County.** In a phone conversation (June 2016), Michael Bowhuis, Coordinator for the Public Defenders in Weber County, estimated that the budget for public defense in the county is about \$1.3 million while the county attorney's office budget is over \$2 million. There has been a recent increase of about 25% for the county attorney's office and 40% for public defense. Part of the increase has gone to improving the staffing for the juvenile court which has been

understaffed. Public defenders also have access to the same legal research service as the county attorneys.

Prior to 2010 the Public Defenders Association acted as a middleman in contracts; currently the county commission contracts with each individual attorney. County commissioners are assisted in contracts and other legal questions regarding public defense by the civil attorney section of the county attorney's office. So the prosecutors are not involved although both the civil attorneys and prosecutors are in the same location.

The recently formed state commission would be a good solution if it could set standards for all public defense and collect data. However, some attorneys would not be in favor of a single statewide agency to fund public defense. They feel that when counties contract with independent attorneys who also have a private practice they feel that the defendant gets better representation because independent attorneys may have broader experience and may be more qualified than an attorney who only works only for a state agency. This is especially true if that state agency only hires lawyers willing to work at the cheapest rates. In addition, an attorney's knowledge of local practices and personnel may provide an advantage to the defendant.

**Grand County.** According to the [transparent.utah.gov](http://transparent.utah.gov) website Grand County spent \$212,300, \$231,691 and \$192,099 for public defense for the years 2015, 2014 and 2013 respectively. The County Attorney's office spent \$477,566; \$398,411 and \$403,703 for the same years.

The county council contracts with each public defense attorney. Currently, there is one firm located in Price Utah (Carbon County) that provides both public defense and parental defender services under two separate flat fee contracts; \$80,000 and \$51,000 per year respectively.

The public defender is required by the contract to submit statistical reports every six months as to the number and types of cases or matters handled specifying the types and classes of offenses, courts, nonjury versus jury trials and plea negotiated settlements.

Grand County utilizes the services of other attorneys for conflicts of interest or other circumstances that prevent the public defender from being able to represent the indigent client.

### **Other Western States**

We also examined public defender services in several neighboring states to learn how they handle the issue of indigent defense. We found the entire range of possibilities, from Colorado, which funded 100% percent of the cost of indigent defense and had two different oversight commissions, to Arizona, where the state funds none of the costs and has no oversight structure, but does have an active Public Defenders Association, which provides statewide consultation. The states surveyed were Arizona, Colorado, Idaho and Nevada.

### **Arizona**

Arizona's counties fund and administer all right to counsel services. Each county has complete authority to determine how it will provide trial, appellate and conflict-case representation. Each county also determines how much funding it will provide each year for those services.

Arizona provides "Fill the Gap" funds to supplement county spending based on the county's population and three-year criminal caseload averages. These funds amount to less than

#### **Arizona Quick Facts:**

- Percentage of State Funding-0%
- Percentage of local funding-100%
- State Commission-none
- Branch of Government-none
- Population-7 million
- Number of Counties-15

\*Compiled by Barb Hicks using data from  
sixthamendment.org and US Census

0.01 percent of the total cost of representation throughout the state and are predominantly based on fines, penalties and fees from civil and criminal cases. Arizona's general fund appropriation is miniscule.

Larger, more urban counties, including Maricopa (Phoenix) and Pima (Tucson) counties, have established public defender offices to handle primary and conflict representation and formal assigned counsel panels for multi-conflict cases. Smaller, rural counties mostly use flat-fee contracts and assigned counsel to provide representation. Each county is responsible for both trial and appellate representation for both adults and children (Gideon at 50, n.d.).

Arizona is the only state, of the four in our sample, which has a very active Public Defender Association. It hosts an annual convention that has over 1500 attendees comprised of public defenders, contract lawyers and members of the private bar. It is very active in promoting education and training. The board of directors meets annually to discuss funding issues, upcoming legislation and rules changes, jail access and ongoing training issues (Arizona Public Defenders Association, n.d.).

### **Colorado**

Colorado provides right to counsel services through two statewide, state-funded systems. In 1970, the state legislature passed SB 126 which created the Office of the State Public Defender as an independent agency.

The Office of the Colorado State Public

#### **Colorado Quick Facts:**

- Percentage of State Funding-100%
- Percentage of local funding-0%
- State Commission-Yes(2) One for primary system, one for conflict system
- Branch of Government-judicial
- Population-5.5 million
- Number of Counties-64

\*Compiled by Barb Hicks using data from [sixthamendment.org](http://sixthamendment.org) and US Census

Defender provides primary representation throughout the state. A chief state public defender, appointed by the Public Defender Commission, is responsible for the agency's general operations and supervises all staff.

The State Public Defender maintains 21 branch offices across the state that provide trial-level services. The branch offices follow the traditional public defender model. Each branch has a team of staff attorneys supervised by a lead attorney, and receives support from staff investigators and administrative staff. Each branch covers a specific geographic area and includes anywhere from one to seven counties, depending on population density.

The State Public Defender's appellate office provides representation in direct appeals and post-conviction matters originating from any jurisdiction in the state.

The Office of the Alternate Defense Counsel (ADC) provides representation whenever the State Public Defender has a conflict of interest. The Alternate Defense Counsel Commission oversees ADC, sets policy and appoints the ADC director. ADC uses assigned counsel to handle direct services in conflict cases, and also appoints private counsel on a case-by-case basis. The state provides 100 percent funding for ADC's services (Gideon at 50, n.d.).

The 2015-2016 budget of approximately \$87 million which will support an estimated 168,000 cases and proceedings (Colorado State Public Defender, 2016).

## **Idaho**

Idaho funds and administers right to counsel services differently for trial and appellate representation.

At the trial level, counties must fund and administer indigent defense services. Each county chooses its own method of providing services in juvenile delinquency and adult criminal, misdemeanor, felony, and capital cases. In one county, there may be an institutional public defender office and flat-fee contract for conflict cases. Other counties provide primary services through flat-fee contract and conflict representation through assigned counsel. No county has a public defense commission to oversee the delivery of services. Instead, the county's board of commissioners administers all services.

#### **Idaho Quick Facts:**

- Percentage of State Funding-11%
- Percentage of local funding-89%
- State Commission-Yes, limited
- Branch of Government-Executive
- Population-1.7 million
- Number of Counties-44

\*Compiled by Barb Hicks using data from sixthamendment.org and US Census

In appellate matters, Idaho funds and administers representation through the Office of the State Appellate Public Defender (SAPD). The state appellate public defender is a direct gubernatorial appointee who oversees a central office in Boise. SAPD has two main divisions: the Appellate Division and the Capital Litigation Unit. The Appellate Division provides representation on direct appeal, taking over cases from county-level trial attorneys. The Capital Litigation Unit provides training and support to the county defenders as capital cases move through the trial phase and then takes over representing the client in direct capital appeals and capital post-conviction stages. Annual General Fund appropriations fund the State Appellate Public Defender (Gideon at 50, n.d.).

In June 2015, the ACLU filed a class action lawsuit against the State of Idaho and various public officials tied to the Idaho State Public Defense Commission asking the court to force the

state to fix its unconstitutional system of public defense(ACLU of Idaho, n.d.). The statewide commission was created in 2014 by HB 542 but remains underfunded and lacking in standards. State hired consultants estimated the cost to overhaul the system to be between \$20 million and \$40 million (Thomas, 2016).

The class action lawsuit was dismissed by the Idaho District Court in January 2016 but the ACLU has appealed the decision to the Idaho Supreme Court (ACLU of Idaho, n.d.).

### **Nevada**

The state of Nevada offers little assistance to counties in providing indigent defense services. Under statute, counties with populations over 100,000 are required to establish a public defender office. Clark (Las Vegas) and Washoe (Reno) counties are the only counties in Nevada with populations over 100,000 and are, thus, responsible for providing indigent defense services at the county level with minimal state assistance.

For smaller, more rural counties, Nevada has established the State Public Defender's Office, within the Department of Health and Human Services, to

provide direct trial-level services under annual contract with county governments. For those counties choosing to participate in the state defender program, the state contributes a percentage of the overall cost of representation. Statute allows the state to contribute up to 50 percent of the cost, but in practice the state only contributes approximately 20 percent. Because of this, most counties have chosen to opt out of the statewide program, and provide services using a method of

#### **Nevada Quick Facts:**

- Percentage of State Funding-1%
- Percentage of local funding-99%
- State Commission-none
- Branch of Government-  
Executive
- Population-3 million
- Number of Counties-16

\*Compiled by Barb Hicks using data from  
sixthamendment.org and US Census

their own choosing at lower cost. Today, only two counties remain under contract with the State Public Defender's Office: Carson City and White Pine County. The State Public Defender's Office provides the bulk of representation for indigent clients on direct appeal. The State Public Defender is a direct gubernatorial appointee.

Smaller Nevada counties have by and large chosen to provide services through flat-fee contracts with private attorneys and law firms; only one, Elko County, has chosen to establish an institutional defender office (Gideon at 50, n.d.).

### **Current Efforts in Utah**

#### **Utah Indigent Defense Commission**

Senate Bill 155, the Indigent Defense Act in 2016, provided the Utah Legislature's response to the first recommendation in the Sixth Amendment Center's report. It created the Utah Indigent Defense Commission, to be composed of 11 to 13 members and funded at \$2 million for the first year. Governor Gary Herbert signed Senate Bill 155, and appointed the members of the Commission who were confirmed by the Utah Senate. (See Appendix C for a complete list of the members.)

In an interview, Senator Todd Weiler, Senate sponsor of the bill, stated that the Commission's main concerns are to

1. decrease the case load of current Public Defense Attorneys,
2. eliminate conflicts of interest with County Attorneys such as flat fee contracts, and
3. provide training for public defenders.

The Commission is also charged with developing the means of oversight for providing for the defense of indigents.

The Commission estimates \$1.5 million of the funding will be matching grants for cities and counties to support their public defender systems. The other \$0.5 million will provide for salaries and overhead including office expenses. The Commissioners themselves do not receive any pay except mileage (personal communication, June 29, 2016.).

Senator Weiler said some progress toward the Commission's goals has already been made. The Legislature took steps to decrease caseload when it passed HB 348, the Criminal Justice Reinvestment Act, in 2015, which shifted some cases from District Courts or Justice Courts to Drug Courts through downgrading many drug charges to misdemeanors.

It also amended Utah Code provisions regarding corrections, sentencing, probation and parole, controlled substance offenses, substance abuse and mental health treatment, vehicle offenses, and related provisions to modify penalties and sentencing guidelines, treatment programs for persons in the criminal justice system, and probation and parole compliance and violations to address recidivism.

In the League of Women Voters of Utah 2014 Relocation of the Utah State Prison at Draper study several facts affecting the relocation were studied including the use of special courts i.e. Drug Courts and treatment for the mentally ill which would possibly decrease the number of offenses requiring public defenders.

In the HB348 Criminal Justice Reform Annual Report, October 2016, five points were noted as significant.

- The overall prison population has continued to decrease and the number of nonviolent, low-level offenders being sent to prison has been reduced significantly.

- Probation-focused policies are progressing, with fewer probation revocations, an increase in the number and rate of successful discharges, and slowed growth of the probation population overall.
- Reclassifying drug possession only penalties from a 3rd degree felony to a class A misdemeanor on the first or second offense has significantly reduced the overall percentage of felony drug offenses.
- Criminal history scoring revisions to the Sentencing Guidelines, recalibrated to better reflect the seriousness of offenders, have resulted in fewer recommendations to prison for 3rd degree felonies.
- Substance use treatment numbers pre-and post-reform remain constant, with treatment for both substance use and mental health being an ongoing area in need of ongoing expansion.

Although it was stated victim services were a very important part of HB348, there was no specific mention of counsel or legal representation in the report.

### **ACLU Suit**

The ACLU has been closely following these legislative actions. Although they supported the establishment of the Utah Indigent Defense Commission, and approved of the make-up of the membership, they were not satisfied with the rate of progress it indicated in addressing the problems facing indigent defenders.

On June 21, 2016, the ACLU filed a class action suit against the State of Utah and Sean D. Reyes, Attorney General of the State of Utah (*Remnick v. Utah*, 2016). Six plaintiffs are listed and described in the suit, but the ACLU indicates that there are many more throughout the state.

The stories of three people affected by Utah's indigent defense system can be found in Appendix E.

The suit indicates that while Senate Bill 155 creates the UIDC, it fails to provide any penalties for counties and municipalities that do not meet the minimum requirements for representation of indigent defendants. Its only incentive is to offer some grant money to counties and municipalities that adopt the UIDC standards. The suit references the 6AC report:

With respect to the actual denial of counsel, the 6AC Report cited (1) failure to appoint counsel at the early critical stages of a criminal prosecution; (2) accepting a waiver of the right to counsel without a colloquy between judge and defendant to ascertain if the waiver was knowingly, voluntarily and intelligently made; (3) pleas accepted without counsel; and (4) interference of prosecutors and judges in plea negotiation with respect to persons unrepresented by counsel (ACLU suit, p. 20).

and

The 6AC Report focused extensively on the constructive denial of counsel to indigent persons, including: (1) the lack of accountability for indigent defense on the part of Defendant State of Utah, the counties and municipalities; (2) the structure of indigent defense, particularly in Justice Courts; (3) the role of county prosecutors in the selection, evaluation and retention of public defenders; (4) financial conflicts created through flat-fee contracting and funding of investigative and trial related expenses; and (5) workloads of public defenders, including time for contesting the prosecution's case (ACLU suit, p. 21).

The suit also references the state requirements:

The State of Utah passed the Indigent Defense Act of 1965 (the “Act”). The Act has been amended and is currently set forth in §§ 77-32-101 et seq., UTAH CODE ANN. The legal defense standards for Utah’s public defender are defined in § 77-32-201(8), UTAH CODE ANN.:

- A. Provide defense counsel for each indigent who faces the potential deprivation of the indigent’s liberty;
- B. Afford timely representation by defense counsel;
- C. Provide the defense resources necessary for a complete defense;
- D. Assure undivided loyalty of defense counsel to the client;
- E. Provide a first appeal of right; and
- F. Prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Defendants have failed to meet or maintain the statutory mandates of the Act. . .

(ACLU suit, p. 24)

Specific concerns include:

Utah has no official or entity empowered to take any binding, remedial actions to fix the counties’ and municipalities’ failure to comply.

Defendants (State of Utah and Sean D. Reyes, Attorney General) do not supervise the provision of indigent defense services in misdemeanor and felony criminal actions in any of Utah’s twenty-nine counties.

Defendants have not implemented any safeguards to ensure that counties comply with the Act and with national performance standards.

National standards require ongoing training, professional development, and continuing legal education. Indigent defense counsel must acquire and maintain lawyering skills, as well as keep current with new developments in the complex and rapidly changing field of criminal law.

Defendants do not provide resources for attorney training, nor require attorney performance evaluations.

Defendants do not oversee workload limits. As a result, only two of Utah's twenty-nine counties (i.e., Salt Lake and Utah counties) have implemented a formal training program for indigent defense counsel at the insistence and direction of the legal defender associations in those two counties.

Most counties rely on private low-bid contracts without any investigation into the qualifications of the applicants. Lacking formal orientation, newly hired attorneys have no opportunity to acquire and maintain the skills and legal knowledge necessary to put the prosecution's case to the crucible of adversarial testing. Counties do not provide or fund training programs for contracted attorneys to hone their skills and remain knowledgeable of significant changes in the law.

The very recently formed UIC Commission, by its nature, has no power at all to take any binding action to bring any county or municipality failing to provide adequate defense into compliance. The UIC Commission is advisory in nature, and counties and municipalities have no obligation to follow any of its guidelines. (ACLU suit, p. 25-26)

Other concerns are that there is no supervision of public defenders, and the contract for a public defender often goes to the lowest possible bid. Saving money is a major concern. In addition, the flat rate contracts provide disincentives for attorneys to provide optimum service.

Usually no money is provided for expert witnesses or investigation services. In counties where these expenses can be reimbursed, the attorney often must request the funds from the prosecution, which creates a conflict of interest, since the prosecuting attorney often selects or influences the selection of the contract attorney.

The substantive relief requested by the Suit includes the following:

1. Assert jurisdiction over this action;
2. Order that Plaintiffs may maintain this action as a class action pursuant to Rule 23 of the Utah Rules of Civil Procedure;
3. Declare unconstitutional and unlawful
  - (a) the Defendants' violation of Plaintiffs' right to effective assistance of counsel, under the Sixth and Fourteenth Amendments to the United States Constitution the Utah code;
  - (b) the Defendants' violation of Plaintiffs' and class members' right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, and under 42 Utah code;
  - (c) Defendants' violation of Plaintiffs' right to effective assistance of counsel, under Article I, § 12 of the Utah Constitution;
  - (d) Defendants' violation of Plaintiffs' right to due process, under Article I, § 7 of the Utah Constitution;
  - ....(f) Enjoin Defendants from their ongoing violations. (ACLU suit, p. 49-50).

The ACLU suit summarizes what the ACLU sees as the continuing shortcomings of the indigent defense system. See Appendix E for personal stories related to the suit.

### **Conclusion**

The Sixth Amendment to the U.S. Constitution unquestionably gives citizens accused of crimes the right to a speedy and public trial. The U.S. Supreme Court has ruled that when incarceration is a possibility, the accused is entitled to be represented by competent counsel. However, in Utah state courts according to recent studies this right has been incompletely and imperfectly supported. Two efforts are currently underway to remedy these wrongs, the Utah Indigent Defense Commission (UIDC) and a class action suit against the State of Utah by the American Civil Liberties Union. Whether either of these actions will result in justice for defendants in Utah courts remains to be seen.

The goal of this study is to inform members of the League of Women Voters of Utah in order to establish a position with which League members can advocate on this issue.

Will the shortcomings of Utah's structure for providing indigent defense be solved by the courts? By the legislature? The League of Women Voters has no influence on the courts, but it can work to influence the state legislature. Changes in the system are now under the auspices of the UIDC, but what it is able to accomplish will depend on how well the Legislature funds the Commission and what its behest is to the Commission.

As Leaguers, we must take consensus on the issues before the state so that we can influence the legislature to take the action we believe in.

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## Appendix A

### American Bar Association's Ten Principles for Public Defense

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

*Utah Reality:* County attorneys routinely help select public defenders, and may also help negotiate the terms of their contracts.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

*Utah Reality:* There are no systems in place to track caseloads, and thus little to no ability to engage the private bar when necessary.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

*Utah Reality:* We were advised that clients often wait weeks for even initial meetings with their public defenders, and that those meetings often occur at the courthouse in the 5-10 minutes before court appearances.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

*Utah Reality:* See above.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

*Utah Reality:* There are no systems in place to track caseloads or quality of representation.

6. Defense counsel's ability, training, and experience match the complexity of the case.

*Utah Reality:* There are few, if any, written criteria or minimum qualifications for public defenders, and no on-going monitoring of ability training.

7. The same attorney continuously represents the client until completion of the case.

*Utah Reality:* Unknown.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

*Utah Reality:* Resource disparities are significant, with county attorneys routinely receiving 3-5 times the budget allocated to public defense.

9. Defense Counsel is provided with and required to attend continuing legal education.

*Utah Reality:* There are no requirements for continuing education, and public defender contracts rarely include any monies set aside for that purpose.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

*Utah Reality:* There are no procedures in place to supervise public defenders, or to monitor the quality or efficiency of their services.

## Appendix B

### Seven Standards for Studying Utah's Public Defense System, by the Study Committee on the Representation of Indigent Criminal Defendants

#### 1. *Independent Representation*

Demonstrative Questions: Are defense providers free to zealously advocate for their clients' stated interests without fear of personal financial retaliation (e.g., termination of employment) or systemic reprisals (e.g., undue reduction in government resources)?

#### 2. *Representation Without Conflicts of Interest*

Demonstrative Questions: Do the interests of the defense provider or system come in conflict with the interests of the client? For example, do defense attorney contracts create financial incentives or disincentives to dispose of cases prematurely?

#### 3. *Representation Without Interference*

Demonstrative Questions: Does the state or local government unduly interfere with the representation in any way? For example, are there court processes, statutes, or local policies that lead to non-zealous representation, or produce conflicts between the defense attorney and the accused, or result in attorneys not appearing at critical stages of the case?

#### 4. *Representation at all Critical Stages*

Demonstrative Questions: Is a defense attorney physically present at every critical stage of a criminal case (as defined by the U.S. Supreme Court) for all case types and in all courts? For example, are defense attorneys provided at arraignments, plea negotiations, and sentencing hearings?

#### 5. *Representation that Ensures Meaningful Adversarial Testing of the State's Evidence*

Demonstrative Questions: Are defense attorneys equipped to adequately represent defendants' stated interests in an effective way? Recognizing that this does not mean one-to-one parity with prosecutors' resources, are public defenders overwhelmed because of a lack of resources, too many cases, or their own professional limitations? Specifically:

*Qualified Counsel*

Demonstrative Questions: Do defense attorneys' skills, training, and experience match the complexity of appointed cases? For example, are young attorneys just out of law school handling serious felony cases?

*Defense Resources*

Demonstrative Questions: Do defense attorneys have appropriate access to investigators, experts, and social workers?

*Reasonable Caseloads*

Demonstrative Questions: Do attorneys have the necessary time to consider whether certain actions (motions, crime scene investigations, witness interviews, etc.) are necessary and appropriate in specific cases?

6. *Fair Compensation and Proper Incentives*

Demonstrative Questions: Do attorneys receive a fair day's wages for a fair day's work?

Specifically:

*Fair Compensation, not Parity*

Are attorneys properly compensated, independent of the resources and salaries paid to prosecutors?

*Proper Incentives*

Do attorney compensation arrangements produce financial incentives or disincentives for the attorney to fulfill his ethical duty to the defendant to provide zealous representation?

*7. Case-Specific and Systemic Quality Control*

Does the indigent defense system provide accountability through supervision and the monitoring of attorney performance against standards? Does the system collect data to ensure accountability?

## Appendix C

## Members of the UIDC and the date their terms expire

Michael D. Zimmerman,	Chairman	Utah Judicial Council	6-15-20
Samuel Alba		Utah Minority Bar Assn.	6-15-20
Patrick L. Anderson		Utah Assn. of Criminal Defense Lawyers	6-15-18
Walter F. Bugden		Utah Assn. of Criminal Defense Lawyers	6-15-20
Mary Corporon		Utah Assn. of Criminal Defense Lawyers	6-15-18
Nicole Cottle		Utah League of Cities and Towns	6-15-18
Ryan W. Loose		Utah League of Cities and Towns	6-15-20
Claudia Jarrett		Utah Assn. of Counties	6-15-20
David C. Wilson		Utah Assn. of Counties	6-15-18
To be appointed		Comm. On Criminal and Juvenile Justice	
Todd Weiler		Utah State Legislature	6-15-20
Joanna Landau		Executive Director (non-voting member)	

## Appendix D

### Understanding Utah's Unique Legal History

In 1847 members of the Church of Jesus Christ of Latter-Day Saints (LDS) first arrived in what would become Utah, and the community had no need of lawyers. They rejected the inefficient and divisive nature of the adversarial system of justice. Instead they turned to their own church courts where lay officials decided the fate of accused persons. Outcomes were based on the common good of both the offender and the greater Mormon community. This rehabilitative approach to justice was less punitive except in rare occasions, when a wrong doer was excommunicated and banished from the Mormon religious community.

During the late 1840s and early 1850s thousands of people headed west in search of financial gain from reported precious metals and ranch lands. The end of the Civil War saw great numbers of people again heading west to make new lives. But claims and counter-claims gave rise to gunfights, lynchings and vigilante committees. The need for an agreed upon rule of law and lawyers to protect one's interests was apparent. In 1877 Nevada became the first state to require the appointment of counsel and to pay such counsel. Soon other states followed.

Only the most serious cases, such as murder, or crimes committed by non-LDS were handled in the territorial district courts relying on the adversarial system of justice. Less serious accusations and offenses charging LDS members continued to be dealt with in church courts with their emphasis on restoring the offender to the community in non-adversarial proceedings. Statehood came to Utah in 1894 along with separation of church and state. Utahans adopted their Constitution of 1896 including article VIII that established the court system.

Utah's district courts have general jurisdiction over civil and criminal matters and are courts of record with judges who are members of the bar. Justice courts of limited jurisdiction include low value civil matters and less serious misdemeanors occurring within the locality. They are not courts of record nor are the judges required to be lawyers.

The transition to an adversarial system with its right of counsel was neither quick nor easy. Because proceedings in district courts were more serious there was a greater number of accused seeking appellate review. This outside oversight sped up the transition to an adversarial approach to jurisprudence in the district courts that did not occur as rapidly in the justice courts.

..."There is much to like in the community centered and restorative approach to justice taken by the early LDS church courts. Too much of the American criminal justice system is simply about retribution. There is also a wrong-headed general acceptance in far too many state courts across our country that people accused of crime are worthless and can never learn to become productive citizens. Utah's original approach to justice based on the power of rehabilitation is admirable.

"The best systems in American justice today are ones that uphold the constitutional right to counsel and infuse true advocacy into the goal of restoring every individual to the community...If Utah will steadfastly continue down the path it set in place with the indigent defense reform legislation...towards establishing a truly effective right to counsel for all defendants, both rich and poor, in all of its courts, it is well-positioned to create a far better paradigm for justice than that presently available in most of America's courts."

From the 3-16-2016 blog of David Carroll of the Sixth Amendment Center

## Appendix E

## Yes on Six: Personal Stories from the ACLU

**David's Story:** After spending just one year as the sole public defender in a rural Utah county, David Van Dyke did not renew his contract.

The experience reshaped how he thought about the need for a vigorous public defender system, as he learned first-hand that Utah's public defense system left too much to be desired.

“When I was in law school I said I would never do criminal defense work. I figured in most cases, those charged were guilty and deserved punishment. However, over time I came to realize that in many situations, the constitutional rights of these individuals were being trampled. Many of the rights we have and take for granted are a result of attorneys defending alleged criminals. I decided a person's constitutional rights should not be violated simply because they were involved in an alleged crime.”

David and his family moved to Wayne County in 2004, where he is one of just a few practicing attorneys living full time in the area (Wayne County is the fourth *least* populous county in Utah, according to 2014 Census data).

He is a graduate of the University of Utah law school, and practiced civil law for many years in various industries, before signing up to represent Wayne County's indigent clients in 2015.

Despite the unique challenges of being a rural public defender David really liked the work. “I wanted to try and make a difference, and not just offer deals or pleas,” he says. “I think you should really fight for your client.”

As part of his flat-fee contract, Dave was paid \$600 a month to handle every criminal defense case in the county – juvenile cases, justice court cases, and criminal cases in the district

court for adult defendants. When he took the job, he calculated, based on some historical data, that he'd probably be paid about \$400 per case. There would be no extra funding for overhead expenses. Should he need to hire experts or investigators, he would have to submit his requests directly to the county prosecutor (his legal opponent in every case).

“At a normal billing rate for an attorney in Salt Lake City, that would cover about one-and-a-half hours of work,” reflects Dave. “I spend at least a couple of hours on *any* case, just making a first appearance, looking at the discovery, and getting to know the case.”

Throughout his time as a public defender, he had to maintain his own private legal practice to make ends meet. Sometimes, he spent his own money to ensure a reasonable defense could be mounted on behalf of his clients. He paid out of his own pocket for several pre-sentence reports by an outside expert because he felt it was necessary for a case.

He truly enjoyed the work, and feels proud of what he was able to accomplish for his clients. Nonetheless, he was troubled by the lack of resources.

In particular, David was struck by his experience with a high-profile juvenile homicide case that hit his desk toward the end of his year-long contract. Acknowledging that he did not have a great deal of experience in with juvenile defense, David consulted juvenile defenders in Salt Lake County for advice, which they freely gave. He was so impressed with their knowledge of the process for certifying a juvenile as an adult, that he asked Wayne County for additional money to hire them as advisors and experts for the certification process.

“The County said no, outright. I had to do the certification hearing without the additional support. The County did agree to pay for an expert to prepare a pre-certification report which was definitely beneficial. However, I had to spend a significant amount of time researching and

preparing for the certification hearing. To the County's credit, they did pay my bill – which I significantly discounted – associated with the work done after my contract was not renewed.”

When David's contract expired, he handed the case off to a new public defender. He hopes the young man will receive the aggressive defense David felt is deserved.

But after holding the public defender contract for just one year, David concluded that he simply couldn't work with such limited support and resources. The cases were too important and he could not justify putting his paying clients on the backburner for his public defense clients.

Currently, with his paying clients, he can afford to hire private investigators and make sure all the right people get interviewed. He can even hire additional consultants to assist as may be needed. He feels confident he is able to provide the vigorous defense his clients deserve – without breaking his own bank account.

David worries that indigent clients in rural counties like Wayne County aren't getting the defense they deserve, and thinks that the new statewide Indigent Defense Commission should provide funds for advisory attorneys to provide support and advice to rural public defenders.

“I've been watching things in other counties and I've been disturbed. I know all the public defenders feel overworked, but a lot of them are accepting contracts that are just terrible. They take issue with the pay, but keep doing it – in most cases because they believe the indigent need a defense. However, it seems that most people aren't getting the defense they deserve due to the lack of resources.”

**Harry's Story:** “That looks like the guy who robbed me.” Those are the eight words that sent Harry Miller to prison for a crime he didn't commit.

Without the intervention of the Rocky Mountain Innocence Center and other supportive legal advocates, Harry Miller might still be behind bars.

On December 8, 2000, in Salt Lake City, someone robbed a woman of her purse at knifepoint. She reported that her assailant was a black male in his early 20s. Three years later, Harry was arrested for the crime, despite the fact that he was a black male in his late 40s - who also happened to be in Louisiana recovering from a massive stroke at the time the crime was committed.

Nonetheless, Harry was charged with aggravated robbery, a first-degree felony, punishable by a sentence of five years to life in prison.

Like most of us, Harry did not have the expendable income to hire a private attorney. So, in accordance with the Sixth Amendment's guarantee of legal counsel, Harry was assigned a public defender. This is very common: across the country, more than 80% of people charged with a crime and who face time behind bars, do not have the funds to hire a private attorney.

That's why the Sixth Amendment is so important, by the way. The United States Supreme Court has explicitly said that because governments "spend vast sums of money to establish machinery to try defendants," a person of meager means, if charged with a crime, cannot really get a fair trial unless a lawyer is provided by the state.

Unlike the vast majority of criminal defendants (more than 95% of all cases end in a plea bargain), Harry's case went to trial. And over the course of that trial - because a key witness was unable to travel to Salt Lake to establish Harry's alibi - it did not come to light that Harry had been in Louisiana, recovering from a stroke, at the time of the robbery. All the jury heard was that Harry lived in Louisiana and was off work for the weeks preceding and following the robbery.

When the verdict came in, Harry was found guilty of aggravated robbery, largely based on two questionable eyewitness identifications. That's all it took – Harry Miller received a sentence of five years to life.

After spending several years in prison, Miller received help from several appellate attorneys who were shocked by the unfairness of his case. After further time and investment, these attorneys found facts supporting Miller's alibi that morning in 2000 – facts that should have saved him from imprisonment in the first place. Harry was eventually released from prison, but only after having spent five years behind bars for a crime he did not commit. It took several more years before the Rocky Mountain Innocence Center helped Harry prove his "factual innocence" of the crime and assisted him in receiving compensation for the time he spent wrongfully incarcerated.

Harry's story is shocking – but it shouldn't be surprising. By now, it has been well established that Utah is failing its residents when it comes to fulfilling their Sixth Amendment rights.

Just last fall, the Sixth Amendment Center, a nationally-recognized non-partisan research organization, released a report detailing numerous constitutional issues in Utah. The 6AC report confirms what the ACLU of Utah documented in 2011, in "Failing Gideon: Utah's Flawed County-by-County Public Defender System." In both reports, every county studied fell far short of meeting national criteria for a constitutionally-adequate public defense delivery system.

We've accumulated enough data, and we've seen enough stories like Harry's. It's time for action! Harry's story is tragic, and without serious reform, we are certain to see many more such miscarriages of justice.

**Sue's Story:** While the state puts together an Indigent Defense Commission that will take at least a few years to take action, real people like Sue McAley are suffering NOW because of Utah's failing public defender system.

Sue McAley moved to Utah to be closer to nature while recovering from breast cancer. She also suffered from anxiety attacks and PTSD, in response to traumas in her recent past – including an addiction to painkillers, which she had finally kicked.

In July 2014, she walked out of a store in Iron County with a \$1.45 item, for which she hadn't paid, in her pocket (she had paid for other items while in the store). She was arrested for retail theft, a Class B Misdemeanor, punishable by up to six months in jail or a fine of up to \$1,000.

Sue went to Iron County Justice Court a month later, hoping to fight the charge, based on her mental health issues. Unemployed at the time (she had filed for disability), she was found to be indigent and because there was the possibility of jail time, she was assigned a public defender.

“I told the public defender that I wanted to fight it. My medication had just been changed, that was why I had been so spacey and messed up. The attorney told me, ‘they don't care about that...they just want your money.’ I really didn't want to plead, I really didn't want a theft on my record. But he said, ‘No, we just need to plead.’ I just wanted to get out of there, and so I agreed to do it.”

The judge sentences her to six months in jail, but agrees to suspend the sentence if she will pay a fine of \$680. Sue asked to be given community service instead. The judge told her, “We don't do that here.” She told her public defender that she didn't have a job, that she couldn't pay a fine like that. He assured her that she would be able to “pay what you can, a little here and there.”

The court set up a payment schedule for her: \$25 a month, until the fine was paid off. It would take her until June of 2017...nearly three years. She would be on probation for a year, if she adhered to the payment schedule.

“I showed up at court, five minutes before my case was going to be heard, and the public defender just sits down and tells me what to do. The lawyers and the judge, they don’t want to hear my story, they don’t want to know what happened. They just want me to take a plea and get out of there. In and out. It’s a money-making mill.”

Sue was seeing a therapist for her mental health issues. She began to teach martial arts, and tried to pick up odd jobs to make ends meet.

But six months later, a warrant was issued for her arrest. Sue had failed to “comply with the court’s order” – that is, she had failed to keep up with her \$25/month payment plan.

Because Sue was arrested on a Friday, she had to spend the weekend in jail until she could be brought before the judge on Monday. They would not release her unless she paid the fine in its entirety.

When she finally appeared before the judge, Sue again explained her financial situation. She told the judge again, “I can’t pay this fine.”

Sue did not have an attorney with her. Nobody advised her or argued on her behalf. She was alone before the judge, in the custody of the jail.

The judge ordered her to begin making payments on her fine. He did not reduce her fine, or give her any credit, for the weekend she had spent in jail.

“They didn’t give me any credit for time served, he didn’t cut me a break at all. He just tells me to start paying again the next month.”

Sue made a few payments of \$15 and \$10, when she could, asking each time to be given the opportunity to do community service instead. She was not able to keep up with the payments.

In July 2015, Sue was called back before the court. The court reviewed her case, determined that she “had not complied with the terms of probation.” Again, she did not have an attorney with her. Nobody argued on her behalf.

She attempted to give the judge a letter from her therapist, which explained Sue’s mental health issues and her mental state at the time of the shoplifting incident. The judge did not accept the therapist’s letter. Rather than invoke the original six-month jail sentence, the judge simply turned the case over to the Office of State Debt Collection.

In October 2015, Sue received a letter from the Office of State Debt Collection, informing her that she now owed \$861 – her original fine, plus collection fees and “Court-Ordered Post Judgment Interest” that had been assessed. There would be no negotiation.

“The judge didn’t even look at the letter from my therapist, he acted indignant when I tried to hand it to him. He didn’t give me the dignity of recognizing that I was making improvements, he just wanted to move on. The public defenders, the prosecutors, the judges...they are all on a first-name basis, they all work together. It feels like your lawyer is working with them, NOT for you.”

## Glossary

### **CRIMINAL OFFENSES**

The **Utah Courts** home page states that Utah has three classifications of criminal offenses: **felonies** (major crimes which can be punished with death, imprisonment and/or fine), **misdemeanors** (lesser crimes, which can be punished with a county jail term of up to one year and/or fine) and **infractions** (minor crimes like traffic violations and disorderly conduct, which are punishable only by fines up to \$750.

Which category a particular act falls into is defined by state law and city or county code and can be changed by the legislature or city or county councils.

<https://www.utcourts.gov/howto/criminallaw/penalties.asp>

Examples:

Class C Misdemeanor: Driving without a valid license, disorderly conduct

Class B Misdemeanor: Possession of one ounce or less of marijuana, DUI, theft of \$500 or less

Class A Misdemeanor: Possession of one ounce to one pound of marijuana, assaulting a police officer, negligent homicide

Third degree felony: theft or check forgery of \$1000-\$5000, aggravated assault

Second degree felony: auto theft, residential burglary, kidnapping, forcible sexual abuse

First degree felony: robbery or arson, rape, murder.

**COUNSEL:** A lawyer who represents a person or group in a court of law [www.merriam-webster.com/dictionary/](http://www.merriam-webster.com/dictionary/)

**Actual Denial of Counsel**

Actual denial of counsel happens when a court refuses or neglects to appoint counsel to an indigent whose court appearance could result in incarceration.

### **Constructive Denial of Counsel**

Constructive denial of counsel happens when a defender is present to represent the accused, but for one reason or another is not able to *effectively* represent the defendant.

## **COURTS**

### **Trial Court:**

The Leadership Conference on Civil and Human Rights defines trial courts simply as where cases are heard for the first time. The two sides present the facts of the case as they see them, and either a judge or a jury makes a decision based on the evidence presented. Trial courts are also called district courts.

<http://www.civilrights.org/judiciary/courts/difference-trial-appellate-courts.html?referrer=https://www.google.com/>

### **Court of Appeals:**

A court whose jurisdiction is to review decisions of lower courts or agencies.

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### **Justice courts**

Justice Courts are trial courts established by counties and municipalities which have the authority to deal only with class B and C misdemeanors, violations of ordinances, small claims, and infractions committed within their territorial jurisdiction. Justice Court judges do not need to be attorneys, but they are required to receive 30 hours of judicial education each year to remain certified. Justice courts in Utah are not courts of record.

<https://www.utcourts.gov/index.html>

### **Court of Record**

A court of record is a trial or appellate court in which a court recorder records the proceedings.

### **Judicial Council**

The Utah Courts website defines the Judicial Council as follows:

“The Utah Judicial Council is the policy-making body for the judiciary. It has the constitutional authority to adopt uniform rules for the administration of all the courts in the state. The Council also sets standards for judicial performance, court facilities, support services, and judicial and non-judicial staff levels.

The Council consists of fourteen members. The Chief Justice of the Utah Supreme Court is the chair. The other members include another Utah Supreme Court Justice; a judge of the Court of Appeals; five District Court judges; two Juvenile Court judges; three Justice Court judges; a state bar representative; and the State Court Administrator, who serves as secretary to the Council. The judges and state bar representative serve three-year terms.

<https://www.utcourts.gov/knowcts/>

**INDIGENT:** Utah state statute (*UT Code Ann. 77-32-20H2*) defines indigent for legal purposes as someone who

1. Does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities; or
2. Has an income level at or below 150% of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services; and

3. Has not transferred or otherwise disposed of any assets since the commission of the offense with the intent of establishing eligibility for the appointment of counsel under this chapter. (<http://saltlakelegaldefenders.org/faqs/>)