



SIXTH  
AMENDMENT  
CENTER

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Montana Task Force on State Public Defender Operations  
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Dear Members of the Task Force on State Public Defender Operations,

The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide competent counsel at all critical stages of a case to the indigent accused who is facing a potential loss of liberty in a criminal or delinquency proceeding. In partnership with the Defender Initiative at Seattle University School of Law's Korematsu Center for Law and Equality, a project that advances justice and equality through research and education, the 6AC provides technical service to legislative bodies free of charge through a generous grant of the U.S. Department of Justice, Bureau of Justice Assistance.

This memorandum is in response to a request for technical assistance received on December 15, 2015 seeking information on the following topic areas: a) systemic indigent defense litigation; b) states using 100% contract indigent defense services; c) states with separate structures for the delivery of criminal and civil right to counsel services; d) states with separate structures for the delivery of trial and appellate indigent defense services; e) states that limit public representation in appeals raising ineffective assistance of counsel at trial; and, f) states with separate structures for the delivery of adult criminal and juvenile delinquency right to counsel services.

- 1. List or identify states or sub-state jurisdictions that are in litigation over an alleged failure to provide constitutionally adequate indigent defense services.**

In February 2002, the American Civil Liberties Union (ACLU) and the ACLU of Montana filed a class-action lawsuit, *White v. Martz*, against the state of Montana and seven counties alleging that the indigent defense services in those counties were constitutionally deficient (Butte-Silver Bow, Flathead, Glacier, Lake, Missoula, Ravalli and Teton Counties). The case settled after the state legislature passed, and the Governor signed into law, a statewide public defense bill in 2005 creating the Montana Public Defender Commission (MPDC) – an 11-person independent commission authorized to promulgate uniform standards for the delivery of indigent defense services.

Montana and its counties are far from alone in facing litigation alleging systemic indigent defense deficiencies. Below is an extensive list of litigation and investigations occurring in other states and counties, in reverse chronological order based on the date of the most recent developments in each case:

- a. Johnson County, Indiana: On October 15, 2015, a class action lawsuit, *Alford v. Johnson County*, was filed alleging systemic denial of counsel in that jurisdiction. The lawsuit claims that Johnson County fails to: impose reasonable caseload limits on public defenders; establish a system of oversight and monitoring; adequately fund the indigent defense system; and, provide competent counsel at all critical stages of a case as defined by the U.S. Supreme Court. Specifically, the suit alleges that the county operates a contract system in which lawyers are beholden to the judges presiding over their cases, thus creating a conflict of interest between what the lawyer must do to properly advocate for his client and what he has to do to incur favor with the judge to secure the next contract. Read more on Indiana's systemic indigent defense deficiencies at: <http://sixthamendment.org/putting-the-spotlight-on-small-town-america-putnam-county-indiana/>
- b. State of California and Fresno County: In July 2015, the ACLU filed a complaint, *Phillips v. State of California*, alleging that the state is responsible for indigent defense deficiencies in Fresno County, including public defenders carrying excessive caseloads. The complaint states that the U.S. Supreme Court, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), made the provision of right to counsel services an obligation of state governments, not counties, by virtue of the Fourteenth Amendment. Though it is not believed to be unconstitutional for a state to delegate to its counties the state's constitutional obligations, in doing so a state must guarantee that local governments are not only able to provide such services but that they are in fact doing so. California has no such mechanism and, as a result, counties like Fresno can disregard constitutional obligations regarding the right to counsel, knowing that the

state has no system in place to monitor or remedy such violations. Read more at: <http://sixthamendment.org/why-the-state-of-california-is-responsible-for-the-public-defense-crisis-in-fresno-county/>

- c. State of New York and Ontario, Onondaga, Schuyler, Suffolk, and Washington Counties: In 2007, the New York Civil Liberties Union (NYCLU) filed a class action lawsuit, *Hurrell-Harring, et al. v. New York*, on behalf of twenty criminal defendants who were or would be represented by public defenders, legal aid lawyers, and assigned counsel. The suit argued that the State of New York's failure to provide adequate funding, resources, and oversight to the public defense system in five New York counties threatens to deprive these defendants and the class they represent of their constitutional right to meaningful and effective assistance of counsel.

In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Importantly, one of the reasons for settlement was that the U.S. Department of Justice filed a statement of Interest in the case detailing what constitutes a "constructive" denial of counsel under the Sixth Amendment. As opposed to an "actual" denial of counsel that occurs when no attorney is present at a critical stage of a criminal or delinquency proceeding, a "constructive" denial of counsel occurs when certain systemic impediments exist such that defendants receive what amounts to no representation at all, despite the physical presence of a defense attorney.

In short, the DOJ statement establishes that a court does not have to wait for a case to be disposed of and only retrospectively determine whether a specific defendant's representation met the aims of the Sixth Amendment. Rather, if state or local governments create structural impediments that make the appointment of counsel "superficial" to the point of "non-representation," a court can step in and presume *prospectively* that the representation is ineffective.<sup>1</sup> The types of governmental interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): "a severe lack of resources;" "unreasonably high caseloads;" "critical understaffing of public defender offices;" and/or anything else making the "traditional markers of representation" go unmet (i.e., "timely and confidential consultation with clients," "appropriate

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<sup>1</sup> "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648 (1984).

investigations,” and adversarial representation, among others). The state agreed to pay \$5.5 Million in attorneys’ fees and costs to the NYCLU and the law firm representing the plaintiffs. The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.

- d. Scott County, Mississippi: On September 23, 2014, the ACLU filed a complaint, *Bassett v. Scott County, Mississippi*, in U.S. District Court alleging that Scott County, Mississippi routinely detains felony defendants pre-trial without bail while failing to appoint counsel until after formal indictment which, at best, does not occur until three to five months after arrest. The ACLU alleges that this is a violation of *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), which states that the right to counsel attaches at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction.” Read more at: <http://sixthamendment.org/aclu-files-federal-6th-amendment-class-action-lawsuit-against-a-mississippi-county/>
  
- e. Cities of Mount Vernon and Burlington, Washington: In December 2013, a U.S. District Court found that two Washington cities are responsible for the systemic deficiencies that deprive the indigent accused of their constitutional right to meaningful representation. The ACLU of Washington filed the class action lawsuit, *Wilbur v. Mount Vernon*, in 2011. In granting injunctive relief, the court determined the steps needed to ensure that the criminal justice system is appropriately adversarial. The court required the cities to hire a supervisor to ensure their defense system complies with constitutional standards, and the court is keeping jurisdiction over the case for three years while reforms proceed. Importantly, the DOJ filed a Statement of Interest in the case calling for an independent monitor to ensure the cities’ compliance with any court order. Further, the Statement laid out the United States’ express position that, to ensure quality representation, “a public defender must have the authority to decline appointments” above a set caseload limit. Read more at: <http://sixthamendment.org/federal-court-orders-washington-cities-to-remedywillfully-deficient-right-to-counsel-services/>.
  
- f. St. Louis County, Missouri: “Protecting the constitutional rights of all children appearing in court is critical to achieving our goals of improving juvenile courts, increasing the public’s confidence in the juvenile justice system and maintaining public safety,” stated Acting Assistant Attorney General for the U.S. Department of Justice, Civil Rights Division, Jocelyn Samuels, in a press release on November 18, 2013, as she announced the launch of a new investigation into claims that the St. Louis courts fail to provide “constitutionally required due process to all children appearing for

delinquency proceedings.” Although DOJ has only said that it has launched an investigation without detailing specific allegations, we know from several recent studies that Missouri’s ongoing indigent defense caseload crisis results in a high number of youth going unrepresented. Read more at: <http://sixthamendment.org/us-doj-investigating-stlouis-family-courts/>.

- g. Shelby County, Tennessee: On December 18, 2012, the U.S. Department of Justice (DOJ), Civil Rights Division announced an agreement with Shelby County, Tennessee to usher in major reforms of the county’s juvenile court system and the method for representing children in delinquency proceedings. Sweeping changes currently being implemented include such systemic safeguards as “independence,” “reasonable caseloads,” “attorney performance standards,” and “training” for the juvenile defense function, among others. Read more at: <http://sixthamendment.org/doj-announces-an-agreement-with-shelby-countytennessee-memphis-to-reform-juvenile-justice-system/>.
- h. State of Maryland: On January 4, 2012, the Maryland Court of Appeals (the highest court in the state) determined in *DeWolfe v. Richmond* that existing statutes require the right to counsel at bail hearings and reviews. On May 22, 2012, Governor Martin O’Malley signed legislation requiring police to issue citations for many misdemeanor violations – rather than arresting and detaining alleged offenders – in hopes of decreasing the need for bail hearings altogether. During the same legislative session, the Office of the Public Defender received a \$6.3 million increase to hire 68 new employees (including 34 lawyers). Read more at: <http://sixthamendment.org/maryland-opd-receives-7-4-budget-increase-to-staff-bail-hearings/>
- i. Luzerne and Allegheny Counties, Pennsylvania: In April 2012, the ACLU of Pennsylvania filed a class action lawsuit against Luzerne County, *Flora v. Luzerne County*, alleging that gross and chronic underfunding of its Office of the Public Defender (OPD) has led to widespread violations of poor criminal defendants’ constitutional right to adequate counsel. The case is still pending. This is the ACLU’s second action in Pennsylvania. In 1996, the ACLU of Pennsylvania filed a similar class action, *Doyle v. Allegheny County (Pittsburgh) Salary Board*, alleging that county failed to provide constitutionally adequate right to counsel services. That case settled, with the county required to increase funding and staffing (line attorneys, support staff, and management) and implement national standards.
- j. State of Colorado: In December of 2010, the National Association of

Criminal Defense Lawyers (NACDL) supported a lawsuit, *Colorado Defense Bar v. Suthers*, seeking to invalidate Colorado Revised Statute § 16-7-301(4), which required a defendant to meet with a prosecutor before being assigned counsel -- a violation of *Rothgery v. Gillespie County*. The case was settled, with the State Public Defender receiving significant new funding to provide attorneys at initial appearances.

- k. Grant County, Washington: In 2005, the ACLU of Washington settled a lawsuit, *Best v. Grant County*, after a Washington state superior court judge determined that the indigent accused have a “well grounded fear” that they will receive ineffective assistance of counsel due to excessive caseloads, a lack of effective supervision, and undue interference of prosecutors when defense counsel seeks funding for experts and investigations. The Settlement Agreement required the county to hire supervising attorneys to ensure “caseload controls,” “attorney performance standards,” and “attorney qualification standards,” among others. The agreement set minimum compensation levels for attorneys, maximum caseload limits, and an investigator-attorney staffing ratio. In addition, the county had to pay a monitor for several years to report to the court, and was ordered to pay \$500,000 in attorneys’ fees. An additional \$600,000 in attorneys’ fees would be required unless the county each year for six years could demonstrate compliance with the agreement.
  
- l. State of Michigan and Berrien, Genesee, and Muskegon Counties: In February 2007, the ACLU filed the class action lawsuit, *Duncan, et al v. State of Michigan*, on behalf of all current and future indigent defendants charged with felonies in three Michigan counties. Although these three counties were the focus of the complaint, the ACLU acknowledges that the types of harms suffered by indigent defendants “are by no means limited or unique” to just the three named counties. As the original complaint details, the State of Michigan had done “nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation.”

The ACLU dismissed the lawsuit as moot after Governor Rick Snyder signed into law comprehensive reform legislation in July 2013 that seeks to balance the scales of justice by creating the Michigan Indigent Defense Commission (MIDC) – a 15-member commission appointed by diverse authorities with the power to develop and oversee the “implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state.” The MIDC now has the authority to investigate, audit,

and review the operation of local county right to counsel services to “assure compliance with the commission minimum standards, rules and procedures.” All new money for meeting standards will come from the state, not from counties. Read more at:

<http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/>

- m. Calcasieu Parish, Louisiana: In September 2004, a lawsuit supported by NACDL, *Anderson v. Louisiana*, was filed alleging deficiencies in the delivery of indigent defense services. The lawsuit was stayed when the Louisiana legislature passed comprehensive indigent defense reform creating the Louisiana Public Defender Board (LPDB). LPDB is a 15-member commission housed in the executive branch that is statutorily required to promulgate and enforce standards related to, among others, reasonable caseloads, attorney qualifications, training, and performance.
- n. State of Connecticut: In 1995, the Connecticut Civil Liberties Union and the ACLU sued the then-governor and the Public Defender Services Commission, in the case of *Rivera v. Rowland*, for failing to provide sufficient funding for public defense services. The complaint alleged that public defenders were underfunded, causing excessive caseloads, which in turn led defenders to triage the services provided to clients. The case settled in 1999 when the state significantly increased spending, creating what is considered today to be a state with some of the most structural safeguards to ensure effective representation.

**2. Identify states that use a 100% contract model for right to counsel services, (i.e., states that have no public employees providing indigent defense services).**

Currently, 27 states<sup>2</sup> provide 100% of the funding for all indigent defense services (or the amount provided by local sub-jurisdictions is negligible or entirely voluntary). Over time, full state funding for right to counsel services has proven to provide the greatest predictability in, and control over, budgeting to provide those services. Of these 27 seven states, only one has chosen to provide services through a 100% contract model.

The Oregon Public Defender Services Commission was established in 2001 as an independent body in the judicial branch, responsible for overseeing and administering the delivery of right to counsel services in each of Oregon’s

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<sup>2</sup> They are: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

counties. The commission is statutorily responsible for promulgating standards regarding the quality, effectiveness, and efficiency by which public counsel services are provided.

With all funding for direct services provided by the state, the commission's central Office of Public Defense Services (OPDS) handles the day-to-day management of the system. OPDS lets individual contracts with private not-for-profit law firms (which look and operate much like the public defender agencies in other states that have full-time attorneys and substantive support personnel on staff), smaller local law firms, individual private attorneys, and consortia of private attorneys working together. The actual contracts are the enforcement mechanism for the state's standards, with specific performance criteria written directly into the contracts. Should any non-profit firm or group of attorneys fail to comply with their contractual obligations, the contract simply will not be renewed.

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

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

Perhaps not surprisingly, Oregon has one of the highest cost-per-capita for indigent defense spending in the country. On April 21, 2015, the U.S. Department of Justice, Bureau of Justice Statistics (BJS) published *Indigent Defense Services in the United States, FY 2008-2012 (Updated)*. The BJS report indicates that Oregon spent \$112,269,000 in fiscal year 2008 on indigent defense services. This equates to spending \$28.79 per person on right to counsel services - second only to Alaska (a state that requires public defenders to fly to many courts

via plane). OPDS indicates that their FY 2016 budget has increased more than 21% over FY 2008, to \$136,189,427.

### **3. Identify states that have separate organizations to provide criminal and civil right to counsel services.**

This question is complicated by the fact that there is no federal right to counsel in civil cases beyond the Sixth Amendment right to counsel in juvenile delinquency proceedings.<sup>3</sup> Some states have a state constitutional or statutory right to counsel in certain civil cases; even there a state may have a right to counsel in abuse and neglect cases or civil commitment cases, but not in others like termination of parental rights cases. This makes comparison across states difficult at best.

For the most part, those states that provide 100% of right to counsel funding *and* have a right to counsel for some classification of civil (non-delinquency cases) cases generally provide those services through whatever organization provides services in criminal cases. However, there are exceptions.

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<sup>3</sup> The United States Supreme Court discussed in *Lassiter v. Dept. of Social Services* 452 U.S. 18, 27 (1981) “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.” The Court added:

A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. ...Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

*Id.*, at 33-34.

The Court later reversed a civil contempt that resulted in incarceration because the defendant did not have either appointed counsel or the benefit of alternative procedures to guarantee a fair determination of his ability to pay child support. The Court held

that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings). *Turner v. Rogers*, 131 S.Ct. 2507 (2011).

For example, Alaska has two parallel executive-branch agencies providing right to counsel services across the state. The primary system, the Public Defender Agency, has branch offices located across the state, with direct trial-level criminal defense services provided through a mixture of full-time staff attorneys and contracts with private attorneys (in more rural parts of the state). In cases of conflict, the Office of Public Advocacy provides services in a structure similar to the primary system, but with a greater emphasis on contracting with private counsel for direct representation. However, the Office of Public Advocacy is the primary service provider in civil cases, including advocating on behalf of children in abuse and neglect cases, incapacitated adults in guardianship proceedings, victims of elder fraud, and adults in termination of parental rights cases.

#### **4. Identify states that have separate organizations to provide trial and appellate services.**

The question of separate trial-level and appellate systems is also one that can be confusing based upon how indigent defense services are structured in the 27 state-funded indigent defense jurisdictions (and even more so in the other 23 states). For example, some states have entirely independent agencies providing appellate as opposed to trial-level services, while others may have a central administration overseeing all services but have separate contracts or divisions for appellate and trial services to ensure that trial services will be given proper scrutiny when it comes to claims of ineffective assistance of counsel. Below are the states with 100% state indigent defense funding that have separate independent trial-level and appellate services:

- a. Florida: Public defender offices staffed with full-time employees provide primary representation to indigent defendants in each of the states' 20 judicial circuits (covering 67 counties). Each office is overseen by a popularly elected chief public defender to ensure independence from the judiciary and other government agencies (chief defenders are elected every four years). When a circuit public defender has a conflict – for example when there are multiple co-defendants or in instances of case overload – secondary representation is provided by five regional conflict defender offices, which are likewise staffed by full-time employees (although the chief conflict attorney is not popularly elected). Tertiary representation is provided by private attorneys paid on an hourly basis or under contract to the judiciary. However, representation of all appeals arising from the primary, conflict, and tertiary systems are provided by one of five independent state appellate defender offices that individually advocate for their own budgets.
- b. Louisiana: The Louisiana Public Defender Board (LPDB) is a statewide

commission that is statutorily required to promulgate and enforce indigent defense standards. Although indigent defense is organized at the state level, trial-level services are still delivered with some local autonomy. Louisiana has 43 judicial districts (comprising 64 parishes that are the equivalent to counties in other states). Local chief defenders in each district oversee public defender offices or contract defenders. LPDB separately contracts with a non-profit public defender agency that itself contracts with individual attorneys to provide appellate representation.

- c. Massachusetts: The Committee for Public Counsel Services (CPCS) is a judicial branch agency overseeing the delivery of indigent defense services in all courts across the state of Massachusetts. CPCS's chief counsel runs the agency from its central office in Boston. Full-time staff public defenders (felonies and delinquencies) and private assigned counsel (misdemeanors) provide trial-level services. CPCS uses private attorneys who are paid hourly to ensure an independent appellate review of trial attorney performance.
- d. New Mexico: The New Mexico Public Defender Department (NMPDD) is a statewide, state-funded agency of the judicial branch overseeing all indigent representation in the state. Although NMPDD employs staff defenders in the state's two urban counties (Bernalillo and Santa Fe), the balance of trial-level services are provided by private attorneys paid under contract. NMPDD has a separate appellate division.
- e. North Carolina: The North Carolina Office of Indigent Defense Services (IDS) is a judicial branch agency that oversees the provision of right to counsel services throughout the state. However, the authority to determine the service delivery model for each judicial district is a legislative decision with input from local actors (county bars, judiciary, etc.). To date, only 16 judicial districts have established public defender offices. Trial-level representation is provided by staff public defenders, assigned counsel, and contract defenders throughout the state. However, IDS employs staff public defenders in a centralized unit to provide appellate representation, separate and apart from the trial services.
- f. Oregon: As explained in Section 2 above, Oregon provides trial-level indigent defense services through a 100% contract model. However, the central office employs staff public defenders to perform all appellate services. The Office of Public Defense Services does not manage appeals in post-conviction or habeas corpus cases. The state has a separate Oregon Capital Resource Center to work on capital

appeals and assist trial level counsel.

- g. West Virginia: West Virginia Public Defender Services (WVPDS) is a state-funded executive branch agency housed in the Department of Administration. WVPDS sets statewide standards related to attorney qualification, performance, and training. WVPDS also has total authority to decide how services are delivered in the state's 55 counties. Twenty-nine counties currently provide primary trial-level services through non-profit public defender corporations contracted to WVPDS. Private attorneys paid hourly provide trial representation in the remaining 26 counties. The only staff government attorneys in West Virginia are housed in the centralized appellate unit of WVPDS.

In closing this section, it is important to note that the two most recent comprehensive indigent defense reform efforts to move to statewide right to counsel systems, in Michigan and Idaho, both have opted to maintain totally separate trial-level and appellate services. In both instances, each state had pre-existing statewide appellate offices before creating new statewide commissions to oversee trial-level representation.<sup>4</sup>

## **5. Identify states that limit public representation in appeals raising ineffective assistance of counsel at trial**

A clear response to this request requires some background information about the right to counsel on appeal, the nature of ineffective assistance of counsel, and the procedures states follow to decide IAC claims. The short answer, though, is that states cannot prevent appointed appellate counsel from raising ineffective assistance of trial counsel claims on direct appeal if they allow privately retained counsel to raise those claims on appeal.

When a defendant is convicted and sentenced in a trial court, the next stage of the criminal proceeding is an appeal to a higher court. Every state in the country has created a statutory right to direct appeal, and many states include that right in their state constitution. On the same day that the United States Supreme Court decided *Gideon v. Wainwright*, it also decided *Douglas v. California*, 372 U.S. 353 (1963), holding that an indigent defendant has a Sixth and Fourteenth Amendment right to counsel for this direct appeal, where the state has created such a process, without regard to any presumed merit or lack thereof. And, the counsel provided for the appeal must be effective, as the Supreme Court held in *Evitts v. Lucey*, 469 U.S. 387 (1985).

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<sup>4</sup> It is common for states that do not fund/administer indigent representation to put their toe into the water by establishing a statewide appellate agency first (e.g., Illinois, Kansas, Mississippi, Ohio, South Carolina and Washington),.

Appellate counsel, whether appointed or retained, is responsible for deciding what non-frivolous issues should be raised and argued on appeal. If a state allows privately retained counsel to raise ineffective assistance of trial counsel claims on direct appeal, it cannot preclude counsel for an indigent appellant from doing so.

Because every defendant, rich or poor, has the right to the effective assistance of counsel in a criminal or delinquency proceeding, the defendant can claim that his trial lawyer performed so poorly that it negatively and unfairly affected the outcome of the case – that is, that the lawyer provided “ineffective assistance of counsel” (IAC). If these IAC claims are found meritorious, the case will be sent back to the trial courts to be re-tried.

In most states, direct appeals are limited to the facts and issues that are apparent from the trial record. That trial record allows the reviewing court to see what *did* happen. If all the facts necessary for an IAC finding are contained in the trial record, then an IAC claim can be decided on direct appeal. It is generally recognized that, for this to happen effectively, an attorney other than the trial attorney needs to be appointed, because the likelihood of an attorney identifying and raising on appeal his own ineffectiveness at trial is limited.

But many of the things that constitute IAC involve things that *did not* happen – motions and objections the defense attorney should have made but did not, investigation the attorney should have conducted but did not, witnesses and evidence the attorney should have introduced at trial but did not. This has led many jurisdictions to decide that IAC claims are better considered in a later proceeding, usually called post-conviction or habeas corpus, where evidence can be introduced about these omissions and why they occurred. These proceedings are collectively called discretionary review.

The United States Supreme Court has held that there is no federal constitutional right to counsel for an indigent person seeking discretionary review of a state court conviction. States are free, however, to make counsel available to convicted defendants at any and all stages of judicial review and far beyond the minimal requirements of the federal Constitution, should they choose to do so. Many states across the country do provide a state constitutional or statutory right to counsel for indigent defendants in discretionary review cases.

## **6. Identify states with separate structures for the delivery of adult criminal and juvenile delinquency right to counsel services.**

The only state-funded jurisdiction that has a separate, independent agency from the adult trial-level indigent defense system that provides juvenile delinquency

services is Colorado. Colo. Rev. Stat. sections 13-91-101 et seq creates the Office of the Child's Representative.

Sincerely,

A handwritten signature in black ink that reads "David Carroll". The signature is written in a cursive, slightly slanted style.

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