



**STATE OF NEVADA
DEPARTMENT OF INDIGENT DEFENSE SERVICES**

896 W. Nye, Suite 202 | Carson City, NV 89703
(775) 687-8490 | www.dids.nv.gov

Oversight Report – Death Penalty Cases & Plan

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Introduction.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases call for each jurisdiction to adopt and implement a plan which formalizes the means by which the jurisdiction will provide high quality legal representation in all death penalty cases. (See Guideline 2.1)

The Guidelines set forth that this Capital Representation Plan should set forth how the jurisdiction will conform to each of the ABA Capital Guidelines. All elements of the Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

Guideline 3.1 establishes that an agency independent of the judiciary should be in charge of ensuring that each capital defendant in the jurisdiction receives high quality legal representation. DIDS is perfectly positioned to create and oversee this plan. Indeed, its mandate naturally includes such oversight. Accordingly, DIDS has drafted a Nevada Rural Capital Defense Plan and has been discussing with the counties their plans for handling death penalty cases under Nevada SCR 250.

NSPD Opt-in & General DP Plan Information.

The following counties are currently opted into the NSPD for death penalty case coverage: Churchill, Humboldt, Lander, and White Pine. The NSPD has currently contracted with two death penalty qualified attorneys for coverage of these cases. Recruitment efforts continue for more contractors.

Over the last several weeks, the Department has reached out to all rural counties to identify their mandatory lists of death-penalty qualified attorneys. We discovered that most lists are outdated, or possibly non-existent.

SCR 250 also requires that a death penalty qualified attorney be appointed to all first degree murder (or open murder) cases in which the district attorney has not affirmatively stated they won't seek the death penalty. While the Department understands the purpose

and intention of this rule, including continuity of representation should a *notice of intent to seek the death penalty* be filed, this rule presents a substantial challenge to rural courts.

In short, there are limited death-penalty qualified attorneys in Nevada to cover all open/first degree murder cases in which the prosecutor is silent on the intent to seek the death penalty. And this complicates establishing a county-by-county plan for what the courts will do when these cases.

The Department is in the process of trying to incorporate these plans into each of the counties' indigent defense plans.

In the meantime, there is one county in which the Department has some concerns about a current death penalty case. We are actively monitoring it.

Pershing County.

There is a capital murder case currently pending in Pershing County, and the Department has concerns about compliance with SCR 250, ADKT 411, and the ABA Standards of Performance for Capital Case Representation. Additionally, after our review of the decision of *Rogers v. Dzurenda*, No. 19-17158 (9th Cir. Feb. 2022), we are concerned about history repeating itself in this case.

In its *Rogers* decision, the Ninth Circuit upheld the lower court's finding of ineffective assistance and prejudice and remanded this case back to Pershing County to either enter a finding of Not Guilty by Reason of Insanity (NGRI) or to retry the matter. (The case is 40 years old.) Pershing County has elected to retry the matter.

Among other things, the Ninth Circuit's Opinion found that the original trial counsel's investigation, preparation, and execution of their chosen insanity defense fell below the standard of reasonableness. The *Rogers* Opinion lists a number of reasons for the Court's conclusion, which serve as cautionary factors today:

(1) Neither trial counsel for Rogers in the original trial had any experience with trying a capital case and they were not adequately trained for handling a death penalty case;

(2) Lead trial counsel in *Rogers* was overburdened with a caseload of approximately 80 cases (the ABA's recommendation is that counsel in a capital case not have more than 35 to 50 cases). In the remanded case at hand, according to LegalServer reports, the Pershing County Public Defender currently has 382 open cases and Kirsty Pickering has 231 open cases. These numbers eclipse the 80 cases called out as excessive by the 9th Circuit;

(3) Trial counsel in the original trial did not have an in-house investigator and was given limited funding to use an outside investigator. So far in the case at hand, counsel's reporting does not show any investigation being performed in the case;

(4) Trial counsel in the original case failed to consult with or otherwise prepare their experts (including an expert regarding legal sanity at the time of the offense -- the primary

issue in the case). It appears the only matter current trial counsel are pursuing is competency to stand trial;

(5) Trial counsel in the original trial failed to prepare to rebut the state's mental health expert. Again, it appears the only matter current trial counsel are pursuing is competency to stand trial;

(6) Trial counsel in the first trial failed to investigate Roger's childhood and did not provide any childhood information to any experts (counsel in a capital case has an obligation to conduct a thorough investigation of the defendant's background). Based upon the reporting, it does not appear any childhood or background information is being investigated or gathered; and

(7) Original trial counsel failed to adequately present the standard for legal insanity. There is no indication from their reporting that current trial counsel are pursuing a defense based upon legal insanity.

In sum, based upon the Department's current oversight of this case, we have the following concerns about the Pershing DP case of *Rogers*: (1) It appears the only issue current trial counsel are pursuing is one of competency to stand trial; (2) There does not appear to be any parallel investigation occurring, including of the defendant's background, the lack of which the 9th Circuit specifically noted as deficient performance; (3) Current trial counsel do not appear to have engaged any experts who can speak to the primary substantive issue of insanity at the time of the offense; (4) Trial counsel both appear to have too high of a workload to devote adequate time and attention to a capital case; and (5) SCR 250 qualified counsel should have been appointed by DIDS and not its designee in this case. The result is a first chair who is not SCR 250 qualified to handle a capital case and a second chair who was qualified by district court judge, even though she has never tried a death penalty case to verdict.

Director Ryba has reached out to County Commission Chair Joe Crim, and discussed the possibility that Pershing County could opt into the NSPD for Death Penalty Representation. In the current *Rogers* case, the district court exercised its discretion under SCR 250 to enter an order qualifying the Pershing County Public Defender as 250 qualified to handle DP cases, even though the Public Defender has never handled a death penalty case as first or second chair. The district court also appointed a second chair who has not handled a death penalty case to verdict. Such a move would have the benefit of saving the county a significant amount of money, while ensuring death penalty experienced counsel were handling the case. If Pershing opts into such a plan, then Pershing would only be responsible for 25% of the expenses and fees in the case, and the state would cover the other 75%.

Again, the Department is actively monitoring the situation and will follow up on this report.