

Preliminary Report of the Monitor: Budgetary Concerns

Davis v. State, Case No. 170C002271B

February 8, 2023

Provided by:

M. Eve Hanan, Esq.
Associate Professor of Law
UNLV William S. Boyd School of Law
eve.hanan@unlv.edu

Provided to:

The Honorable James E. Wilson, Jr.
First Judicial District Court, Dept. II

Representatives of the Plaintiff Class:

Franny Forsman, Esq., Plaintiffs' counsel
f.forsman@cox.net

Matt Cowan, Esq. Plaintiffs' counsel
mcowan@omm.com

Emma Andersson, Esq., ACLU Plaintiffs' counsel
eandersson@aclu.org

Representatives of the Defendants, State of Nevada and the Governor:

Assistant Attorney General Craig Newby
CNewby@ag.nv.gov

The Department of Indigent Defense Services:

Marcie Ryba, Esq., Executive Director of the Department of Indigent Defense
mryba@dids.nv.gov

The Board of Indigent Defense Services:

Dave Mendiola, Chair of the Board of Indigent Defense
dave.mendiola@humboldtcountynv.gov

This Preliminary Monitor's Report to the First Judicial District Court of Carson City addresses some budgetary issues that may impact the Defendants' compliance with the terms of the *Davis* Judgment. While these issues will be addressed fully in the Monitor's next quarterly report, this analysis is designed to immediately alert the parties and the Court to the issues.

On January 23, 2023, the Governor released a recommended executive budget for 2023-2025. As proposed, the Governor's budget appears to be insufficient to honor the state's legal obligations under the *Davis* Judgment, and simultaneously risks running afoul of the state's obligation to provide effective assistance of counsel under the Sixth Amendment.¹

The primary areas of concern are as follows:

1. Staff for the Department's oversight function: The Governor's budget does not include funds for staff to conduct oversight. Without the addition of two Senior Policy Counsel, the lean Department of seven employees is unlikely to be able to comply with the oversight of indigent defense in the ten *Davis* counties that the Judgment requires.
2. Reimbursement to the counties: The Governor is recommending that the funds for county reimbursement be set aside in the budget of the Governor's Finance Office, requiring the Department to request disbursement to the counties as needed. The process of repetitively requesting the release of funds is inefficient for the Department and introduces uncertainty for the counties. This problem could be averted if the Department could reimburse counties from its budget.
3. Adequacy of attorney compensation: The Judgment requires that attorneys providing indigent defense be compensated at a comparable rate to their prosecutorial counterparts. While pay parity often must be addressed at the county level, the Nevada State Public Defender provides representation in some of the *Davis* counties.
 - A. Inadequate budget for the new White Pine County public defender office. The Governor's recommended budget for a new State Public Defender office in White Pine County likely will be inadequate to put those attorneys on par with the county's District Attorney and Deputy District Attorney.
 - B. Inadequate complex litigation budget. The Governor's recommended budget for death penalty defense for the State Public Defender is \$100,000, an amount that

¹ The Sixth Amendment's right to counsel provision can be violated by structural or systemic inadequacies in a state's public defense system. *See, e.g.*, *Tucker v. State*, 394 P.3d 54, 62 (Idaho 2017) (systemic inadequacies in a public defense system can result in actual or constructive denials of counsel at critical stages of the prosecution, thus demonstrating sufficient injury in fact to establish standing in lawsuit alleging violation of the Sixth Amendment right to counsel). The absence of certain fundamental markers of representation will lead to a presumption of ineffectiveness. *United States v. Chronic*, 466 U.S. 468 (1984), citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932).

likely will be insufficient if there are multiple cases in which the state seeks the death penalty.

4. Training and resources: The Department has an inadequate budget to provide training and resources for attorneys and seeks grants to cover some training expenses while the budget for training Nevada's prosecutors is adequately funded.

Before addressing each of these areas in depth, it is helpful to summarize the Department's accomplishments in complying with the Judgment. Since its inception, the Department has assisted the Board in promulgating regulations and implementing a maximum contribution formula; assisted all ten counties in developing and implementing *Davis*-compliant plans for indigent defense; created a system for attorney selection and for payment of case-related expenses independent from judicial or political influence; worked with the counties to secure reimbursement; developed and implemented a system of qualifying attorneys by case type; developed a model attorney-county contract; instituted universal case and time reporting for all attorneys providing indigent defense in the *Davis* counties; issued quarterly caseload/workload reports; assisted in completing the data collection phase of the caseload study; conducted in-person visits to every county; and offered regular trainings and resources.

Nevertheless, several provisions of the Judgment remain unfulfilled, namely the creation of a sustainable oversight system to ensure the quality of legal representation and the implementation of workload limits. The latter awaits the results of the workload study that is being conducted by the National Center for State Courts. The former requires more resources.

1. Staff for the Department's oversight function

The Department must ensure that attorneys providing indigent defense in the rural counties are meeting constitutional standards. The Judgment requires that the state enforce the minimum standards through oversight, review, and corrective action plans, when necessary. Nevada law also requires this. Pursuant to NRS 180.440, the Deputy Director of the Department shall obtain information regarding caseloads, payment, and performance, and shall also conduct on-site visits to determine whether indigent defense is effective and in compliance with minimum standards set forth by the Board. Should the Deputy Director determine that a county is failing to provide adequate and effective indigent defense services, the deputy will recommend a corrective action plan.

This level of oversight requires travel to the counties, and, thus, adequate staffing. The Judgment specifies benchmarks of representation. As part of its oversight, the Department must, for example:

- Ensure that class members have access to applications for indigent defense services, including at the jails.
- Ensure prompt screening for indigence after arrest.
- Ensure that those eligible for public defender services have an attorney present at their initial appearance/arraignment without delaying the hearing.
- Ensure that the attorney counsels the client not to waive substantive rights at arraignment.

- Ensure that all attorneys comply with the performance standards regarding client communication that are laid out in the performance standards ordered in ADKT411 (Oct. 16, 2008).
- Engage in reasonable efforts to ensure that attorneys have a means through which incarcerated clients can contact them and take steps to ensure that prisons and jails comply with the law regarding access and privacy of attorney-client communications.
- Ensure that all counties are adhering to a process to screen for conflicts of interest.
- Ensure that indigent defense provider qualifications match the complexity of the case.

In addition to reviewing the adequacy of representation on an annual basis, the Department must respond whenever a concern over representation has been brought to its attention.

To comply with the oversight requirement of *Davis*, the Department consulted with a data analyst, Dr. Mitch Herian of Soval Solutions, who issued a report recommending that the Department hire two, additional staff members, Senior Policy Counsel, to conduct oversight. The Department estimates that two senior counsel and an assistant would require a total of \$379,000 for FY2024.

The Governor's budget, however, contains no funding for these positions. Instead, the Governor's budget recommends funding one additional staff person to assist with reimbursements and billing. While this is helpful (because the Department dedicates significant time to reimbursements and billing) it is not responsive to the central requirement of the Judgment: the assurance of effective assistance of counsel in the rural counties through regular oversight.

2. Reimbursement to the counties

It is difficult to overstate the importance of the Department's successful efforts to reimburse the counties for their indigent defense expenses over the maximum contribution formula. Historically, rural counties bore financial responsibility for their indigent defense. The requirement from the state that the counties improve and expand their defense systems could only be realized with a concomitant investment of state funds for rural defense. To do this, AB81 (2019) required the Board of Indigent Defense to create a formula for maximum contribution for the counties. The Board approved a formula that was formalized in the Board's regulations.

However, the current reimbursement arrangement has required the Department to request earmarked funds from the Interim Finance Committee on an *a la carte* basis. The Department assists the counties in submitting quarterly expenditure reports that capture their costs. Then, the Department makes requests as needed to the Interim Finance Committee on behalf of individual counties.

This is a time-consuming process. For example, the Department's Executive Director appeared before the Interim Finance Committee on January 31, 2023, to request \$38,916 for Douglas and White Pine counties. Given that reimbursement for FY2022 totaled close to \$1.9 million, one can see how the repeated requests for individual county reimbursements could work a great inefficiency on this state agency.

Under the Governor's plan, the budget for county reimbursements would be placed with the Governor's Finance Office. While the Department would no longer be required to go to the Interim Finance Committee, the Department still would be required to apply to the Governor's Finance Office for each request for reimbursement.

The Monitor recommends that this process be streamlined by allocating sufficient funds for reimbursement to the Department's budget so that the Department can reimburse the counties directly.

3. Adequacy of attorney compensation

The *Davis* judgment requires that the pay for public defense in the rural counties be comparable to their prosecutorial counterparts. While the Department is still in the process of determining a formula for measuring parity for contract attorneys in the rural counties, the Department has studied pay parity issues for attorneys in the Department and the State Public Defender in comparison with the pay scale for the Office of the Attorney General. The Department both lacks the resources and the pay scale of the Attorney General's office.

The role of the State Public Defender in *Davis* counties is increasing. In FY2024-25, the State Public Defender will provide all indigent defense services in White Pine County, as well as death penalty representation in Churchill, Humboldt, and Lander counties, and appellate representation in Esmeralda, Humboldt, Lander, and Lincoln counties. Thus, pay parity between the assistant public defenders in the State Public Defender and their prosecutorial counterparts will be subject to the *Davis* Judgment.

The Governor's budget does not increase State Public Defender salaries or meaningfully address the parity issues. Moreover, the State Public Defender's 30% vacancy rate suggests that it is having difficulty recruiting attorneys.

A secondary compliance issue will occur if the *Davis* counties contracting with the State Public Defender have death penalty cases. The Governor's budget allocates \$100,000 to the State Public Defender for death penalty cases, which are notoriously labor and resource intensive. Indeed, Lyon County currently has a death penalty case that has totaled \$86,000 in defense expenses in the first two quarters of FY2023.

4. Training and resources

Finally, the Department has a slim budget for training and resources, which the Judgment requires the state provide to the attorneys in the rural counties. In fact, the Department has had to request grants to pay for its annual training and to defray the cost of attending for rural attorneys.

The Department's limited training budget can be compared to the state's budget for training prosecutors. The Attorney General's Council of Prosecuting Attorneys is tasked with training the state's prosecutors and coordinating the development of policies that facilitate prosecution. Since 2001, the Council has been funded with administrative assessments pursuant to NRS 176.059. Its

recommended budget for 2023-24 is \$309,451, more than ten times the budget of for training and resources of the Department of Indigent Defense, which is \$25,000 per year in the Governor's budget.

In conclusion, the state has made great strides to comply with the Judgment, particularly through the establishment of the Department of Indigent Defense Services and all its work to date. But the state is at risk of compliance failures if it does not fund oversight, attorney parity, training, and litigation resources.