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THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

DIANE DAVIS; JASON LEE ENOX; JEREMY LEE IGOU, and JON WESLEY TURNER II, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA;STEVE SISOLAK, in his capacity of Governor of the State of Nevada,

Defendants.

Case No. 170C02271B

Dept. No. II

OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Defendants, State of Nevada and Governor Steve Sisolak, by and through counsel, Aaron D. Ford, Attorney General of the State of Nevada; Jeffrey M. Conner, Deputy Solicitor General, hereby submit their opposition to Plaintiffs' Motion for Class Certification.

Dated: April 22 2019.

AARON D. FORD
Attorney General

By: _____
JEFFREY M. CONNER
Deputy Solicitor General

Attorneys for Defendants
State of Nevada and Governor
Steve Sisolak

I. INTRODUCTION

While eschewing the idea that Nevada's "Rural Counties"[1] are driven purely by a desire to minimize costs when deciding how to deliver indigent defense services and acknowledging that the Rural Counties are making "legitimate attempts" to deliver those services, the Sixth Amendment Center has identified areas where it believes the state legislature can, and should, take action to improve the delivery of indigent defense services in rural Nevada.[2] Ex. 14 at 24, 164-80.[3] The Sixth Amendment Center is correct that there is room for improvement in the delivery of indigent defense services in the Rural Counties. But, while Nevada can design a system that better suits its needs, the system itself is not broken.

Having room to improve on the delivery of indigent defense services is not the equivalent of stating that current conditions are resulting in a nearly statewide, systemic deprivation of the right to counsel for indigent defendants in Nevada. Indeed, as the Sixth Amendment Center indicated, "there are many highly-qualified lawyers providing indigent services in Nevada's rural counties," and excessive workloads do not appear to be an issue in many of the rural counties. Ex. 14 at 117, 134–38. More importantly, even assuming the report had concluded that Nevada is facing a constitutional crisis with respect to delivery of indigent defense services in the Rural Counties, Plaintiffs nevertheless fail to establish that they are entitled to certification of the class identified by their motion. Memorandum in Support of Plaintiffs' Amended Motion for Class Certification at 1 n.2.

As the Sixth Amendment Center's report shows, circumstances of the delivery of indigent services in the Rural Counties—the terms of contracts, the number of contracted

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[1] To maintain consistency with the first-amended complaint and the motion for class certification, Respondents refer to Churchill, Douglas, Esmerelda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties as the "Rural Counties."

[2] The Sixth Amendment Center's report has not fallen on deaf ears in the Legislature; Assembly Bill 81 proposes the creation of the Board on Indigent Services and the Office of Indigent Services.

[3] All "Ex. __" citations refer Plaintiffs' Index of Exhibits in Support of Plaintiffs' Amended Motion for Class Certification.

attorneys, the experience level of the contracted attorneys, the extent of the workloads, and the availability of conflict counsel—vary materially from county to county. The Sixth Amendment Center acknowledges that the kind and degree of deficiencies generally identified by its report vary from county to county. Ex. 14 at 164. Determining whether, and to what extent, indigent defendants from the Rural Counties are receiving inadequate representation will require a separate inquiry into the circumstances of each county. Additionally, even assuming Plaintiffs' can prove that indigent defendants in all of the Rural Counties are receiving inadequate representation, any proven constitutional violations will require remedies tailored to the circumstances existing in each county.

Plaintiffs' fail to establish that this Court should grant the motion for class certification. As a threshold question, this Court must determine whether Plaintiffs' have standing to initiate this litigation. With the named plaintiffs in this case hailing from only two of ten Rural Counties, Plaintiffs' fail to meet standing requirements for alleging violations of the federal and state constitutions in the eight remaining Rural Counties because the Plaintiffs' simply have not alleged that they suffered, or will imminently suffer, actual harm in those other counties.

Furthermore, Plaintiffs' fail to meet the requirements for class certification under Rule 23 of the Nevada Rules of Civil Procedure and persuasive federal authority applying the equivalent federal rule. The First Amended Complaint (hereinafter FAC) is aimed at alleging systemic, statewide violations of the right to counsel under *United States v. Cronic,* 466 U.S. 648 (1984). But Plaintiffs' fail to carry their burden of meeting the rigorous standard on commonality. *Wal-Mart v. Dukes*, 564 U.S. 338 (2011);[4] *see also* Stephen F. Hanlon,[5]

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[4] While *Dukes* is a federal case, the parties agree that the Nevada courts look to cases applying the federal analog to NRCP 23 for guidance.

[5] Stephen F. Hanlon is General Counsel to the National Association for Public Defense, "serves as the American Bar Association's Project Director for the public defender workload studies," and is an adjunct professor at Saint Louis University School of Law. Hanlon, *supra* at 625 n.a1.

The Appropriate Legal Standard required to Prevail in a Systemic Challenge to an Indigent Defense System, 61 St. Louis U. L.J. 625, 644-48 (2017) (acknowledging that *Dukes* fundamentally changed the way lawsuits like this need to be pleaded in order to obtain class certification). Plaintiffs' allegations here fare no better in establishing systemic conditions resulting in the violation of the right to counsel across ten different counties than the plaintiffs did in their attempt at establishing nationwide discriminatory practices by Wal-Mart in *Dukes*. And the same facts that distinguish the circumstances of each county extend into consideration of the typicality requirement and undercut Plaintiffs' ability to satisfy NRCP 23(c)(2).

This case presents this Court with the need to litigate separate inquiries into the provision of indigent defense services in each of the Rural Counties. The need for such an individualized inquiry defeats the purpose of NRCP 23. This Court should deny the motion for class certification.

II. ANALYSIS

The core purpose of the Sixth Amendment is to protect the adversarial process that serves as the foundation for our system of justice. *Cronic*, is clear on this point: it provides for a presumption of prejudice where the outcome of criminal proceedings are inherently unreliable because "the accused is denied counsel at a critical stage of his trial," *or* "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing...." 466 U.S. at 659.

To proceed under *Cronic*, in the absence of allegations of the complete absence of counsel, a plaintiff must establish the complete absence of adversarial testing. To make such a showing, *Cronic* indicates that circumstances must be such that "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60.

Because the Sixth Amendment right to counsel at trial is incorporated into the Due Process Clause of the Fourteenth Amendment, it is true that the duty of preserving the

right to counsel at trial in state criminal proceedings ultimately falls to the states. But Plaintiffs have not cited any authority establishing that a state's decision to delegate that duty to local governmental entities is a *per se* violation of the Sixth or Fourteenth Amendments. And Nevada's own right to counsel is coextensive with the Sixth Amendment. *McKague v. Whitley*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). So, the issue in this case is not whether Nevada's system of delegating the delivery of defense services to the Nevada's counties is unconstitutional on its face. What Plaintiffs must establish in this case is that Nevada's system for delivery of indigent services, in practice, has led to the existence of unconstitutional conditions in the Rural Counties *because* the counties are not providing adequate representation for indigent defendants.

Plaintiffs fail to carry their burden of establishing that this Court should grant their motion for class certification. As an initial matter, Plaintiffs lack standing to assert violations of the Sixth Amendment in counties not represented by a named plaintiff. Furthermore, material distinctions in circumstances from county to county will essentially require this Court to litigate a mini-trial on the current circumstances in each county. The need for such an individualized inquiry undercuts Plaintiffs' ability to satisfy the commonality and typicality requirements and defeats the purpose of the class-action mechanism. This Court should deny Plaintiffs' motion.

A. Plaintiffs Lack Standing to Assert Sixth Amendment Violations on Behalf of Defendants from Other Counties.

Before reaching the issue of whether Plaintiffs meet standards for class certification, this Court must address whether Plaintiffs have standing to maintain this action. They do not.

As is explained above, Plaintiffs do not challenge Nevada's decision to delegate the delivery of indigent services to the counties generally. Instead, they acknowledge that States may delegate an obligation to smaller government agencies but that the State retains the ultimate duty to ensure fulfillment of the underlying obligation. Memorandum in Support of Plaintiffs' Motion for Class Certification at 6. Thus, the question in this case

is not merely whether the State is failing to fulfill its constitutional obligation *because* it delegated delivery of indigent defense services to the counties; the issue in this case is whether the state is failing to fulfill its obligation *because* the Rural Counties are themselves failing to provide adequate representation to indigent defendants.

Plaintiffs lack standing to bring this lawsuit altogether due to the absence of an injury in-fact. Without allegations that the Rural Counties are actually failing to provide representation that meets Sixth Amendment standards, Plaintiffs cannot prevail. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (identifying Nevada's "long history of requiring an actual justiciable controversy as a predicate to judicial relief"). Absent allegations that the counties are actually failing to provide adequate representation, this Court would be left with nothing more to address than non-justiciable abstract propositions and political questions about whether there are better ways for Nevada to provide indigent defense services in the Rural Counties. *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. 682, 310 P.3d 583 (2013) (applying the political question doctrine); *NCAA v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) ("Of course, the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.").

This case presents this Court with the issue of whether circumstances in the Rural Counties are such that indigent defendants are not receiving constitutionally adequate representation. But the named plaintiffs hail from only two of ten Rural Counties. As a result, this Court should conclude that the Plaintiffs lack standing to challenge the delivery of indigent services in the eight counties where they have not alleged that they suffered any harm.

1. Under Nevada law, the Standing Inquiry Precedes the Question of Class Certification.

An inquiry into whether a party has standing to commence litigation and the class action inquiry are separate issues under Nevada law. *Beazer Homes Holding Corp. v. Dist.*

Ct., 128 Nev. 723, 291 P.3d 128 (2012) ("Failure to meet any additional procedural requirements, including NRCP's class action requirements cannot strip a common-interest community association of its standing to proceed on behalf of its members under NRS 116.3102(1)(d)."). The same is true in federal court; a party may not use the class action mechanism as a backdoor to get around their lack of standing. *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004).

However, in federal court, to what extent named plaintiffs must have standing with respect to the claims of unnamed members of the putative class and when courts are to conduct the standing inquiry in relation to the determination on class certification is unsettled and the subject of disagreement between the federal circuits. *See, e.g., Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62-66 (2d Cir. 2012). On two occasions, the United States Supreme Court has determined that the class action inquiry was "logically antecedent" to the standing inquiry, and the federal circuits are split on whether the those decisions established a general rule that requires the class inquiry to be conducted first in all cases or if the Court was establishing an exception to the general rule that courts should assess standing first. *Id.* at 63–65. And the Courts requiring an inquiry into standing prior to assessing class certification often dismiss claims for lack of standing where the plaintiff raises state-law claims arising out of states where no named plaintiff suffered any alleged harm. *In re Plasma-Derivative Protein Therapies Antitrust Litigation*, No. MDL 2109, 09 C 7666, 2012 WL 39766 (N.D. Ill. 2012); *Parks v. Dick's Sporting Goods, Inc.*, No. 05-CV-6590 (CJS), 2006 WL 1704477, at **3-6 (W.D.N.Y. 2006).

The Nevada Supreme Court's decision in *Beazer* suggests that Nevada would stand with the Courts holding that the standing inquiry comes before the question of class certification under Nevada law. In *Beazer*, a homeowners' association sued a developer for construction-defects on behalf of its members, and the district court allowed the matter to proceed while concluding that the court did not need to assess whether the homeowners' association could meet the requirements of NRCP 23. 128 Nev. at 727-28, 291 P.3d at 131–32. But the Nevada Supreme Court issued a writ of mandamus, which recognized that

the failure to satisfy NRCP 23 does not strip a homeowners' association of its statutory standing to litigate a representative action, but that the failure to satisfy NRCP 23 "may influence how the case proceeds." *Id.* at 731-32, 291 P.3d at 134. The Nevada Supreme Court's analysis establishes that NRCP 23 is merely a procedural mechanism that courts may use, when appropriate, to litigate claims that plaintiffs have standing to bring on behalf of the class as a whole. *Id.* at 732–735, 291 P.3d at 134–36. Thus, *Beazer* suggests that the standing inquiry must be satisfied before this Court can invoke NRCP 23's procedural framework for litigating class actions. And this Court should require Plaintiffs to establish that they have standing to address harms from each of the Rural Counties before proceeding to the issue of class certification.

2. Plaintiffs Lack Standing to Allege a Constitutional Violation Based on the Circumstances within a County Where They Have Not Suffered Any Harm.

This case is brought by four named plaintiffs on behalf of indigent inmates in the Rural Counties—ten Nevada counties that contract with various private defense attorneys to serve as court-appointed counsel when a defendant is indigent and unable to afford counsel. FAC at 1, 3 n.3. However, Plaintiffs allege that the named plaintiffs received, or are receiving, assistance from court-appointed counsel in only two of the ten Rural Counties. FAC at ¶¶28-99. There are no allegations in FAC that the named plaintiffs suffered, or will imminently suffer, actual harm in the remaining eight Rural Counties. Because this Court is not presented with allegations that a named plaintiff suffered, or will imminently suffer, actual harm in Douglas, Esmerelda, Eureka, Lander, Lincoln, Lyon, Mineral, and White Pine counties, this Court should conclude that Plaintiffs lack standing to allege violations of the state and federal constitutions in those counties.

The United States Supreme Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), is instructive on this point. In *Lewis*, inmates from Arizona's prison system brought a class action lawsuit challenging prison policies on access to law libraries based on their right to access the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). After a hearing, the federal district court "identified only two instances of actual injury," but then appointed a "Special

Master 'to investigate and report about' the appropriate relief—that is (in the court's view), 'how to best accomplish the goal of constitutionally adequate inmate access to the courts,'" before entering a 25-page injunction that "mandated sweeping changes designed to ensure that ADOC would 'provide meaningful access to the Courts for all present and future prisoners." *Lewis*, 518 U.S. at 347. While the Supreme Court acknowledged the federal district court could remedy the actual harms established in the case before it, the Court held that the district "court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid." *Id.* at 349.

The essence of the Supreme Court's analysis in *Lewis* was that *Bounds* did not create a right to access law libraries; *Bounds* establishes that inmates have a right to access the courts and that law libraries are one of many ways that states may protect an inmate's right to access the courts. *Id.* at 349-51. As a result, an allegation that a "prison's law library or legal assistance program is subpar in some theoretical sense" does not establish an actual injury. *Id.* at 351. The same concept is true here. The federal and state constitutions give indigent persons the right to appointed counsel. But neither the state constitution nor the federal constitution tell the State exactly what procedural protections it must put into place to preserve that right. As a result, allegations that Nevada's system of providing indigent defense services is subpar "in some theoretical sense" is insufficient to establish an actual injury; Plaintiffs must still establish that the actual system in place is causing their alleged injury.

With the FAC only naming plaintiffs from two of the ten Rural Counties, none of the named plaintiffs in this case present allegations establishing that they suffered, or will imminently suffer, an actual injury in the other eight counties. The injury alleged in this case is not merely that the State has delegated its duty to provide indigent defendants with counsel to the counties; it is that the Rural Counties are failing to provide constitutionally adequate representation. While the Plaintiffs in this case undoubtedly have standing to assert a violation of the right to counsel under the state and federal constitutions in the counties where they were appointed counsel, the proposed class representatives have not

identified an actual or imminent injury arising in the eight remaining rural counties. And because it is this Court's duty "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it," *NCAA*, 97 Nev. at 57, 624 P.2d at 10, Plaintiffs fail to establish that they have standing to challenge any purported violation of the state and federal constitutions in Douglas, Esmerelda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties. Accordingly, this Court need not determine whether Plaintiffs can meet the requirements of NRCP 23 with respect to the class identified in their motion.

B. Plaintiffs Fail to Satisfy Standards for Class Certification.

Even assuming this Court reaches the question of class certification, Plaintiffs fail to carry their burden of satisfying the requirements of NRCP 23. In particular, Plaintiffs must satisfy all four requirements of NRCP 23(a) and must satisfy one of the available prongs under NRCP 23(c). Plaintiffs fail to make this showing.

1. Plaintiffs Fail to Establish Commonality.

Plaintiffs seek certification of a class that would include indigent defendants from ten different counties in Nevada. To obtain class certification, Plaintiffs must show that there is a common question of law or fact with respect to the putative class members from each of the Rural Counties. NRCP 23(a)(2). But merely establishing that class members "suffered a violation of the same provision of law" is not enough to establish commonality. *Dukes*, 564 U.S. at 350. Rather, there must be something uniting the claims in a way that allows the court to determine the validity of each claim "in one stroke," and the determination of whether such a claim exists may require a court to look beyond the pleadings in a way that overlaps with an analysis of the merits of the underlying claims. *Id.* at 350–52.

For instance, in *Dukes*, the plaintiffs sought to challenge discriminatory employment practices. *Id.* at 342. However, the plaintiffs' claims challenged discretionary decisions made by thousands of different people. *Id.* at 345. And the Court determined that such

claims were not amendable to class resolution because "the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 355–56. This principle is instructive on the issue of class certification in this case.

The FAC names four plaintiffs, three of whom hail from a single county, while putting the delivery of indigent services in ten counties at issue. FAC at ¶¶28-99. Thus, the named plaintiffs in this action represent only two of the ten relevant counties. However, as the Sixth Amendment Center's report shows, the factual circumstances regarding the delivery of indigent services are materially different in each county. Ex. 14. As a result, even assuming Plaintiffs can prove a violation of the right to counsel in Nye County or Churchill County, it does not necessarily follow that the same violation is occurring in the other Rural Counties. That point undercuts Plaintiffs' ability to establish commonality. *Dukes*, 564 U.S. 355-56.

First, the Sixth Amendment Center's report summarizes the terms of the contracts the various counties have with attorneys and demonstrates that the terms of those contracts differ significantly from county to county. Ex. 14 at 66-104. And contrary to Plaintiffs' representations, the contracts are not all "explicit or *de facto* flat-fee contracts...." Memorandum in Support of Plaintiffs' Amended Motion for Class Certification at 10. For instance, Mineral County's contract provides for payment at an hourly rate in non-capital trials that exceed three working days, and allows the contracted attorneys to petition the court for additional compensation in capital cases. Ex. 14 at 66; *see also* Ex. 11 at 2–3. Lincoln and White Pine counties have contracts that require the contracted attorneys to reimburse the county if they do not put a certain number of hours or require the county to pay the contracted attorney at an hourly rate if the attorney exceeds the allotted number of hours in the contract. Ex. 14 at 90–92; *see also* Ex. 9 at 7–8; Ex. 13 at 8. Additionally, Churchill County's contact includes a provision that allows the court to grant the contracted attorney additional fees. Ex. 14 at 73; Ex. 5 at 4. Lyon County's contract provides for an hourly fee if a contracted attorney is appointed on more than one capital case in a contract year and allows the attorney to contact the county in the event of "an

unforeseen circumstance aris[ing] in a capital or extraordinary case." Ex. 14 at 76; *see also* Ex. 10 at 1–2. Those distinctions are material to Plaintiffs' claims that the terms of the contracts by themselves create conditions that result in the constructive denial of the right to counsel in each of the Rural Counties. That point alone undermines Plaintiffs' ability to establish commonality because the parties will need to litigate the actual effect of the terms of each contract on the availability of indigent defense services in each county.

More importantly, even if all the relevant contracts were identical, this Court will still need to consider other factors in determining whether circumstances in any individual county rise to the level of a systemic, constructive violation of the Sixth Amendment right to counsel at trial. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1128 (W.D. Wash. 2013) (noting that an assessment of counsel's workload, experience and proficiency is necessary to assess counsel's ability to give "the kind of individualized client representation that every indigent criminal defendant deserves"). For instance, the report acknowledges that Esmerelda County has a fixed-fee contract but only had three indigent defense appointments for the year in 2017. Ex. 14 at 84. Esmerelda County may be an outlier on the low number of appointments but it emphasizes the fact that other factors beyond the terms of the contracts will be relevant to deciding whether indigent defendants in each of the Rural Counties are receiving constitutionally adequate representation.

Relevant factors to consider include the number of attorneys contacted in a particular county, the level of experience of the contracted attorneys, evaluation of their caseloads based on type and complexity of the cases they are appointed to handle, and the availability of conflict counsel. *Wilbur*, 989 F. Supp. 2d at 1128. And Plaintiffs' own evidence establishes that those factors differ significantly from county to county in ways that are material to Plaintiffs' claims that the absence of standards governing caseloads and performance standards are actually creating conditions that are resulting in a constructive denial of the right to counsel in each of the Rural Counties.

And Plaintiffs' reliance on *Hurrell-Herring v. State*, 930 N.E.2d 217 (N.Y. 2010), and *Wilbur*, in the memorandum supporting their motion is unavailing. In *Hurrell-Herring*,

the complaint included *twenty* plaintiffs from only *five* counties, and the Court certified the class in light of allegations that at least half the class was allegedly deprived of counsel altogether in four of the five counties. 930 N.E.2d at 219, 222. In *Wilbur*, although that case only included three named plaintiffs, the complaint challenged the delivery of indigent defense services in *two* neighboring cities in northwest Washington State by the *same group of attorneys*. 989 F.3d at 1123–29.

In contrast, this case involves ten different counties that have materially different contractual agreements with different attorneys that have differing levels of experience and workloads, and the complaint only alleges actual or imminent injuries from two of the ten counties. Those facts are more analogous to what occurred in cases like *Dukes* and *Civil Rights Education and Enforcement Center v. Hospitality Properties Trust*, 317 F.R.D. 91 (N.D. Cal. 2015) (hereinafter *CREEC*).

In *Dukes*, the plaintiffs failed to show commonality because their allegations boiled down to a challenge of discriminatory intent in discretionary decisions made by managers at Wal-Mart, and proof that one exercise of discretion by a manager was invalid would say nothing about the validity of another manager's exercise of discretion. *Dukes*, 564 U.S. 355-56. That concept applies here. Evidence establishing that circumstances in Nye County or Churchill County are so dire as to have reached the point of a constitutional crisis does not prove that the conditions in the remaining Rural Counties are the same.

CREEC provides further guidance on this point. In *CREEC*, the named plaintiffs alleged that the owner of approximately 300 hotels throughout 38 states violated the ADA by not providing equivalent transportation services for guests in wheelchairs as they did for other guests at approximately 142 of their hotels. 317 F.R.D. at 95. However, the defendant in that case did not have a single company-wide policy for providing transportation services, nor did the law require them to have one. *Id.* at 100-03. As a result, although the court recognized that the evidence showed that many of the hotels in question were noncompliant with the ADA, the court concluded that plaintiffs failed to establish commonality because the distinct situations from the different hotels would have

required 142 trials to address whether and to what extent each of the 142 hotels violated the ADA. *Id.*

While the numbers in this case are not as dramatic as those in *CREEC*, that case emphasizes Plaintiffs' failure to establish commonality in this case. The Sixth and Fourteenth Amendments and the Nevada Constitution establish that indigent defendants have a right to court-appointed counsel. About that point, there is no doubt. But the constitutional provisions establishing that right do not tell Nevada what steps it must take to preserve that right. There is no requirement that Nevada have a uniform, statewide policy to govern the delivery of indigent defense services in each of the Rural Counties. And even if the circumstances in every Rural County are unconstitutional, Plaintiffs will still need to establish that point with independent proof of the circumstances from each county. As a result, to determine whether indigent defendants in the Rural Counties are receiving constitutionally adequate representation, the distinct circumstances from county to county will essentially require ten different mini-trials to determine whether the circumstances in each county rise to the level of a constitutional violation.

Just as in *CREEC* and *Dukes*, the issue presented in this case is not one that presents a common question of law or fact that can be resolved in a single stroke. Plaintiffs fail to satisfy the commonality requirement of NRCP 23(a)(2).

2. Plaintiffs Fail to Establish Typicality.

The commonality and typicality requirements have a tendency to merge with each other. *Id.* at 103. That point is true here, just as it was in *CREEC*. *Id.* Plaintiffs' failure to carry their burden on the issue of commonality bleeds into their ability to establish typicality. The material distinctions existing between each of the counties and the absence of named plaintiffs from each of the different counties undercuts Plaintiffs' ability to show that claims of the named plaintiffs from Nye and Churchill counties are typical of claims of the members of the putative class from the remaining Rural Counties. For instance, plaintiffs in Nye County and Churchill County may prevail on their allegations related to attorney workloads or lack of independence, while the problems in other counties—if any

actually exist—may be the result of the allegations asserting a lack of oversight on training and supervision. Plaintiffs' claims for relief require an individual analysis of the circumstances of each county. And that point undercuts Plaintiffs' ability to establish that the claims of the named plaintiffs are typical of the class as a whole.

3. Plaintiffs Fail to Satisfy NRCP 23(c)(2).

The final thing Plaintiffs must do to obtain class certification is satisfy one of the three prongs of NRCP 23(c). In their motion, Respondents claim that they can satisfy NRCP 23(c)(2) because they seek uniform injunctive relief. However, the unique circumstances in each county also undercut Plaintiffs' ability to meet this requirement.

Just as the Supreme Court noted in *Lewis*, courts can only remedy the harms actually established in the case before the courts. 518 U.S. at 360. Thus, while the courts in that case could enter an injunction to address the specific harms established in that case, the courts were without authority to grant an injunction that went beyond what was necessary to remedy those harms. *Id.* And when that point is considered alongside the aforementioned problems with commonality and typicality, even assuming Plaintiffs can establish system-wide injury, a system-wide injunction would be much more difficult to implement and oversee than Plaintiffs propose.

CREEC is also instructive on the point. There, the court concluded that the plaintiffs failed to satisfy the federal equivalent of NRCP 23(c)(2), because the court (1) could only grant injunctive relief with respect to hotels that are noncompliant with the ADA, and (2) would need to enter injunctions addressing the specific conditions at each hotel location. 317 F.R.D. at 105. The same is true here. Even assuming the named plaintiffs can establish that injunctive relief is warranted in Nye and Churchill counties, whether injunctive relief would be appropriate with respect to the delivery of indigent defense services in the remaining Rural Counties would remain in question, and the relief necessary to correct any proven constitutional violations would require an injunction addressing the varying conditions in each county where the right to counsel is being violated.

III. CONCLUSION

The right to counsel is a fundamental right and its preservation is vital to maintaining our system of ordered liberty. However, the decision of how a state should protect that right is not a question with state or federal constitutional origin. Considering that foundational point reduces the questions presented by this case to whether the circumstances in each of the individual Rural Counties rise to the level of the constitutional crisis alleged by the Plaintiffs. But with named plaintiffs that hail from only two of the ten Rural Counties, Plaintiffs lack standing to bring challenges to constitutional violations in the eight remaining counties, and they fail to carry their burden of establishing they meet the standards for class certification under NRCP 23 because the circumstances in each county are unique. This Court should deny Plaintiffs' motion.

DATED: April 22 2019.

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Attorney General

By: _____
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 22nd of April 2019, I served a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** by placing said document in the U.S. Mail, postage prepaid, addressed to:

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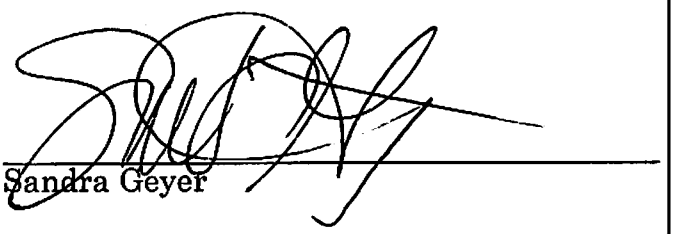

Sandra Geyer