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AMY M. ROSE (State Bar No. 12081)  
AMERICAN CIVIL LIBERTIES UNION OF NEVADA  
rose@aclunv.org  
601 S. Rancho Drive, Suite B11  
Las Vegas, NV 89106  
(702) 366-1536

FRANNY FORSMAN (State Bar No. 14)  
LAW OFFICE OF FRANNY FORSMAN, PLLC  
f.forsman@cox.net  
1509 Becke Circle  
Las Vegas, NV 89104  
(702) 501-8728

MARGARET L. CARTER (*pro hac vice application forthcoming*)  
O'MELVENY & MYERS LLP  
mcarter@omm.com  
400 South Hope Street, 18th Floor  
Los Angeles, CA 90071  
(213) 430-7592

KATHERINE A. BETCHER (*pro hac vice application forthcoming*)  
O'MELVENY & MYERS LLP  
kbetcher@omm.com  
Two Embarcadero Center, 28th Floor  
San Francisco, CA 94111  
(415) 984-8965

EMMA ANDERSSON (*pro hac vice application pending*)  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
eandersson@aclu.org  
125 Broad Street  
New York, NY 10004  
(212) 284-7365  
*Attorneys for Plaintiffs*

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

DIANE DAVIS, RYAN ADAM  
CUNNINGHAM, and JASON LEE ENOX,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs,

vs.

STATE OF NEVADA; BRIAN SANDOVAL,  
Governor, in his official capacity.

Defendants.

Case No. 170C00227 1B

Dept. No. X II

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**CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1 Plaintiffs Diane Davis, Ryan Adam Cunningham, and Jason Lee Enox, on behalf of  
2 themselves and all others similarly situated, by and through the undersigned counsel, upon  
3 knowledge with respect to their own acts and on information and belief as to other matters,  
4 hereby complain of Defendants and allege as follows:<sup>1</sup>

### 5 INTRODUCTION

6 1. The right to counsel is the lifeblood of the American criminal justice system. To  
7 ensure fair treatment under the law, the Sixth Amendment to the United States Constitution  
8 guarantees that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of  
9 Counsel for his defense.” U.S. Const. Amend. VI.<sup>2</sup> More than 50 years ago, the Supreme Court  
10 declared in *Gideon v. Wainwright* that the Sixth Amendment obligates states to provide counsel to  
11 criminal defendants unable to afford an attorney. 372 U.S. 335 (1963). Over the decades, the  
12 Supreme Court has expanded that obligation in significant ways, requiring the states to provide  
13 counsel to indigent defendants facing incarceration, including for misdemeanors, and extending  
14 protections to juveniles in delinquency proceedings. But the animating principle has remained  
15 the same: it is the state’s responsibility to ensure that “any person haled into court who is too poor  
16 to hire a lawyer” is provided with an adequate legal defense. *Gideon*, 372 U.S. at 344.

17 2. A state does not satisfy its obligation under *Gideon* simply by appointing someone  
18 with a law license to represent indigent defendants. The state must instead appoint attorneys  
19 under circumstances—financial, administrative, logistical, political—that permit those attorneys  
20 to do their jobs. The appointed lawyer must be in a position to provide *meaningful* assistance—  
21 otherwise the state effects “a denial of Sixth Amendment rights that makes the adversary process  
22 itself presumptively unreliable.” *United States v. Cronin*, 446 U.S. 648, 659 (1984); *Unger v.*  
23 *Sarafite*, 376 U.S. 575, 589 (1964) (the Sixth Amendment right to counsel would be “an empty  
24 formality” if appointed counsel were precluded from providing his or her client any meaningful  
25

26 \_\_\_\_\_  
27 <sup>1</sup> All “Ex. \_\_\_” citations refer to the supporting exhibits filed in conjunction with this complaint.

28 <sup>2</sup> The Sixth Amendment’s guarantees apply to the states through incorporation into the Fourteenth Amendment. U.S. Const. Amend. XIV.

1 representation). This foundational right attaches well before trial begins, because “certain pretrial  
2 events may so prejudice the outcome of the defendant’s prosecution that, as a practical matter, the  
3 defendant must be represented at those events in order to enjoy genuinely effective assistance at  
4 trial.” *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008).

5           3.       The State of Nevada is failing, on a systemic level, to meet its foundational  
6 obligations under *Gideon* to indigent defendants in its rural counties.<sup>3</sup> The State has a  
7 constitutional obligation to provide meaningful legal representation to criminal defendants  
8 anywhere in Nevada who cannot otherwise afford an attorney. The Governor is constitutionally  
9 vested with the executive power of the State and must ensure that the laws of Nevada are  
10 faithfully executed—including ensuring that Nevada is meeting its state and federal constitutional  
11 obligations to indigent defendants. Nev. Const. art. 5, §§ 1, 7.

12           4.       The principles of equal justice and due process rest on Nevada’s fulfillment of this  
13 duty. Yet the system of publicly-appointed defense attorneys in Nevada’s rural counties is  
14 plagued with serious structural deficiencies that have created a patchwork approach to indigent  
15 representation and rendered access to justice a function of geography. These are problems the  
16 State and the Governor (collectively “Defendants”) have long known about but failed to remedy.

17           5.       Having abdicated its constitutional responsibility to provide defense of the poor,  
18 Nevada has left its rural counties to their own devices. To fulfill the obligations ceded by the  
19 State, the rural counties—without sufficient resources, standards, or oversight—have turned to  
20 contract attorneys to provide indigent defense services. When a rural county uses a contract  
21 attorney for indigent defense services, the State does not cover any of the costs and does not  
22 oversee or supervise the county systems to ensure that the services meet constitutional standards.

23           6.       The State does nothing to ensure that the rural counties have the funding, policies,  
24 programs, guidelines, or other essential resources to equip their contract attorneys to provide  
25 constitutionally adequate legal representation. Without oversight from the State, rural county  
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27 <sup>3</sup> For the purposes of this complaint, “rural counties” means the following Nevada counties:  
28 Churchill, Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, Pershing, and White Pine.

1 indigent defense services are under-funded, poorly administered, and entrusted to overburdened  
2 contract attorneys who lack the time, staff, and incentives to meaningfully perform their jobs.

3 7. The host of structural problems afflicting Nevada's publicly appointed defense  
4 system include:

- 5 • Inadequate resources;
- 6 • Flat-fee and *de facto* flat-fee contracts that saddle appointed attorneys with  
7 burdensome workloads and disincentivize them from devoting sufficient time to  
8 investigating or litigating their cases;
- 9 • Unconscionable delays because of the unavailability of appointed defense counsel;
- 10 • No compensation for attorney travel time and costs;
- 11 • Contracts that require attorneys to obtain a court order to pay any investigators or  
12 expert witnesses;
- 13 • Contracts that include appellate work where the fees are already inadequate for  
14 trial level work;
- 15 • Non-lawyer government officials selecting which attorneys receive the contracts;
- 16 • Lack of appropriate qualifications, supervision, evaluation, training and continuing  
17 legal education for appointed defense counsel;
- 18 • Lack of independence.

19 8. These structural problems infect the representation that indigent rural county  
20 defendants receive at every stage of their cases. Too often, understaffed, inexperienced, or poorly  
21 trained attorneys fail to: be present to advocate for their clients at initial appearances or  
22 arraignments, contest bail amounts or advocate for personal recognizance pretrial release, conduct  
23 timely investigations and hire needed experts, reliably communicate with their clients in private  
24 settings, make themselves available to their clients for extended periods of time, file necessary  
25 pretrial motions, obtain adequate discovery, explain plea deals and shield their clients from  
26 pressure to accept them, take cases to trial and hold the prosecution to its burden of proof, and  
27 effectively advocate during sentencing proceedings. Despite the State's obligation to provide  
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1 meaningful representation to indigent defendants, the State has done little or nothing to address  
2 these well-documented problems.

3 9. Plaintiff Jason Lee Enox is one of many indigent defendants in Nevada's rural  
4 counties who has not received the meaningful representation guaranteed to him under the United  
5 States Constitution and the Nevada Constitution pursuant to *Gideon* and its progeny. For the past  
6 19 months, he has been sitting in jail awaiting trial, hoping that he will not be condemned to live  
7 out his days behind bars.

8 10. Mr. Enox cannot afford an attorney. He is therefore constitutionally entitled to  
9 have the court appoint an attorney to represent him.

10 11. Mr. Enox has had two appointed attorneys since his arrest in 2016. Each one has  
11 failed to perform even the most basic tasks that anyone—especially someone facing a life  
12 sentence—would reasonably expect a lawyer to do to meaningfully defend a client. Mr. Enox's  
13 first appointed attorney did so little on his case that the judge openly chastised him for his lack of  
14 attention. Mr. Enox has reason to believe that his attorney lied to him about collecting evidence  
15 for the case and withdrew from the case when Mr. Enox raised his concerns with the judge.

16 12. Despite numerous attempts, Mr. Enox went months without being able to reach his  
17 current appointed attorney. Mr. Enox's appointed attorney does not return Mr. Enox's phone  
18 calls, and he refused to talk to Mr. Enox's family members even after they followed him outside  
19 the courthouse at a recent hearing. Mr. Enox has not been kept informed of developments in his  
20 case. Mr. Enox thought that an evidentiary hearing was going to happen on May 31, 2017, but it  
21 never happened. Mr. Enox was not informed of the reason for its continuance. Mr. Enox  
22 believes that no investigators or experts have been retained to work on his case, that neither of his  
23 appointed attorneys meaningfully tried to obtain bail for him, and that neither provided him with  
24 complete discovery. During his time in jail, Mr. Enox has lost his jobs painting houses and doing  
25 mechanic work, and has had to sell all of his belongings. His father died in early 2017 and Mr.  
26 Enox was unable to attend the funeral.

1           13.     Facing the prospect of going to trial with a lawyer who had not collected evidence,  
2 had not spoken to witnesses, and had not hired an investigator, Mr. Enox felt extreme pressure to  
3 avoid a catastrophic verdict, and on October 3, 2017, just three weeks before his trial was  
4 scheduled to start, he accepted a plea agreement pursuant to *North Carolina v. Alford*, 400 U.S.  
5 25 (1970). He now faces a maximum sentence of 11 to 27 years.

6           14.     Mr. Enox’s case is not an anomaly; it is emblematic of the devastating outcomes  
7 and the impossible choices indigent criminal defendants in Nevada’s rural counties have to make  
8 when their freedom hinges on the State’s inadequate system of legal representation. Under the  
9 State’s current structure, the adversarial system cannot function properly, and it cannot be relied  
10 on to reach just outcomes.

11           15.     The State’s system has created a crisis in Nevada that departs sharply from  
12 Nevada’s legacy as an early protector of indigent defendants. In 1877, the Nevada Supreme  
13 Court reached the trailblazing conclusion that “a failure to assign professional counsel for a poor  
14 defendant would be deemed a fatal error on appeal.” *In re Wixom*, 12 Nev. 219, 224 (1877). Not  
15 until 1963 did the U.S. Supreme Court catch up to Nevada and affirm that the United States  
16 Constitution requires every state to provide legal representation to criminal defendants unable to  
17 afford an attorney. *Gideon*, 372 U.S. at 335.

18           16.     Mr. Enox’s experience with appointed attorneys, however, is far closer to the rule  
19 than the exception in Nevada’s rural counties these days. A 2007 report by the Nevada Supreme  
20 Court’s Indigent Defense Commission revealed the systemic failures of Nevada’s rural indigent  
21 defense system. It warned the State and the Governor that “Nevada’s least populous counties  
22 struggle to provide constitutionally mandated indigent defense services.”<sup>4</sup>

23           17.     In the years since, the Indigent Defense Commission and the Sixth Amendment  
24 Center<sup>5</sup> have repeatedly studied—and re-diagnosed—the same problems with public defense in

25 \_\_\_\_\_  
26 <sup>4</sup> Ex. 1, Final Report and Recommendations of Supreme Court Indigent Defense Commission,  
27 Ex. B: Report of The Nevada Supreme Court’s Indigent Defense Commission 7, ADKT No. 411  
(Nov. 20, 2007) (Doc. No. 07-28444).

28 <sup>5</sup> The Sixth Amendment Center is a nonprofit organization founded in 2013 to help state and local  
governments to meet their obligations to provide public indigent defense services, including by

1 rural counties. Yet the State and the Governor have repeatedly failed to fix the system. Bills  
2 have been introduced in the Nevada Legislature that would have provided a pathway toward  
3 fulfillment of the State's constitutional duty to indigent defendants. But Nevada has failed to pass  
4 these bills or take any action sufficient to remedy the systemic failures.

5 18. Meanwhile, people accused of crimes in Nevada's rural counties who cannot  
6 afford a lawyer continue to be herded through the criminal justice system without the basic  
7 constitutional protection of meaningful representation.

8 19. Plaintiffs Diane Davis, Ryan Adam Cunningham, and Jason Lee Enox, bring this  
9 class action on behalf of themselves and all those similarly situated to remedy the State of  
10 Nevada's and the Governor's longstanding, and repeatedly documented, failure to provide  
11 constitutionally adequate legal representation to indigent men and women accused of crimes in  
12 Nevada's rural counties. They seek declaratory and injunctive relief from the ongoing injuries  
13 and harm caused by Defendants' refusal to discharge their obligations. Plaintiffs and Class  
14 Members are facing actual and constructive denial of their right to counsel at critical stages of  
15 their cases.

16 20. Plaintiffs' experiences illustrate the rampant problems with Nevada's rural  
17 indigent defense system. Each of the named Plaintiffs is indigent and is facing criminal charges  
18 that could lead to their imprisonment for years, if not decades. Each has had an attorney  
19 appointed to represent them in court, but the representation they are receiving fails to meet  
20 minimum constitutional standards. The named Plaintiffs have had insufficient time to meet  
21 confidentially with their contract-appointed attorneys, and often they meet with their attorneys  
22 only moments before a court proceeding. None of the Plaintiffs' appointed attorneys have spoken  
23 with their clients in a meaningful way about their defenses or the strength of the case against  
24 them. None of the named Plaintiffs have had a meaningful opportunity to review their complete  
25 discovery with their attorneys, or to identify favorable witnesses and evidence. Two of the  
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27 "measuring public defense systems against Sixth Amendment case law and established standards  
28 of justice." *BAC & Our Work*, SIXTHAMENDMENT.ORG, <http://sixthamendment.org/about-us/> (last visited Oct. 30, 2017).

1 Plaintiffs have had attorneys who have been so ill-prepared that the Plaintiffs were forced to make  
2 their own arguments in court proceedings. All of the named Plaintiffs have been pressured by  
3 their attorneys to accept plea bargains without their attorneys having taken the time to properly  
4 evaluate the merits of the case against them.

5 21. Plaintiffs do not use this Complaint to take issue with their individual lawyers'  
6 competence, but rather with the State's systemic failure to meet its foundational, well-established  
7 obligation under *Gideon* to provide constitutionally meaningful legal representation to criminal  
8 defendants, like themselves, who cannot afford it.

9 22. The State of Nevada and the Governor have been warned time and time again that  
10 their failure to act is turning the right to counsel into an empty promise for indigent rural  
11 defendants. But Defendants have ignored these warnings. They are failing to provide meaningful  
12 representation, and they are failing to ensure that the rural counties do so. Plaintiffs and Class  
13 Members have borne the brunt of this failure for too long and now seek a meaningful and lasting  
14 remedy.

#### 15 JURISDICTION AND VENUE

16 23. This Court has subject matter jurisdiction over this action for injunctive and  
17 declaratory relief pursuant to Nev. Const. art. 6, § 6; Nev. Rev. Stat. §§ 33.010, 34.330.

18 24. Venue is proper in this Court pursuant to Nev. Rev. Stat. § 13.010 because the  
19 State of Nevada and the Governor are named as Defendants in this action, and Carson City  
20 encompasses the capital city of Nevada and the Governor's office. Additionally, the decisions  
21 that have caused the failures of Nevada's indigent defense system were made in Carson City.

#### 22 PARTIES

##### 23 **A. Plaintiffs**

##### 24 *Diane Davis*

25 25. Plaintiff Diane Davis is, and at all times pertinent has been, a resident of Pahrump,  
26 Nevada. Ms. Davis was arrested on or about July 12, 2013, in Nye County. Ms. Davis receives  
27 disability benefits because she is disabled and cannot work. She suffers from fibromyalgia,  
28



1 chronic obstructive pulmonary disease, and curvature of the spine. Ms. Davis lives with her sister  
2 who is also disabled and mostly homebound. Despite their health challenges, Ms. Davis and her  
3 sister do their best to take care of each other and their dogs.

4 26. Ms. Davis is currently charged with one count of arson and 13 counts of animal  
5 cruelty and faces up to 67 years in prison. Ms. Davis was previously charged and tried in a  
6 separate criminal prosecution for identity theft. That conviction is on appeal.

7 27. Nye County relies on contract-appointed attorneys, who are paid an annual fee to  
8 represent indigent criminal defendants being prosecuted within its jurisdiction.

9 28. Ms. Davis was arraigned on her arson and animal cruelty charges in 2013.  
10 Ms. Davis has since been represented by four different appointed attorneys.

11 29. After being arraigned on her arson and animal cruelty charges, Ms. Davis was  
12 released on personal recognizance. While her arson and animal cruelty case was pending, she  
13 was arrested and charged with identity theft, for which she was arraigned in October 2013.

14 30. Initially, a philanthropic women's group agreed to fund a private attorney for  
15 Ms. Davis, but after Ms. Davis was charged with additional crimes, the women's group used the  
16 remainder of the available funds to post a \$65,000 bond for Ms. Davis.

17 31. At some point after her arraignment for identity theft, Ms. Davis was no longer  
18 able to pay her attorney, and the same attorney that she had retained was then appointed by the  
19 court to represent her in both her arson and identity theft cases.

20 32. After the public defense system began to compensate Ms. Davis's attorney, the  
21 quality of Ms. Davis's representation sharply declined. Before he was court-appointed and  
22 compensated by the public system, Ms. Davis's attorney discussed with her how they would fight  
23 the charges against her. After being appointed, Ms. Davis's attorney began to pressure her to take  
24 a plea deal, which she refused to do. Ms. Davis had to resist pressure from her first attorney to  
25 take a plea deal on at least six separate occasions.

26 33. At a November 2, 2015 status hearing for her arson case, Ms. Davis's appointed  
27 attorney informed the court that Ms. Davis was rejecting the State's plea deal and requested that  
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1 the court continue the trial. The court then set the trial to begin on March 8, 2016. A calendar  
2 call was set for February 8, 2016, when the court would require the attorneys to appear to ensure  
3 that there were no scheduling conflicts with the March 8, 2016 trial date.

4 34. Shortly before the February 8, 2016 calendar call for her arson case, Ms. Davis  
5 spoke with her attorney and his partner by phone. They continued to pressure her to take a plea  
6 deal.

7 35. At the calendar call for her arson case, the partner of Ms. Davis's appointed  
8 attorney declared that they were not ready for trial and requested a continuance until July 2016  
9 because they were still searching for a fire investigator—nearly three years after Ms. Davis's  
10 arraignment.

11 36. The court granted the continuance as to the arson case.

12 37. Ms. Davis went to trial on or about March 8, 2016, in her identity theft case.  
13 Ms. Davis was convicted. Ms. Davis was sentenced in December 2016 to five years' probation.  
14 Ms. Davis has appealed, based on claims of ineffective assistance of counsel.

15 38. Around May 2016, after her trial for identity theft, Ms. Davis wrote a letter to the  
16 court, describing her first appointed attorney's lack of communication and preparation.  
17 Ms. Davis's first appointed attorney moved to withdraw as her counsel at a hearing on August 1,  
18 2016, noting that Ms. Davis had raised claims of ineffective assistance of counsel. The court  
19 granted Ms. Davis's first attorney's motion and appointed Ms. Davis a second attorney, both to  
20 represent Ms. Davis in the appeal of her conviction and sentence after trial on the identity theft  
21 charges, and also during the arson trial.

22 39. Before her contract expiration, Ms. Davis's second appointed attorney made a  
23 motion to authorize retention of an investigator. The motion was granted in March 2017,  
24 authorizing payment of up to \$2,500 for the investigator.

25 40. But on January 25, 2017, Ms. Davis's second appointed attorney notified the court  
26 that her contract as an appointed attorney with the county would soon expire. As a result, the  
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1 court appointed Ms. Davis a third attorney to represent her in the arson case and vacated the  
2 March 2017 trial date.

3 41. After Ms. Davis's third appointed attorney was unable to retain Ms. Davis's case  
4 due to his caseload, the court appointed a fourth attorney to represent Ms. Davis.

5 42. This fourth appointed attorney represented Ms. Davis for a month and a half  
6 before he realized that he had a conflict of interest because he also represented a key witness  
7 against Ms. Davis. This attorney never contacted Ms. Davis at any point during his  
8 representation of her.

9 43. On or about April 6, 2017, Ms. Davis's third appointed attorney was then re-  
10 appointed. This third appointed attorney currently represents Ms. Davis.

11 44. Ms. Davis was not informed of the hearing at which this re-appointment took place  
12 and was not present.

13 45. When Ms. Davis went to the courthouse on an unrelated matter several weeks after  
14 her third attorney was re-appointed, she was informed that her case file was still being held for  
15 him, and that he had not yet picked it up. Because her current attorney did not pick up her case  
16 file during this time period, he could not have reviewed any of its contents. Unsurprisingly, at the  
17 next court hearing, on April 24, 2017, Ms. Davis's attorney requested a two-week continuance,  
18 further delaying resolution of her long-pending case.

19 46. At the next status hearing, on May 8, 2017, Ms. Davis complained to the court  
20 about her current attorney's refusal to meet with a witness she identified and his unwillingness to  
21 adequately prepare for her trial.<sup>6</sup> At the hearing, Ms. Davis's current attorney explained that his  
22 caseload prevented him from focusing on Ms. Davis's case until her trial was imminent, stating:  
23 "As a public defender with a large caseload, I have to prioritize. Her case is important to me, yes,  
24 but so are all of my other clients' cases."<sup>7</sup>

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27 <sup>6</sup> Ex. 2, Transcript of Proceedings, Status Hearing/Trial Setting, Fifth Judicial Court of the State  
of Nevada, State v. Davis, No. CR-7883, May 8, 2017.

28 <sup>7</sup> *Id.*

1           47.     At the May 8, 2017, hearing, Ms. Davis asked to have a new attorney assigned to  
2 her trial. Her request was denied.

3           48.     Ms. Davis has met with her third attorney a total of only three times. She met with  
4 him twice in the public courtroom. Both of those meetings lasted for fewer than 15 minutes. She  
5 met with him for the third time in late April 2017 in his office. At this meeting, he immediately  
6 pressured her to take a plea deal. When Ms. Davis refused, he became irate and stormed out of  
7 the room. This was the second time that Ms. Davis has had to refuse pressure to take a plea deal  
8 from her current attorneys.

9           49.     Ms. Davis's arson and related charges have been pending for over four years.  
10 During this time, on information and belief, no investigators or experts have done any work on  
11 her case. Ms. Davis's first attorney waited over two years after she was arraigned to request an  
12 expert. On December 30, 2015, just three months before Ms. Davis's arson case was originally  
13 set to go to trial, Ms. Davis's first attorney made an *ex parte* request to the presiding judge for  
14 approval of \$23,750.00 to retain an arson expert. In support of the motion, Ms. Davis's attorney  
15 submitted an itemized budget that the proposed arson expert had prepared. Although the court  
16 approved the request for an expert on January 6, 2016, the fee amount the court approved was  
17 significantly reduced to just \$5,000. Upon information and belief, Ms. Davis's attorneys have  
18 been unable to find an expert willing to perform the necessary services for this sum.

19           50.     Upon information and belief, there is a causation issue in Ms. Davis's arson case  
20 involving ephemeral evidence that an expert needed to evaluate before the evidence disappeared  
21 or was destroyed. But because of Ms. Davis's first attorney's extreme delay in requesting an  
22 expert and the court's approval of a lower-than-requested amount that effectively denied Ms.  
23 Davis the use of an expert, in the intervening time, the property that was allegedly burned has  
24 been destroyed. Ms. Davis is now facing a maximum sentencing exposure of 67 years in prison  
25 without the benefit of an expert or an investigator to prepare her defense.  
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1                    ***Ryan Adam Cunningham***

2                    51. Plaintiff Ryan Adam Cunningham is, and at all times pertinent has been, a resident  
3 of Dayton, Nevada. He is a father of three children and has been a tile-setter for 25 years.  
4 Mr. Cunningham was taken into custody on April 14, 2017, in Lyon County and was charged  
5 with two counts of assault with a deadly weapon and gross misdemeanor child abuse and neglect.  
6 He faces over 12 years in prison.

7                    52. Lyon County relies on contract-appointed attorneys, who are paid an annual fee to  
8 represent indigent criminal defendants being prosecuted within its jurisdiction.

9                    53. Mr. Cunningham appeared for a video arraignment in Dayton County Justice  
10 Court on April 19, 2017. Mr. Cunningham had no counsel at this arraignment, although at this  
11 appearance, the court ordered an attorney to be appointed to represent him thereafter. The court  
12 set bail at \$72,500. Mr. Cunningham could not pay this amount to secure his release.

13                    54. On or around April 20, 2017, Mr. Cunningham met with his appointed attorney for  
14 the first time in a holding cell. The meeting lasted no more than two minutes. At this meeting,  
15 Mr. Cunningham gave his attorney a letter that explained the facts of his case and identified  
16 potential leads to investigate.

17                    55. At Mr. Cunningham's preliminary hearing in Justice Court on May 24, 2017, a  
18 colleague of Mr. Cunningham's appointed attorney represented him. This colleague met with  
19 Mr. Cunningham before the hearing for a few minutes to introduce himself as an associate of  
20 Mr. Cunningham's appointed attorney. At this hearing, the court reduced Mr. Cunningham's bail  
21 to \$52,500, which he still could not afford to pay.

22                    56. At his arraignment hearing in the Third Judicial District Court in Yerington on  
23 June 5, 2017, Mr. Cunningham's appointed attorney appeared on his behalf. Mr. Cunningham's  
24 appointed attorney did not know what happened during the May 24, 2017 preliminary hearing and  
25 had limited knowledge of the facts of the case.

26                    57. At this District Court arraignment, Mr. Cunningham told his attorney that he  
27 would like to be released on personal recognizance so that he could take care of his father who  
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1 had suffered a heart attack two weeks earlier. Mr. Cunningham's attorney then requested a bail  
2 reduction, but did not offer any argument or justification for this request, and did not alert the  
3 court to Mr. Cunningham's family issues. Bail was slightly reduced to \$50,000, but  
4 Mr. Cunningham still could not afford to secure his release.

5           58. At this arraignment, Mr. Cunningham also unknowingly waived his right to a  
6 speedy trial. When the court asked Mr. Cunningham whether he wanted to waive this right, he  
7 turned to his attorney, who provided just a seconds-long explanation to Mr. Cunningham in open  
8 court. Mr. Cunningham told his attorney that he did not fully understand what he was being  
9 asked, but ultimately agreed to waive his right because he felt pressured to do so.  
10 Mr. Cunningham has written letters to his appointed attorney, to the court, and to the district  
11 attorney in an effort to withdraw his waiver of his right to a speedy trial, but his letters have gone  
12 unanswered.

13           59. Mr. Cunningham has repeatedly gone months without being able to contact his  
14 attorney. Mr. Cunningham and his family members have attempted to contact his appointed  
15 attorney several times. Mr. Cunningham is unable to call his attorney because his appointed  
16 attorney's office does not accept collect calls, which is the only way for him to make telephone  
17 calls from Lyon County Jail. Mr. Cunningham's mother has left unreturned voicemails for her  
18 son's attorney.

19           60. Mr. Cunningham wrote a letter to his attorney and had another inmate represented  
20 by the same attorney deliver the letter. This inmate delivered the letter, but Mr. Cunningham's  
21 attorney did not recognize Mr. Cunningham's name, and asked if the inmate who wrote the letter  
22 was from another county. Mr. Cunningham's letter has gone unanswered. Mr. Cunningham  
23 wants to withdraw his previous waiver of his right to a speedy trial but has been unable to  
24 communicate this to his attorney.

25           61. At Mr. Cunningham's last status hearing on September 18, 2017, an associate of  
26 his appointed attorney appeared on his behalf. Mr. Cunningham met this attorney for the first  
27 time at the court appearance. This attorney told Mr. Cunningham that Mr. Cunningham's  
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1 appointed attorney had passed Mr. Cunningham's case off to the associate. On information and  
2 belief, the associate attorney has not been appointed by the court to represent Mr. Cunningham  
3 and is not himself a contract defender for Lyon County.

4 62. Since Mr. Cunningham's last hearing in September 2017, he has been unable to  
5 reach his appointed attorney, despite leaving multiple messages.

6 63. Mr. Cunningham's trial is scheduled to begin January 2, 2018, at which time he  
7 will have been incarcerated for roughly nine months.

8 64. Mr. Cunningham's continued incarceration has created extreme hardships for him  
9 and his family. Since his arrest, he has lost a residential property that he rented. He has also lost  
10 all of his personal belongings stored at that property including his tile-setting tools, which have  
11 been his livelihood for 25 years. His girlfriend of 12 years has left him and obtained custody of  
12 their nine-year-old daughter. His 22-year-old daughter attempted suicide, and his father suffered  
13 a heart attack and was diagnosed with cancer. This separation from his family has caused him  
14 depression and anxiety and he is currently being treated with prescription anti-depressants.  
15 Despite these familial hardships and Mr. Cunningham's deep ties to the community, his attorney  
16 never argued for personal recognizance release.

17 *Jason Lee Enox*

18 65. Plaintiff Jason Lee Enox is, and at all times pertinent has been, a resident of  
19 Fallon, Nevada. Mr. Enox earns a living painting houses and performing mechanic work.

20 66. He is currently incarcerated in the Lyon County Jail after being transferred from  
21 Churchill County. Mr. Enox is charged with trafficking, possession and other drug-related  
22 charges, failure to stop, and possession of a billy club and stun gun. He is also charged with  
23 being a habitual criminal. These charges exposed Mr. Enox to a life sentence.

24 67. Churchill County relies on contract-appointed attorneys, who are paid an annual  
25 fee to represent indigent criminal defendants being prosecuted within its jurisdiction.

1           68.     Mr. Enox's first appointed attorney did not have a sit-down meeting with him until  
2 approximately one month after his arraignment. This attorney consistently showed up unprepared  
3 for subsequent meetings with Mr. Enox, failing to even bring Mr. Enox's file.

4           69.     Mr. Enox's first appointed attorney did so little on his case that the judge openly  
5 chastised the attorney in December 2016 and ordered the attorney to be in town every two weeks  
6 to work on the case. At that same hearing, Mr. Enox also raised concerns that his attorney was  
7 not being truthful with him about collecting evidence.

8           70.     During a January 2017 hearing, Mr. Enox told the court that his attorney had again  
9 misled him about collecting evidence. His attorney then told the court that he had a conflict of  
10 interest and that he would no longer represent Mr. Enox. The court then appointed a second  
11 attorney, who is currently representing Mr. Enox.

12           71.     Mr. Enox has gone months at a time without being able to reach his second  
13 appointed attorney. Mr. Enox has met privately with this attorney only a handful of times for  
14 approximately ten to fifteen minutes each time, with one meeting lasting 30 minutes.

15           72.     Mr. Enox thought that an evidentiary hearing was going to happen on May 31,  
16 2017, but the hearing never happened, and Mr. Enox does not know why and he was not informed  
17 of its continuance.

18           73.     Neither of his appointed attorneys has meaningfully tried to get Mr. Enox released  
19 on bail pending his trial and neither has provided him with complete discovery. When Mr. Enox  
20 was able to briefly look at his discovery in May 2016, it did not include important pieces of  
21 evidence that Mr. Enox believes are favorable to him.

22           74.     In the 19 months he has been in jail, Mr. Enox has lost his job and has had to sell  
23 all of his belongings. His house was demolished because he was not able to fight against an  
24 ongoing property dispute while he was in custody. In early 2017, Mr. Enox's father passed away,  
25 and Mr. Enox was unable to attend the funeral.

26           75.     Mr. Enox believes that no investigators or experts have been retained to work on  
27 his case. At a status hearing on September 26, 2017, just over a month before Mr. Enox's case  
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1 was supposed to go to trial on October 30, 2017, Mr. Enox argued with his appointed attorney in  
2 open court and was finally able to get his attorney to request funding for an investigator.

3 Mr. Enox's attorney indicated on the record during the September 26, 2017 hearing that he did  
4 not think an investigator was necessary, but the court nevertheless authorized \$1,500 for an  
5 investigator to work on Mr. Enox's case. On information and belief, Mr. Enox's appointed  
6 attorney still did not hire an investigator.

7 76. Following the September 26, 2017 hearing and with a trial date looming, Mr. Enox  
8 was increasingly concerned about his appointed attorney's failure to collect any evidence, talk to  
9 any witnesses, or hire an investigator.

10 77. Mr. Enox felt that his attorney was not prepared to take his case to trial and  
11 communicated to a family friend that he might be willing to take a plea deal. Mr. Enox's family  
12 friend then told Mr. Enox's appointed attorney that Mr. Enox was considering a plea deal. Mr.  
13 Enox had repeatedly tried calling his appointed attorney himself, but Mr. Enox's attorney did not  
14 answer any of Mr. Enox's calls.

15 78. Just seven days after the September 26, 2017 status hearing, with a trial set to start  
16 only a few weeks later, Mr. Enox entered into an *Alford* plea agreement on October 3, 2017.  
17 Mr. Enox felt extreme pressure to take the plea agreement, and did so because he felt he could not  
18 go to trial with an attorney who was not prepared.

19 79. In connection with the *Alford* plea agreement, Mr. Enox met with his appointed  
20 attorney for 30 minutes, the longest meeting Mr. Enox ever had with his appointed attorney over  
21 the course of the representation.

22 80. Mr. Enox is scheduled to be sentenced on December 12, 2017. Under the terms of  
23 his plea agreement, Mr. Enox faces a maximum sentencing exposure of 11 to 27 years.

24 **B. Defendants**

25 81. Defendant State of Nevada has violated and continues to violate the Nevada and  
26 United States constitutions, which require the State to provide meaningful indigent defense  
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1 services to Nevada's poorest citizens. The State Capital and center of State government is in  
2 Carson City.

3 82. Defendant Brian Sandoval, in his official capacity as the Governor of Nevada, has  
4 violated and continues to violate the Nevada and United States Constitutions, which require the  
5 State of Nevada to provide meaningful indigent defense services to Nevada's poorest citizens.  
6 Governor Sandoval, in his official capacity as the State's chief executive, must ensure that the  
7 laws of Nevada are faithfully executed.

8 **CLASS ACTION ALLEGATIONS**

9 83. Plaintiffs incorporate by reference all previous and following allegations of this  
10 Complaint as if fully laid out here.

11 84. Plaintiffs Davis, Cunningham, and Enox bring this action pursuant to Nevada Rule  
12 of Civil Procedure 23 on behalf of themselves and all others similarly situated. The Class  
13 represented by the named Plaintiffs consists of all persons who are now or who will be under  
14 formal charge before a state court in a rural Nevada county of having committed any offense, the  
15 penalty for which includes the possibility of confinement, incarceration, imprisonment, or  
16 detention in a correctional facility (regardless of whether actually imposed), and who are indigent  
17 and thus constitutionally entitled to the appointment of counsel.

18 85. As indigent persons unable to afford to hire counsel to defend them, Class  
19 Members depend on the State of Nevada and the Governor to provide them with meaningful  
20 counsel and other associated services necessary for their defense. Each day, hundreds of these  
21 Class Members are criminally prosecuted in the State of Nevada.

22 86. Class Members are being harmed by the State of Nevada's and the Governor's  
23 abdication of their responsibility to ensure that poor defendants in rural counties receive  
24 constitutionally sufficient legal representation that satisfies the guarantees of the Sixth and  
25 Fourteenth Amendments to the United States Constitution and Article I, Section 8, of the Nevada  
26 Constitution.

1  
2 87. Certification of this action as a class action is appropriate under Nevada Rule of  
3 Civil Procedure 23 for the following reasons:

- 4 a. The Class is so numerous and fluid so as to make joinder of all members of  
5 the Class impracticable. At any point, hundreds of indigent persons in  
6 Nevada's rural counties with pending criminal charges punishable by  
7 imprisonment must rely on appointed defense counsel for legal  
8 representation;
- 9 b. The case involves common questions of law, fact, and relief that are  
10 capable of class-wide resolution. Separate prosecution of these actions by  
11 individual Class Members would create a risk of differing and inconsistent  
12 adjudications with respect to individual members of the Class, which could  
13 establish inconsistent standards of conduct, exacerbating the different and  
14 inadequate public defense programs currently in place in various counties  
15 in the state. Such a risk is of particular concern in this case since the lack  
16 of uniform performance standards is central to Plaintiffs' allegations;
- 17 c. The claims of the named Plaintiffs are typical of the claims of the Class as  
18 a whole. The claims of the named Plaintiffs arise from the same acts  
19 and/or omissions of Defendants, as do the claims of the Class. And like all  
20 Class Members, the named Plaintiffs are being actually and constructively  
21 denied their right to meaningful representation, in violation of the Sixth  
22 Amendment to the U.S. Constitution and Article 1, Section 8 of the Nevada  
23 Constitution. Defendants' ongoing abdication of their duty to guarantee  
24 the right to counsel is the cause of Plaintiffs' and Class Members' injuries;
- 25 d. The individuals identified as named Plaintiffs will fairly and adequately  
26 protect the interest of the Class and will vigorously prosecute the suit on  
27 behalf of the Class. Plaintiffs and their legal counsel know of no conflicts  
28 of interest between the named Plaintiffs as representatives and Class

1 Members concerning the relief sought in the complaint. The named  
2 Plaintiffs are jointly represented by the American Civil Liberties Union  
3 Foundation, the American Civil Liberties Union of Nevada (collectively,  
4 “ACLU”), Law Office of Franny Forsman PLLC, and the law firm of  
5 O’Melveny & Myers LLP. The ACLU has extensive experience in  
6 successfully representing individuals and classes in similar actions. The  
7 attorneys for the named Plaintiffs are capable and experienced litigators,  
8 are attorneys of good reputation, and have experience successfully  
9 representing parties in courts in complex litigation. Plaintiffs’ attorneys  
10 have identified and thoroughly investigated all claims in this action, and  
11 have committed sufficient resources to represent the Class; and

- 12 e. The State of Nevada and the Governor have failed to ensure that Class  
13 Members’ state and federal constitutional rights to counsel and due process  
14 are protected and effectuated. As a result, the State of Nevada and the  
15 Governor have acted and refused to act on grounds generally applicable to  
16 the Class, making injunctive and declaratory relief with respect to the  
17 entire Class appropriate.

18 88. Questions of fact and law common to the Class include, but are not limited to:

- 19 a. Whether Defendants are required under both the United States and the  
20 Nevada Constitutions to provide meaningful representation to indigent  
21 persons charged with crimes in Nevada’s rural counties;  
22 b. Whether Defendants have systemically denied Plaintiffs and Class  
23 Members meaningful representation at critical stages of their case;  
24 c. Whether Defendants have created circumstances such that even where  
25 counsel is nominally available, “the likelihood that any lawyer, even a fully  
26 competent one, could provide effective assistance is small,” thereby  
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constructively depriving Plaintiffs of counsel in violation of *Cronic*, 466 U.S. at 660;

- d. Whether Defendants are in violation of their obligations under the Sixth and Fourteenth Amendments to the United States Constitution to ensure that defense counsel appointed for Class Members have the resources, oversight, supervision, and training necessary to provide Class Members with constitutionally sufficient representation;
- e. Whether Defendants are in violation of their obligations under Article 1, Section 8 of the Nevada Constitution to ensure that defense counsel appointed for Class Members have the resources necessary to provide Class Members with constitutionally sufficient representation;
- f. Whether, within the public defense system that Defendants have established and enabled, counsel for indigent defendants in rural Nevada counties are able to meaningfully represent their clients by performing functions including but not limited to adequately communicating with clients, investigating cases, hiring necessary experts, advocating for pretrial release, filing necessary pretrial motions, holding the government to its burden at trial where appropriate, advising clients on guilty pleas—including the immigration consequences of guilty pleas—and advocating during sentencing proceedings.
- g. Whether Defendants’ delegation and abdication of responsibility for providing indigent defense to creates disparate access to the fundamental right to counsel.
- h. Whether Defendants have failed to ensure that defense counsel appointed to represent Class Members have been provided with the resources necessary to adequately challenge the State’s charges against the Class Members; and

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- i. Whether, as a result of Defendants' actions and omissions, Class Members are currently being harmed based on the State's failure to provide them with meaningful representation.

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**FACTUAL ALLEGATIONS**

7

***History of Indigent Defense in Nevada***

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**Nevada's Pioneering Role as a Protector of Indigent Defendants' Rights**

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89. The State of Nevada has a long history of recognizing the right to counsel for those criminal defendants unable to afford an attorney. "On November 6, 1863, Section 8 of the Nevada Constitution was proposed and adopted with no debate, ensuring from that day forward that 'in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel' and that under no circumstances shall the accused be deprived of 'life, liberty, or property, without due process.'"<sup>8</sup> The Constitution was approved on September 1, 1864, containing that provision.<sup>9</sup>

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90. By the 1870s, judges in Nevada typically appointed an attorney whenever a criminal defendant requested one.<sup>10</sup>

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91. An 1875 Assembly Bill (No. 122) codified payment to attorneys appointed by the court, and the Nevada Supreme Court case *In re Wixom* in 1877 confirmed that "the failure to appoint counsel to the poor in a criminal case was a valid reason to overturn convictions on direct appeal."<sup>11</sup>

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<sup>8</sup> Ex. 3, Sixth Amendment Center, *Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada So as to Ensure Equal Access to Justice in the Future* ("Reclaiming Justice") 10 (citing Andrew J. Marsh & Samuel L. Clemens, Reports of the 1863 Constitutional Convention of the Territory of Nevada (Legislative Counsel Bureau, State of Nevada, William C. Miller & Eleanore Bushnell eds., 1972), available at: [http://sixthamendment.org/6ac/nvreport\\_reclaimingjustice\\_032013.pdf](http://sixthamendment.org/6ac/nvreport_reclaimingjustice_032013.pdf)).

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<sup>9</sup> *Id.*

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<sup>10</sup> *Id.* at 11.

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<sup>11</sup> *Id.* at 18 (citing *In re Wixom*, 12 Nev. at 219-24; Assembly Bill 122, Journal of the Assembly for the State of Nevada, 1875 at 48).

1           92.     The right to counsel was subsequently codified in Section 10883 of the Nevada  
2 Code in 1909: “If the defendant appears for arraignment without counsel, he must be informed by  
3 the court that it is his right to have counsel before being arraigned and must be asked if he desires  
4 the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to  
5 defend him.” Nev. Stat. 1909, 330-33.

6           **The U.S. Supreme Court’s Adoption and Expansion of the Right to Counsel for**  
7 **Indigent Defendants**

8           93.     Years later, the United States Supreme Court mandated that states have the  
9 ultimate obligation to ensure that indigent defendants accused of felonies in state courts are  
10 provided with competent legal counsel. *Gideon*, 372 U.S. at 344.

11           94.     After *Gideon*, the Supreme Court continued to expand the right to counsel in  
12 significant ways. The Court has extended the right to counsel to children in juvenile delinquency  
13 proceedings (*see In re Gault*, 387 U.S. 1 (1967)); probationers in probation revocation  
14 proceedings (*see Mempa v. Rhay*, 389 U.S. 128 (1967)); and indigent defendants charged with  
15 misdemeanors (*see Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002); *Argersinger v. Hamlin*, 407  
16 U.S. 25 (1972)).

17           95.     More recently, the Supreme Court found that the right to counsel attaches for all  
18 defendants at their initial appearances (*see Rothgery v. Gillespie Cty.*, 554 U.S. 191 (2008)); and  
19 that plea bargaining constitutes a “critical stage” of any criminal proceeding, thereby requiring  
20 the effective assistance of counsel in connection with plea negotiations (*see Lafler v. Cooper*, 566  
21 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012)).

22           96.     The United States Supreme Court has also explained that *constructive* denial of  
23 the right to counsel is a violation of the Sixth Amendment. *Cronic*, 466 U.S. at 659.  
24 Constructive denial of counsel occurs when, among other things, an indigent defendant is denied  
25 assistance of counsel at a critical stage of the proceedings, when defense counsel fails to  
26 investigate the underlying facts of a case, or when defense counsel fails to subject the  
27 prosecution’s case to meaningful adversarial testing. *Id.*

1                   **Nevada’s Erosion of Indigent Defense Protections**

2           97.     While the United States Supreme Court has expanded the constitutional rights of  
3 criminal defendants, Nevada has taken several steps back, abandoning its role as an early leader  
4 in protecting the rights of indigent defendants. Rather than making good on its trailblazing  
5 efforts, which served as a model for other states, Nevada today fails to ensure that people accused  
6 of crimes within its borders who are unable to afford an attorney are provided with  
7 constitutionally meaningful legal assistance.

8           98.     Under the current system, Nevada counties with a population over 100,000 must  
9 create a county public defender’s office. Nev. Rev. Stat. § 260.010. This applies to only two  
10 counties: Washoe (encompassing the city of Reno) and Clark (encompassing the city of Las  
11 Vegas). Counties that have fewer than 100,000 residents may establish a county public  
12 defender’s office – or pay for the services of the Nevada State Public Defender. *Id.* §§ 260.010,  
13 180.110. When first established, the State paid the majority of the costs associated with use of  
14 the State Public Defender, but now, the responsibility has flipped with participating counties  
15 paying a greater proportion of the costs.

16           99.     In practice, this forces the rural counties to forgo paying for the State Public  
17 Defender and establish individual contracts with private attorneys to provide indigent defense  
18 services. When counties enter into these arrangements, the State does not cover any of the costs  
19 and does not oversee or supervise the county systems to ensure that the services provided meet  
20 constitutional standards.

21           100.    While it is permissible for a state to delegate its indigent defense obligations, “it  
22 must do so in a manner that does not abdicate the constitutional duty it owes to the people.”  
23 *Claremont Sch. Dist. v. Governor*, 147 N.H. 499, 513 (2002). In other words, the state retains  
24 ultimate responsibility for protecting the Sixth Amendment rights of its citizens regardless of  
25 whether it has delegated this duty to the counties. *Armstrong v. Schwarzenegger*, 622 F.3d 1058,  
26 1062-63 (9th Cir. 2010), *aff’d sub nom. Armstrong v. Brown*, 732 F.3d 955, 957 (9th Cir. 2013),  
27 *cert denied*, 134 S. Ct. 2725 (2014) (holding that the State of California retains ultimate  
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1 responsibility for providing reasonable accommodations to disabled prisoners and parolees under  
2 the Americans with Disabilities Act regardless of whether it has delegated the operation of jails to  
3 the counties); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 26, 930 N.E.2d 217, 227 (2010) (allowing  
4 class action to proceed against the State of New York even though indigent defense obligations  
5 had been delegated to counties); *Duncan v. State*, 832 N.W.3d 752 (Mich. 2013) (mem.) (holding  
6 that putative class of criminal defendants could proceed with suit alleging State of Michigan  
7 failed to comply with its indigent defense obligations even though responsibility had been  
8 delegated to counties); *Tucker v. State*, 394 P.3d 54, 64 (Idaho 2017) (holding that State of Idaho  
9 “has ultimate responsibility to ensure that the public defense system passes constitutional  
10 muster,” even though State has delegated provision of indigent defense to counties).

### 11 **The Ongoing Indigent Defense Crisis in Nevada**

12 101. A decade ago, the Nevada Supreme Court created the Indigent Defense  
13 Commission (“IDC”) to address “concerns about the current process for providing indigent  
14 defendants in criminal and juvenile delinquency cases with counsel and whether the attorneys  
15 appointed are providing quality and effective representation.”<sup>12</sup> The IDC was tasked with  
16 studying Nevada’s indigent defense systems and making recommendations to the Supreme  
17 Court.<sup>13</sup>

18 102. At the IDC’s first meeting on May 15, 2007, it was announced that the primary  
19 goal of the IDC is to “effect compliance with ABA standards for indigent defense statewide.”<sup>14</sup>

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22 <sup>12</sup> Ex. 4, Order Establishing Study Committee on Representation of Indigent Defendants,  
Supreme Court of Nevada, ADKT No. 411 (Apr. 26, 2007) (Doc. No. 07-28443).

23 <sup>13</sup> *Id.*

24 <sup>14</sup> Ex. 1, Final Report and Recommendations of Supreme Court Indigent Defense Commission,  
25 Ex. A: Summary of May 15, 2007 Meeting, Statement of Chief Justice Maupin, ADKT No. 411  
(Nov. 20, 2007) (Doc. No. 07-28444). The ABA Ten Principles of a Public Defense Delivery  
26 System cited by Chief Justice Maupin was “created as a practical guide for governmental  
27 officials, policymakers, and other parties who are charged with creating and funding new, or  
28 improving existing, public defense delivery systems. The Principles constitute the fundamental  
criteria necessary to design a system that provides effective, efficient, high quality, ethical,  
conflict-free legal representation for criminal defendants who are unable to afford an attorney.”

1 Chief Justice Maupin also noted that the “[i]ssues are different in rural areas where compliance  
2 becomes more problematic.”<sup>15</sup>

3 103. At this first meeting, the IDC identified what remains a pervasive constitutional  
4 violation throughout the State of Nevada: “Rural courts are getting inadequate counsel. There  
5 seems to be different levels of justice throughout Nevada that must be changed.”<sup>16</sup> The IDC  
6 conducted an initial statewide survey of indigent defense services in June and July 2007.<sup>17</sup> The  
7 IDC identified problems then that still have not been solved a decade later.<sup>18</sup>

8 104. The IDC issued its first report in November 2007. Several recommendations  
9 specifically sought to address the crisis in the rural counties. These included the recommendation  
10 that indigent defendants in all counties other than Clark, Washoe, and Elko should be represented  
11 by the State Public Defender’s Office, with funding from the State.

12 105. Since that first report, the IDC has repeatedly identified persistent problems with  
13 indigent defense delivery, especially in the rural counties, and issued recommendations designed  
14 to guarantee meaningful representation to all indigent defendants.<sup>19</sup> For example, in 2008, the  
15 IDC’s Rural Subcommittee recommended that:

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19 The ABA Ten Principles of a Public Defense Delivery System (approved by American Bar  
20 Association House of Delegates, February 2002).

21 <sup>15</sup> Ex. 1, Final Report and Recommendations of Supreme Court Indigent Defense Commission,  
22 Ex. A: Summary of May 15, 2007 Meeting, Statement of Chief Justice Maupin, ADKT No. 411  
23 (Nov. 20, 2007) (Doc. No. 07-28444).

24 <sup>16</sup> *Id.*

25 <sup>17</sup> Ex. 1, Final Report and Recommendations of Supreme Court Indigent Defense Commission,  
26 Supreme Court of Nevada, ADKT No. 411 (Nov. 20, 2007) (Doc. No. 07-28444).

27 <sup>18</sup> Ex. 1, Final Report and Recommendations of Supreme Court Indigent Defense Commission,  
28 Ex. B: Report of the Nevada Supreme Court’s Indigent Defense Commission 6, ADKT No. 411  
(Nov. 20, 2007) (Doc No. 07-28444).

<sup>19</sup> *See also* Ex. 5, Order, In the Matter of the Review of Issues Concerning Representation of  
Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Jan. 4, 2008)  
(Doc. No. 08-33146); Ex. 6, Order, In the Matter of the Review of Issues Concerning  
Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT  
No. 411, Mar. 21, 2008 (Doc. No 08-33173); Ex. 7, Order, ADKT No. 411, Oct. 16, 2008 (Doc.  
No. 08-33207); Ex. 8, Nevada Supreme Court, Indigent Defense Commission Rural

- The State of Nevada accept its constitutional responsibility to fully fund all aspects of the delivery of indigent defense services in all counties;
- Each county should be free to choose its own system, provided that the system meets performance and caseload standards and is subject to oversight;
- The State of Nevada should fund an independent, statewide oversight board, made up of members from all three branches of government at state and local level, and other relevant constituencies;
- The State of Nevada should create a permanent indigent defense commission;
- The State of Nevada should fully fund the Office of the Nevada State Public Defender, with competitive salaries, adequate attorney training, funding for investigative services, and not administer the Office within the Department of Health and Human Services.<sup>20</sup>

106. Defendants have adopted none of these recommendations.

107. Indeed, the Rural Subcommittee filed an updated status report in 2014. This report reaffirmed its previous recommendations, the bulk of which remained unaddressed, and added more.<sup>21</sup>

108. Most notably, the Rural Subcommittee recommended that the State of Nevada fully fund its constitutional obligation to provide indigent defense services to rural counties.

109. In 2015, the Nevada Supreme Court adopted some of the Subcommittee's 2014 recommendations but took no action on whether the State of Nevada should fully fund indigent defense, calling it an "unresolved legal question which is better raised in an actual case in controversy."<sup>22</sup>

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Subcommittee, Report and Recommendations, ADKT No. 411, Dec. 16, 2008 (Doc. No. 08-33209).

<sup>20</sup> See Ex. 8, Nevada Supreme Court, Indigent Defense Commission Rural Subcommittee, Report and Recommendations, ADKT No. 411, Dec. 16, 2008 (Doc. No. 08-33209).

<sup>21</sup> See Ex. 9, Rural Subcommittee Report on the Status of Indigent Defense in the 15 Rural Counties and Recommendations to Improve Service to Indigent Defendants, ADKT No. 411, Oct. 24, 2014 (Doc. No. 14-25500).

<sup>22</sup> Ex. 10, Order, Nevada Supreme Court, ADKT 0411, July 23, 2015 (Doc No. 15-22416).

1           110. During the 2015 legislative session, Senate Bill 451 was introduced to address  
2 some of the systemic indigent defense issues plaguing Nevada. After a hearing, the bill died in  
3 committee.

4           111. Meanwhile, the State allowed the status quo to continue while it prosecuted nearly  
5 4,000 indigent defendants in rural counties in fiscal years 2015 and 2016 without constitutionally  
6 adequate representation.<sup>23</sup>

7           112. In the coming two years, the same problems will likely be observed and diagnosed  
8 yet again. On June 8, 2017, the Governor signed into law Senate Bill 377, which created a new  
9 entity—the Nevada Right to Counsel Commission (“NRCC”)—to “conduct a study during the  
10 2017-2019 interim concerning issues relating to the provision of indigent defense services.”<sup>24</sup>  
11 The NRCC will “make recommendations to the Legislature to improve the provision of indigent  
12 defense services and to *ensure that those services are provided in a manner that complies with*  
13 *the standards for the effective assistance of counsel* established by the United States Supreme  
14 Court and the appellate courts of this State under the Sixth Amendment to the United States  
15 Constitution and Section 8 of Article 1 of the Nevada Constitution.” *Id.*

16           113. Although the new law is a step in the right direction, the NRCC was created solely  
17 to *recommend* legislation. There remains no state oversight or enforcement mechanism to ensure  
18 compliance with any performance or caseload standards the NRCC may recommend. The NRCC  
19 is not authorized to implement any of its recommendations.

20           114. Senate Bill 377, in its original form, provided the NRCC with oversight,  
21 implementation, and enforcement powers but was not adopted by the legislature.

22           115. History has shown that without teeth, the recommendations of such commissions  
23 cannot remedy underlying problems. For example, on July 23, 2015, the Nevada Supreme Court  
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25 <sup>23</sup> See Ex. 11, Nevada Supreme Court, Indigent Defense Commission, Oct. 23, 2017 Meeting  
26 Materials, Indigent Defense Statistics, Fiscal Year 2016-18; Ex. 12, Nevada Supreme Court,  
27 Indigent Defense Commission, Feb. 23, 2016 Meeting Materials, Indigent Defense Caseload  
28 Statistics, Fiscal Year 2014-16.

<sup>24</sup> Senate Bill 377, Section 11 (2017) (emphasis added).

1 issued Order ADKT No. 411. Among other things, this order adopted one of the IDC Rural  
2 Subcommittee's recommendations that counties "shall not use a totally flat fee contract," and  
3 must permit "modification of fees for extraordinary cases, and allow for investigative fees and  
4 expert witness fees."<sup>25</sup> In issuing this order, the Supreme Court acknowledged that the  
5 "competent representation of indigents is vital to our system of justice."  
6

7 116. Over two years later, on information and belief, at least eleven of Nevada's 17  
8 counties have contracts that do not comply with Court's 2015 Order. Some of these contracts are  
9 explicitly flat-fee contracts, and some constitute *de facto* flat-fee contracts by either failing to  
10 provide for any modification of the annual compensation under the contract or limiting the ability  
11 to receive additional compensation so severely that it creates a substantial disincentive to  
12 appropriately litigate cases.

13 117. As the ABA has explained, "[c]ontracts with private attorneys for public defense  
14 services should never be let primarily on the basis of cost; they should specify performance  
15 requirements and the anticipated workload, provide an overflow or funding mechanism for  
16 excess, unusual, or complex cases, and separately fund, expert, investigative, and other litigation  
17 support services."<sup>26</sup> None of these safeguards are found in the flat-fee contracts in many Nevada  
18 counties.

19 118. Rather than adopting legislation before it that would have solved its longstanding  
20 problems, the State gutted that legislation and tasked a powerless commission with proposing a  
21 legislative solution. The absurdity of that abdication underscores Defendants' stubborn refusal to  
22 protect the constitutional rights of indigent defendants despite knowledge of the problem.

23 119. In the meantime, the same shortcomings will persist, harming Plaintiffs and Class  
24 Members irreparably.

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26 <sup>25</sup> Ex. 10, Order, Nevada Supreme Court, ADKT 0411, July 23, 2015 (Doc. No. 15-22416).

27 <sup>26</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System*, Feb. 2002,  
28 [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sc\\_laid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sc_laid_def_tenprinciplesbooklet.authcheckdam.pdf).

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**PROBLEMS PERVADING THE INDIGENT  
DEFENSE SYSTEM IN NEVADA’S RURAL COUNTIES**

120. Defendants alone bear the responsibility for ensuring that indigent defendants accused of a crime throughout Nevada receive constitutionally meaningful representation. But Defendants have set up a system that fails to ensure that result. In delegating responsibility for providing counsel to Nevada’s rural counties without providing oversight, enforcement standards, or adequate resources, Defendants have abdicated their constitutionally-mandated duty to Plaintiffs and the Class.

121. The contracts that Nevada’s rural counties have entered into illustrate the varied ways in which the State has abdicated its constitutional duty to protect the rights of indigent defendants. None of the rural counties’ contracts pass muster, for the reasons outlined below.

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***Flat-Fee and De Facto Flat-Fee Contracts***

122. The very terms of the appointed attorney contracts disincentivize zealous representation. Under the flat-fee and *de facto* flat-fee annual contract model, appointed attorneys are not paid any more or any less for the number or complexity of cases they handle, and insufficient safeguards exist to ensure performance; appropriate workload; separate funding for expert, investigative, or other litigation support functions; or overflow and funding mechanisms for excess, unusual, or complex cases.

123. Upon information and belief at least eleven of Nevada’s 17 counties use flat-fee or *de facto* flat-fee appointed attorney contracts. A flat-fee contract fails to provide for any modification of the annual compensation under the contract, and *de facto* flat-fee contracts limit the ability to receive additional compensation so severely that it creates a substantial disincentive to appropriately litigate cases.

124. Fees in flat-fee and *de facto* flat-fee contracts are established irrespective of the number of clients the attorney may be assigned during the term of the contract or the seriousness of those clients’ criminal charges or the number of cases that proceed to trial.

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2 125. None of the contracts in the rural counties provide additional compensation to  
3 attorneys for the vast amounts of travel that is often required in those sparsely populated regions,  
4 and many of the contracts do not provide for additional expenses or fees when taking a case to  
5 trial.

6 126. Flat-fee and *de facto* flat-fee contracts create a serious conflict of interest for  
7 defense attorneys because attorneys are rewarded with more money for doing less work for  
8 clients. These contracts encourage the attorney to spend as little money and time as possible on  
9 each case in order to maximize the amount of money and time that can be used to cover other  
10 cases, and other expenses, including compensation for the attorney him or herself.

11 127. Upon information and belief, many of Nevada's rural counties contract with  
12 private attorneys who also represent their own paying clients, in addition to an unlimited number  
13 of indigent defendants whom they represent on an annual *de facto* flat-fee basis. This type of  
14 arrangement leads to an actual conflict of interest, because the contract attorney is incentivized to  
15 spend no time or money on the cases of his indigent clients; no matter how much time or money  
16 the attorney spends on a case for an indigent client, the attorney is paid the same yearly flat-fee  
17 from the county.

18 128. None of the counties using the flat-fee or *de facto* flat-fee contract system prohibit  
19 attorneys from having private clients while fulfilling their contracts. In fact, in counties whose  
20 population is less than 100,000, appointed attorneys are expressly permitted to engage in private  
21 practice. *See Nev. Rev. Stat. § 260.040(4).*

22 129. As explained further below, many of the rural county contracts require the  
23 appointed attorney to pay for routine investigative and expert witness fees from the flat-fee  
24 amount paid for their services, and will allow additional payment only with a court order.

25 130. For example, the Eureka County public defense contract states the independent  
26 contractor is not restricted from "offering his/her services to the general public while engaged in  
27 this work relationship with the County." In those instances, the attorney is conflicted by the duty  
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1 to the private clients (who usually will pay more money on an hourly basis than what the  
2 appointed attorney contract provides) and their duty to represent indigent defendants.

3 131. The public defense contract in Lander County indicates that the County will pay  
4 the contracting attorney \$88,000 per year. However, the contract explicitly states that “[a]ll office  
5 space, furniture, equipment and supplies, [and] secretarial assistance required to perform the  
6 duties of the Lander County Appointed attorney shall be borne by the contractor.”

7 132. The Douglas County public defense contract provides a flat compensation rate of  
8 \$195,833.33 per year. Under the contract, attorneys must use this fee for all investigative and  
9 expert witness costs. They are allowed to seek additional compensation only for “extraordinary  
10 costs,” and must first have those costs approved by a court. This kind of flat-rate contract creates  
11 a disincentive to spend any extended amount of time in court, meeting with clients or  
12 investigating indigent defense cases. This is especially problematic given that the public defense  
13 contractors in Douglas County are still permitted to maintain a separate private practice.  
14 Moreover, the contract does not include support staff and provides reimbursement only for  
15 “extraordinary investigative costs, expert witness fees, or other necessary services if so ordered  
16 by a Court.”

17 133. In Nye County, the current appointed attorney contract pays each contracting  
18 attorney \$150,000 per year. The County, upon information and belief, has courthouses in Beatty  
19 and Tonopah, which are more than two and a half hours apart by car. Travel from Beatty or  
20 Tonopah to the Pahrump Township Justice Court or Fifth District Court takes as long as an hour  
21 and a half. But the contract explicitly states that the attorney is not eligible for travel expenses.  
22 Given the distance and lack of compensation, a contracting attorney in Nye County is further  
23 discouraged from traveling to meet his or her client.

24 134. The appointed attorneys in Lyon County also face a substantial burden due to  
25 travel. There, the Dayton Justice Court and Canal Township Justice Court are a 40-minute drive  
26 from each other and at least a 50-minute drive from the Third District Court and Walker River  
27 Justice Court. Even though an appointed attorney in Lyon County could have appearances in  
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1 each of these courthouses, and may even have multiple appearances in one day, the public  
2 defense contract in Lyon County prohibits reimbursement for travel expenses.

3 135. The Douglas, Eureka, Lincoln, Mineral, White Pine, and Lander county contracts  
4 similarly prohibit travel reimbursements.

5 136. Not only do these flat-fee contracts create perverse incentives, but they largely  
6 operate without oversight by either the counties or the State. For example, in Mineral County the  
7 contract does not require any kind of workload or caseload monitoring. There are no reporting  
8 requirements detailing the number of people represented, the types of crimes involved, or any  
9 other information that would help indicate when a workload is so burdensome that competent  
10 representation is impossible.

11 137. By allowing these flat-fee and *de facto* flat-fee contracts to exist without requiring  
12 any safeguards or exercising any oversight, Defendants have abdicated their duty under *Gideon*.  
13 Defendants have essentially done nothing to ensure that the indigent defense provided pursuant to  
14 these flat-fee and *de facto* flat-fee contracts is constitutionally sufficient.

15 ***Lack of Investigation and Expert Analysis and Testimony***

16 138. Public defense contracts also lack sufficient provisions to ensure that contract  
17 attorneys have the ability to provide indigent defendants with even the most basic components of  
18 legal representation, including appropriate investigators and experts.

19 139. Many of the flat-fee and *de facto* flat-fee contracts do not provide for the cost of  
20 investigators and experts. Rather, the appointed attorney must make special requests of the court,  
21 on a case-by-case basis, to obtain the resources to hire an investigator or expert.

22 140. For example, one appointed attorney in White Pine County had 109 felony  
23 appointments, but made only four fee requests for an expert, and one fee request for an  
24 investigator.

25 141. Another appointed attorney in Nye County had 253 misdemeanor appointments,  
26 41 gross misdemeanor appointments, and 159 felony appointments in fiscal year 2016, but made  
27 only nine fee requests for an expert and seven fee requests for an investigator.  
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1           142. An appointed attorney in Mineral County had 76 misdemeanor appointments, 35  
2 gross misdemeanor appointments, and 122 felony appointments during the first eight months of  
3 2016, but reported that no experts or investigators were needed at all.

4           143. Here too, the State has abdicated its responsibility by failing to establish a  
5 mechanism to ensure that appointed attorneys are in fact requesting the appropriate investigators  
6 and experts, or for ensuring that the services that are in fact deployed are likely to result in  
7 meaningful representation.

8           ***Lack of Supervision and Standards for Minimum Qualifications***

9           144. The contracts for appointed attorneys typically do not include any requirement that  
10 the appointed attorney have any prior experience in criminal defense work or with indigent  
11 populations. Most of the rural appointed attorney contracts simply track the statutory  
12 requirements, and mandate that an appointed attorney be licensed to practice in Nevada and  
13 maintain good standing. *See Nev. Rev. Stat. § 260.030.*

14           145. Nearly all of the rural appointed attorney contracts have no minimum  
15 qualifications or ongoing training requirements.

16           146. Notably, in Lander County, the contract attorney need not meet any specified  
17 qualifications and need not demonstrate that he or she is competent to represent an individual  
18 charged with a crime. Because the contract does not provide any funds for training, any training-  
19 related expenses would presumably come out of the flat-fee, further diminishing any incentive to  
20 gain additional skill or experience.

21           147. Defendants and the individual counties also do not adequately supervise or  
22 evaluate the contract defenders. Upon information and belief, in nearly every county that uses  
23 contract public defenders, the appointed attorneys there are not subject to any meaningful  
24 oversight as to the quality of representation they provide.

25           148. Although the Nevada Supreme Court on October 16, 2008, adopted performance  
26 standards recommended by the IDC, there is no provision for enforcement. The standards merely  
27 provide guidelines and do not mandate minimum levels of performance by appointed attorneys  
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1 representing indigent defendants in rural counties. See *Washoe Cty. Pub. Def.'s Office v. Second*  
2 *Judicial Dist. Court of State ex rel. Cty. of Washoe*, No. 61173, 2013 WL 5614272, at \*2 (Nev.  
3 Oct. 9, 2013). For the appointed attorneys serving under contracts in rural counties in Nevada,  
4 there are no performance standards and no means by which to evaluate the attorneys working in  
5 these counties.

6 149. This combination of lack of qualifications and lack of ongoing training and  
7 supervision leaves contract-appointed attorneys ill-equipped to provide meaningful representation  
8 to their indigent clients.

9 150. Defendants have failed to address this issue and have no provision within the State  
10 indigent defense system for ensuring that appointed attorneys are qualified or that they have  
11 appropriate ongoing training and supervision. Moreover, Defendants provide no means of  
12 accountability for attorneys who fail to provide meaningful representation.

### 13 ***Lack of Independence***

14 151. The process that rural counties use to select contract-appointed attorneys and the  
15 role of the local judiciary in overseeing those attorneys also disincentivizes meaningful  
16 representation by making contract holders beholden to people other than their clients. The first of  
17 the ABA Ten Principles is to ensure that “the public defense function, including the selection,  
18 funding, and payment of defense counsel is independent.”<sup>27</sup> As the Sixth Amendment Center has  
19 explained:

20 The public defense function “should be independent from political influence and  
21 subject to judicial supervision only in the same manner and to the same extent as  
22 retained counsel,” noting specifically that “[r]emoving oversight from the judiciary  
23 ensures judicial independence from undue political pressures and is an important  
24 means of furthering the independence of public defense.” Likewise, the public  
25 defense function should also “be independent from political influence.” To  
“safeguard independence and to promote the efficiency and quality of services, a  
nonpartisan board should oversee defender, assigned counsel, or contract  
systems.”<sup>28</sup>

26 <sup>27</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System*, Feb. 2002,  
27 [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)

28 <sup>28</sup> Ex. 3, *Reclaiming Justice* at 26 (internal citations omitted).

1           152. Appointed attorneys in rural counties are subject to both political influence and  
2 excessive judicial involvement in the defense function.

3           153. In this system, appointed attorneys have to cater to local officials who frequently  
4 are not lawyers with criminal defense expertise and who therefore do not prioritize or demand the  
5 delivery of constitutionally adequate representation for rural defendants. For example, in  
6 Churchill County, applications in response to the County’s 2017 RFQ for an appointed attorney  
7 were evaluated by the County Manager, Comptroller, and Chief Civil Deputy District Attorney,  
8 with the primary selection criteria being “ability and history of successfully completing contracts  
9 of this type, meeting deadlines, office hours and experience in similar work, with consideration  
10 given to references.”<sup>29</sup>

11           154. Upon information and belief, neither the Churchill County Manager nor  
12 Comptroller is an attorney licensed to practice law in Nevada. And involving anyone from the  
13 District Attorney’s Office in the selection of contract-appointed attorneys undermines  
14 independence and creates an egregious conflict, because it allows prosecutors to pick their  
15 opponents.

16           155. Even after an attorney has secured a public defense contract, many rural counties  
17 require the contract holder to request an order from a judge to obtain reimbursement for  
18 investigative costs, expert witness fees, or other necessary services. This impermissibly burdens  
19 the lawyer with the choice between revealing defense strategy to the judge and procuring the  
20 resources needed to hire an expert or investigator. Further, as Plaintiff Diane Davis’s case  
21 demonstrates, even if a lawyer requests funds for an expert or investigator, the court may choose  
22 not to provide the necessary funds, effectively denying indigent defendants like Ms. Davis the  
23 benefit of these crucial resources.

24           156. These structural problems result in a level of representation that “makes the  
25 adversary process itself presumptively unreliable.” *Cronic*, 446 U.S. at 659.

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27 \_\_\_\_\_  
28 <sup>29</sup> Request for Qualifications for Public Defense Services, Churchill County, Nevada,  
<http://www.churchillcounty.org/DocumentCenter/View9998> (last visited Oct. 18, 2017).

1                   ***Lack of Representation at Initial Appearance***

2                   157. Defendants’ failures also mean that rural counties do not comport with the  
3 Supreme Court’s decision in *Rothgery v. Gillespie County*, which reaffirmed that the right to  
4 counsel attaches when “formal judicial proceedings have begun.” 554 U.S. at 211. For a person  
5 who is arrested, the beginning of formal judicial proceedings is at the “criminal defendant’s initial  
6 appearance before a judicial officer, where he learns the charge against him and his liberty is  
7 subject to restriction.” *Id.* at 213. Once the right to counsel attaches at the initial appearance, a  
8 criminal defendant is “entitled to the presence of appointed counsel during any ‘critical stage’ of  
9 post-attachment proceedings.” *Id.* at 212.

10                   158. But in Nevada’s rural counties, appointed attorneys are routinely unavailable to  
11 represent indigent defendants at every critical stage of the criminal process, including at  
12 arraignments where bond is determined, resulting in the actual denial of counsel to indigent  
13 defendants across the state.

14                   159. Typically, attorneys are appointed to indigent defendants at their initial  
15 appearances, but the attorneys do not actually meet with their clients until days or weeks after the  
16 appointment. As a result, bond determinations, which usually occur at the criminal defendant’s  
17 initial appearance before the court, are nearly always made without the benefit of counsel.  
18 Consequently, bond may be set based on inappropriate factors, or the court may make its bond  
19 determination without the benefit of facts critical to such a determination.

20                   160. Often, unrepresented indigent defendants must argue on their own behalf for their  
21 release on their own recognizance or for a reasonable reduction in their bond amount. Because  
22 they lack the training to advocate effectively, they are forced to remain in jail simply because they  
23 did not have the benefit of adequate legal counsel who could make appropriate arguments on their  
24 behalf.

25                   161. In failing to remedy these deficiencies, the State of Nevada has caused harm to  
26 Plaintiffs, and those similarly situated, by constructively denying them their Sixth Amendment  
27 right to counsel and their Fourteenth Amendment right to due process.  
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1 *Unnecessary and/or Extended Pretrial Detention*

2 162. Due in part to the State's failure to provide meaningful representation to indigent  
3 defendants at their initial appearances, bail is often set at amounts that indigent defendants cannot  
4 afford. Unnecessary, wealth-based pretrial detention has severe consequences for indigent  
5 defendants on their criminal cases as well as on their personal lives.

6 163. According to studies conducted or cited by, among others, the U.S. Department of  
7 Justice's Bureau of Justice Assistance and the private, nonprofit Arnold Foundation, whether or  
8 not a criminal defendant is held in pretrial custody can have a tremendous impact on the outcome  
9 of the case. For instance, in its review of outcomes for more than 150,000 defendants in  
10 Kentucky during 2009-2010, the Arnold Foundation determined that "[w]hen other relevant  
11 statistical controls are considered, defendants detained until trial or case disposition are 4.44 times  
12 more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than  
13 defendants who are released at some point pending trial.<sup>30</sup> Similarly, in New York City, "the  
14 citywide conviction rate for cases with no trial release was 92%. By contrast, the conviction rate  
15 for cases in which the defendant was at liberty from arraignment to disposition was 50%."<sup>31</sup>  
16 Unnecessary pretrial detention can make it more difficult for criminal defendants to meet with  
17 their attorneys or to assist with their defense.

18 164. Plaintiff Ryan Cunningham has suffered extreme hardship as a result of his  
19 unnecessary pretrial detention. Unable to pay bail initially set at \$72,500, later reduced to  
20 \$50,000, Mr. Cunningham has watched his life fall apart from behind bars: his girlfriend left him  
21 and obtained custody of their nine-year-old daughter, his father suffered a heart attack and was  
22 diagnosed with cancer, and his 22-year-old daughter attempted suicide.

23 165. The economic consequences for Mr. Cunningham have also been devastating.  
24 Mr. Cunningham has worked as a tile-setter for 25 years, but since his arrest and extended pretrial  
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26 <sup>30</sup> Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, Investigating the Impact  
27 of Pretrial Detention on Sentencing Outcomes 10 (Nov. 2013).

28 <sup>31</sup> Mary Phillips, N.Y.C. Crim. Just. Agency, Pretrial Detention and Case Outcomes 28 (Nov.  
2007).

1 detention, he has lost his rental property and all of his personal property, including his tile-setting  
2 tools. Despite these substantial personal and economic hardships, Mr. Cunningham's attorney  
3 never made any arguments in favor of his release or for bail reduction. Mr. Cunningham's story  
4 is just one example of the consequences of the State's abdication of its constitutional duty to  
5 provide meaningful representation at all critical stages for indigent criminal defendants.

6 166. Pretrial detention can also serve as an inappropriate incentive to obtain a guilty  
7 plea in exchange for release from jail, notwithstanding the person's innocence or the availability  
8 of viable defenses to challenge the prosecution's case. Indeed, many Class Members are  
9 compelled to take pleas, often to the highest charge, even when they have a meritorious defense.  
10 Because of poor training, cost-cutting contracts, and lack of oversight, many appointed attorneys  
11 routinely encourage their clients to plead guilty without even a cursory investigation into  
12 potentially meritorious defenses or into the strength of the prosecution's case, including the  
13 absence of any physical evidence.

14 ***Lack of Effective or Consistent Attorney-Client Communication***

15 167. Indigent defendants in rural counties do not have sufficient access to their  
16 attorneys, with whom they are unable to communicate for weeks or months at a time. Multiple  
17 factors contribute to these breakdowns: vast travel distances, unreimbursed travel expenses, lack  
18 of sufficient support staff to help manage client relationships, and the flat-fee and *de facto* flat-fee  
19 contracts that incentivize lawyers to spend as little time as possible on any individual case.  
20 Indigent defendants' lack of communication with their appointed attorneys makes it virtually  
21 impossible for them to understand developments in their case or to assist meaningfully in their  
22 own defense.

23 168. Plaintiff Ryan Cunningham was unable to communicate with his attorney for more  
24 than three months, from his arraignment on June 5, 2017 until September 18, 2017, at which point  
25 his appointed attorney's associate—someone unknown to Mr. Cunningham—appeared on his  
26 behalf at a status hearing. Since then, Mr. Cunningham has been unable to reach his appointed  
27 attorney. Mr. Cunningham and multiple family members tried unsuccessfully to contact his  
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1 appointed attorney several times. Mr. Cunningham is unable to call his appointed attorney from  
2 the Lyon County Jail because his attorney's office does not accept collect calls. Because of these  
3 and other communications failures with his appointed attorney, Mr. Cunningham unknowingly  
4 waived his right to a speedy trial and is currently attempting to withdraw his waiver.

5 169. Plaintiff Jason Lee Enox has faced similar obstacles to communicating with his  
6 appointed attorney. Mr. Enox has had to go months at a time without contact with his attorney.  
7 Mr. Enox has repeatedly attempted to call his attorney, but his attorney has not responded. Over  
8 the course of the representation, Mr. Enox's attorney has met with him for no more than two  
9 hours total. As a result, Mr. Enox has not had the opportunity to participate meaningfully in his  
10 defense, nor has he been kept apprised of key developments in his case.

11 170. In addition, several inmates at the Nye County Jail have submitted complaints  
12 directly to the jail about their lack of contact with their appointed attorneys. The Nye County  
13 Sherriff's office has forwarded all of these concerns to the District Attorney and the County  
14 Manager.<sup>32</sup>

15 171. One inmate in Nye County wrote about his inability to get in touch with his  
16 appointed attorney:

17 I have no way to get in touch with my lawyer and is is causing extream anguish.  
18 Ive called, ive written, I just tried to send email but the keyosk wont let me  
19 because i have no money. Ive grievenced the issue and reported it through this  
20 message a few times.<sup>33</sup>

21 172. Another inmate in Nye County voiced similar concerns:

22 Im still waiting to hear from my lawer [] i have written letters and have asked you  
23 personally to please help me contact my lawyer and still have not heard from him  
24 nor have i gotten a response. I was on the calander for court today 8-10-17 at 9am  
25 and never went Nor was i told My court was canceled. I've tried asking for my  
26 next court date and all i got was threatened with Disciplinary time what is going  
27 on? Whyam i being Treated like this ?<sup>34</sup>

28 <sup>32</sup> Ex. 13, August 22, 2017 Email from Lt. Lieutenant David Boruchowitz and attachment.

<sup>33</sup> *Id.* (reproduced as written).

<sup>34</sup> *Id.* (reproduced as written).



1           173. When indigent defendants *do* get the opportunity to communicate with their  
2 appointed attorneys, the meetings are usually perfunctory and often held in open court or other  
3 areas of the courthouse that lack the privacy necessary for truly confidential discussions. There is  
4 no physical barrier or door protecting the attorney-client privileged discussions from other people  
5 in attendance. This is only exacerbated for those in custody, where conversations with appointed  
6 attorneys often take place in group holding cells where indigent defendants are not assured that  
7 their statements to counsel will not be overheard by other inmates and jail personnel. These kinds  
8 of interactions make it difficult to establish a meaningful attorney-client relationship, not to  
9 mention breach ethical standards and could result in privileged communications being divulged.

10           ***Failure to Hold Prosecution to Its Burden***

11           174. While few criminal cases ever reach trial, criminal trials in Nevada’s rural counties  
12 are even rarer.

13           175. For example, in Douglas County, of the approximately 930 indigent defense cases  
14 assigned to four contract-appointed attorneys in fiscal year 2015, only 35 went to trial. This  
15 amounts to a trial rate of 3.7%—compared to an approximately 6% rate nationwide. *See Frye*,  
16 566 U.S. at 143 (citations omitted).

17           176. In Churchill County, in fiscal year 2016, of the 364 indigent defense cases  
18 assigned to the one contract-appointed attorney during that period, only four went to trial—a rate  
19 of 1.1%. Notably, not one of the 135 felony cases assigned to this attorney was challenged at  
20 trial.

21           177. The rarity of trials means that appointed attorneys cannot credibly threaten to hold  
22 the prosecution to its burden of proof. As a result, clients are pressured to accept pleas that do not  
23 reflect the merits of their cases. This is precisely what happened to Plaintiff Jason Enox, who  
24 mere weeks before trial, acquiesced to a plea deal rather than fight a potential life sentence with  
25 an attorney who was not adequately prepared.

26           178. Even when appointed attorneys do take cases to trial, the flat-fee terms of their  
27 contracts disincentivize them from adequately preparing for trial. Also the contracts do not allow  
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1 for attorneys to adjust their workloads should a trial consume their schedule, further  
2 disincentivizing taking cases to trial.

3 ***Harm to Plaintiffs***

4 179. Plaintiffs and the Class are suffering irreparable harm as a result of the State's  
5 dereliction of its constitutional duty to guarantee that indigent defendants receive meaningful  
6 representation.

7 180. Plaintiff Diane Davis is suffering irreparable harm. She has been represented by  
8 four different attorneys over the four years that her case has been pending. She is currently  
9 experiencing extreme pressure to plead guilty and has not had the opportunity to meaningfully  
10 discuss the merits of her case with any of her attorneys. All of her attorneys worked on a flat-fee  
11 or *de facto* flat-fee contract. None of her attorneys have independently investigated her case or  
12 hired expert support. Ms. Davis is facing many decades of imprisonment if convicted of the  
13 charges against her.

14 181. Plaintiff Ryan Cunningham is suffering irreparable harm. He has been in pretrial  
15 detention since April 2017. He is represented by an attorney who takes cases pursuant to a *de*  
16 *facto* flat-fee contract. He has had minimal contact with his attorney and has had repeated  
17 difficulty contacting his attorney throughout his pre-trial detention. After a truncated explanation  
18 in the middle of a hearing, Mr. Cunningham waived his right to a speedy trial. He now wishes to  
19 withdraw his waiver but has been unable to communicate that to his attorney. While he has been  
20 detained, Mr. Cunningham has suffered personal and professional misfortune, yet his attorney has  
21 not advocated for him to be released pretrial. Mr. Cunningham faces 12 years in prison.

22 182. Plaintiff Jason Lee Enox is suffering irreparable harm. He has been detained for  
23 19 months and is being represented by an attorney on a *de facto* flat-fee contract. He has been  
24 unable to contact his attorney for months at a time. Mere weeks before his trial was scheduled to  
25 start, Mr. Enox believed that his attorney had not collected any evidence, had not spoken to  
26 witnesses, had not engaged an investigator, and would not fight for him, so Mr. Enox agreed to  
27 enter an *Alford* plea. During his detention, Mr. Enox has lost his job and had to sell everything  
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1 that he owns. While he was incarcerated, Mr. Enox's father died and Mr. Enox was unable to  
2 attend the funeral. Under the terms of his *Alford* plea, he faces a maximum sentence of 11 to 27  
3 years.

4 ***State and Gubernatorial Liability***

5 183. The United States Supreme Court has affirmed that, under the Sixth Amendment  
6 to the U.S. Constitution, the State of Nevada has a duty to provide meaningful representation for  
7 criminal defendants who are unable to afford an attorney.

8 184. The Governor is constitutionally vested with the executive power of the State and  
9 must ensure the laws of Nevada are faithfully executed. Nev. Const. art. 5, §§ 1, 7.

10 185. The State of Nevada and the Governor have failed to ensure that the provision of  
11 indigent services is constitutionally adequate.

12 186. The State of Nevada and Governor have failed to provide any supervision over the  
13 provision of indigent defense services across the state.

14 187. The State of Nevada and Governor have failed to adopt any consistent, statewide  
15 caseload and workload standard for appointed attorneys across the state.

16 188. The State of Nevada and Governor have failed to adopt any statewide performance  
17 standards for appointed attorneys across the state.

18 189. By virtue of the ongoing work of the Indigent Defense Commission and the  
19 Supreme Court's adoption of a portion of the Rural Subcommittee's recommendations, the State  
20 of Nevada and Governor have been on notice for years that Nevada's appointed attorney system  
21 is failing to provide constitutionally sufficient representation.

22 190. Despite this notice, the State of Nevada and Governor have failed to take sufficient  
23 action to remedy the deficiencies in the provision of indigent defense services.

24 191. The failure of the State of Nevada and Governor to take sufficient steps to remedy  
25 the deficiencies in Nevada's indigent defense system is the proximate cause of the harm suffered  
26 by indigent criminal defendants in the state, including Plaintiffs and the Class they represent.  
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1 **CLAIMS FOR RELIEF**

2 **First Claim for Relief**

3 **Violation of the Sixth and Fourteenth Amendments to the United States Constitution**  
4 **(Right to Counsel) and 42 U.S.C. § 1983**  
5 **(All Plaintiffs and the Class Against All Defendants)**

6 192. Plaintiffs allege and incorporate by reference as if fully set forth herein the  
7 allegations contained in all preceding paragraphs of this Complaint.

8 193. The Sixth Amendment to the United States Constitution, as applied to the States  
9 through the Fourteenth Amendment, requires Defendants to ensure that all indigent criminal  
10 defendants receive meaningful legal representation at all critical stages of their cases.

11 194. Defendants have violated and continue to violate the Sixth and Fourteenth  
12 Amendments because they fail to ensure that Plaintiffs and all Class Members—indigent  
13 defendants in rural counties facing the possibility of incarceration—receive meaningful legal  
14 representation at all critical stages of their cases, resulting in the constructive denial of their right  
15 to counsel.

16 195. Plaintiffs bring this claim under 42 U.S.C. § 1983, which provides for suit against  
17 the government for constitutional violations.

18 **Second Claim for Relief**

19 **Violation of Article 1, Section 8, of the Nevada Constitution (Right to Counsel)**  
20 **(All Plaintiffs and the Class Against All Defendants)**

21 196. Plaintiffs allege and incorporate by reference as if fully set forth herein the  
22 allegations of all preceding paragraphs.

23 197. Article 1, Section 8 of the Nevada Constitution requires the State of Nevada and  
24 by extension, the Governor, to ensure that all indigent criminal defendants receive meaningful  
25 legal representation.<sup>35</sup>

26 198. Defendants are failing to ensure that Plaintiffs and all Class Members—indigent  
27 defendants in rural counties facing the possibility of incarceration—receive meaningful legal  
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<sup>35</sup> Plaintiffs assert that Nevada's right to counsel guarantees a higher level of representation than the Sixth Amendment requires, notwithstanding *McKague v. Whitley*, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996).

1 representation at all critical stages of the case, in violation of Article I, Section 8 of the Nevada  
2 Constitution.

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4 **Third Claim for Relief**  
5 **Violation of the Fourteenth Amendment to the United States Constitution (Due Process)**  
6 **and 42 U.S.C. Section 1983**  
7 **(All Plaintiffs and the Class Against All Defendants)**

8 199. Plaintiffs allege and incorporate by reference as if fully set forth herein the  
9 allegations of all preceding paragraphs.

10 200. The Due Process Clause of the Fourteenth Amendment to the United States  
11 Constitution requires Defendants to ensure that all indigent criminal defendants receive  
12 meaningful legal representation.

13 201. Defendants are failing to ensure that Plaintiffs and all Class Members—indigent  
14 defendants in rural counties facing the possibility of incarceration—receive meaningful legal  
15 representation at all critical stages of the case, in violation of the Due Process Clause of the  
16 Fourteenth Amendment to the United States Constitution.

17 202. Plaintiffs bring this claim under 42 U.S.C. § 1983, which provides for suit against  
18 the government for constitutional violations.

19 **Fourth Claim for Relief**  
20 **Violation of Article 1, Section 8, of the Nevada Constitution (Due Process)**  
21 **(All Plaintiffs and the Class Against All Defendants)**

22 203. Plaintiffs allege and incorporate by reference as if fully set forth herein the  
23 allegations of all preceding paragraphs.

24 204. Under Article 1, Section 8, of the Nevada Constitution, the State of Nevada and,  
25 by extension, the Governor are required to ensure that all indigent criminal defendants receive  
26 meaningful legal representation at all critical stages of the case.

27 205. Defendants are failing to ensure that Plaintiffs and all Class Members—indigent  
28 defendants in rural counties facing the possibility of incarceration—receive meaningful legal  
representation at all critical stages of the case, in violation of Article 1, Section 8, of the Nevada  
Constitution.

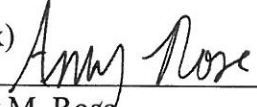
1 **RELIEF REQUESTED**

2 WHEREFORE, Plaintiffs respectfully request that this Court:

- 3 A) Certify this case as a class action pursuant to Nevada Rule of Civil Procedure 23;
- 4 B) Declare that the State of Nevada and the Governor are constitutionally obligated to  
5 provide meaningful representation to indigent criminal defendants;
- 6 C) Declare that the constitutional rights of Nevada's indigent criminal defendants in  
7 the rural counties are being violated by Defendants on an ongoing basis, and  
8 provide a deadline for Defendants to move this Court for approval of specific  
9 modifications to the structure and operation of the State's indigent-defense system;
- 10 D) Enjoin Defendants from continuing to violate the rights of indigent defendants by  
11 providing constitutionally deficient representation;
- 12 E) Enter an injunction requiring Defendants to propose, for this Court's approval and  
13 monitoring, a plan to develop and implement a statewide system of public defense  
14 that is consistent with the U.S. Constitution and the Constitution and laws of the  
15 State of Nevada;
- 16 F) Enter an injunction that requires Defendants to propose, for this Court's approval  
17 and monitoring, uniform workload, performance, and training standards for  
18 attorneys representing indigent criminal defendants in the State of Nevada in order  
19 to ensure accountability and to monitor effectiveness;
- 20 G) Enter an injunction barring the use of flat-fee contracts in the delivery of indigent  
21 defense services in the State of Nevada;
- 22 H) Award Plaintiffs and the Class reasonable attorneys' fees and costs incurred during  
23 the course of this litigation pursuant to 42 U.S.C. § 1988, and Nev. Rev. Stat.  
24 § 18.010(2); and
- 25 I) Grant any other relief the Court deems necessary and proper to protect Plaintiffs  
26 and the Class from further harm.
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Dated: November \_\_, 2017

AMY M. ROSE (SBN: 12081)  
AMERICAN CIVIL LIBERTIES UNION OF  
NEVADA  
rose@aclunv.org  
601 S. Rancho Drive, Suite B11  
Las Vegas, NV 89106  
(702) 366-1536  
(702) 366-1331 (fax)  
By:   
Amy M. Rose

FRANNY FORSMAN (SBN: 14)  
LAW OFFICE OF FRANNY FORSMAN,  
PLLC  
f.forsman@cox.net  
1509 Becke Circle  
Las Vegas, NV 89104  
(702) 501-8728

MARGARET L. CARTER (*pro hac vice  
application forthcoming*)  
O'MELVENY & MYERS LLP  
mcarter@omm.com  
400 South Hope Street, 18th Floor  
Los Angeles, CA 90071  
(213) 430-7592  
(213) 430-6407 (fax)

KATHERINE A. BETCHER (*pro hac vice  
application forthcoming*)  
O'MELVENY & MYERS LLP  
kbetcher@omm.com  
Two Embarcadero Center, 28th Floor  
San Francisco, CA 94111  
(415) 984-8965  
(415) 984-8701 (fax)

EMMA ANDERSSON (*pro hac vice  
application pending*)  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
eandersson@aclu.org  
125 Broad Street  
New York, NY 10004  
(212) 284-7365  
(212) 549-2654 (fax)