THE RIGHT TO COUNSEL IN SOUTH DAKOTA

Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal Cases

SEPTEMBER 2024

6AC SIXTH AMENDMENT CENTER
ENSURING FAIRNESS & EQUAL ACCESS TO JUSTICE

The Right to Counsel in South Dakota: Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal Cases

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The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, www.6AC.org.

The Sixth Amendment Center acknowledges with gratitude those who contributed to the work of conducting the evaluation and writing this report: Nancy Bennett, Gabrielle Caron, David Carroll, Lacey Coppage, Aditi Goel, Marquita Johnson, Jon Mosher, and Jiacheng Yu.

Prepared for

The Office of the State Court Administrator of the South Dakota Unified Judicial System requested this evaluation.

This report solely reflects the opinions of the authors and does not necessarily reflect the views of the Office of the State Court Administrator of the South Dakota Unified Judicial System.

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Executive Summary

In *Gideon v. Wainwright,* the U.S. Supreme Court declared it an "obvious truth" that anyone accused of a crime who cannot afford the cost of a lawyer "cannot be assured a fair trial unless counsel is provided for him." Nearly a century before – even before statehood – the right to counsel in South Dakota was already taking shape.

The 1868 Dakota Territory laws required courts to assign counsel to criminal defendants who appeared without counsel at arraignment. This right was clarified in 1874 to require courts to assign an attorney to a defendant who was "unable to employ counsel." And in 1879, Dakota Territory counties were directed to pay "reasonable and just compensation" to appointed counsel for their services.

Current U.S. Supreme Court caselaw states that the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment. However, in South Dakota, the state fully delegates to county governments the responsibility to fund, administer, and deliver effective indigent defense services. This means that no matter how geographically large or small, or how densely populated or rural, or how wealthy or poor a county is, state law requires each of its 66 county governments to fulfill the entire provision of the effective right to counsel.

To address the right to counsel issues that stem from a decentralized, locally funded indigent defense system with no state oversight, in January 2023, South Dakota Supreme Court Chief Justice, Steven R. Jensen, called for the creation of an indigent defense study group. The Legislature and Governor Kristi Noem responded, signing a bill creating the Indigent Legal Services Task Force ("Task Force"). The Task Force issued a report in October 2023, finding that the state's "county-based system provides no mechanism for oversight and training for defenders statewide," leading "the counties and the judicial system to question if the current system is meeting the needs of South Dakota."

The Task Force recommended that the state (1) create an independent statewide indigent defense commission and state public defender office; and (2) conduct an independent statewide evaluation of trial-level indigent defense services.

In March 2024, South Dakota created the first-ever state indigent defense commission, the Commission on Indigent Legal Services (CILS). CILS oversees all indigent representation services statewide "to ensure the effective assistance of counsel where there is a right to counsel under state or federal law."

Although South Dakota state leaders in all three branches of government deserve acclaim for taking this monumental step, the state retained the Sixth Amendment Center (6AC) to conduct an independent statewide evaluation of trial-level indigent defense services to provide CILS and policymakers with recommendations on how best to provide effective right to counsel services in the state's trial courts.

This report is the product of a nine-month-long statewide evaluation of trial-level indigent defense services in adult criminal cases, from October 2023 – June 2024.

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This is not the first evaluation of indigent defense services in South Dakota. In 1976, the Conference of Presiding Court Judges of South Dakota requested a statewide evaluation of indigent defense services. Funded by the U.S. Department of Justice, the National Center for Defense Management conducted the evaluation and issued a 153-page report in January 1977 titled "Systems Development Study of Indigent Defense Delivery Systems for the State of South Dakota."

Observations made by 6AC evaluators are similar to observations made by the 1977 report evaluators nearly 50 years ago, specifically on the economic pressures faced by county governments and private attorneys, and the quality of right to counsel services. As the 1977 report stated: "While it is not impossible, it is difficult to be an effective yet aggressive defender lawyer in South Dakota." Based on our evaluation, we believe this remains an apt description of indigent defense in South Dakota.

Because the state did not make changes to the *structure* of the indigent defense *system* in response to the 1977 report, the right to counsel issues that existed nearly 50 years ago have been passed down, institutionalized, and inherited to present day. No single person today can, or should, be blamed for the right to counsel deficiencies detailed in this report – they predate any of today's system actors. South Dakota's right to counsel deficiencies are structural (not individual) and can only be remedied at the state-level, by the state.

Chapters 1 – 3 explain the right to counsel in South Dakota and include the following findings:

FINDING 1: South Dakota delegates its entire constitutional right to counsel obligation to county governments. This results in counties funding indigent defense systems at levels they can afford instead of at levels that meet the counties' indigent defense needs.

FINDING 2: The judiciary's group advisement of rights may not ensure that defendants understand their constitutional right to counsel.

FINDING 3: The judiciary's advisement of rights on recoupment is inconsistent from judge to judge and can chill the right to counsel.

FINDING 4: Judicial and prosecution practices at the initial appearance can result in the actual denial of counsel.

FINDING 5: The state has no indigency determination standards. This can result in the unequal treatment of defendants in the state.

Chapters 4 – 8 detail how systemic judicial and political involvement, along with government recoupment practices, impact the independence of the indigent defense system, and thus, the adversarial justice system in South Dakota, and include the following findings:

FINDING 6: The state has no qualification, training, and supervision standards for appointed attorneys.

FINDING 7: The state has no workload standards, resulting in appointed attorneys carrying workloads that exceed national standards.

FINDING 8: The state lacks compensation standards, creating a lack of fiscal oversight, financial conflicts of interests, and insufficient resources on appointed cases.

FINDING 9: The state's recoupment practice can interfere with the appointed attorneys constitutional duty to exercise independent judgment about how to conduct the defense.

FINDING 10: South Dakota's current indigent defense system may impair the ability of appointed attorneys to be adversarial.

Our Recommendations in Chapter 9 offer changes to the structure of the indigent defense system so that every indigent person accused of a crime in South Dakota is afforded their right to counsel under the Sixth and Fourteenth Amendments, today and in the future:

RECOMMENDATION 1: CILS should promulgate standards necessary to ensure the effective assistance of counsel.

RECOMMENDATION 2: CILS should be funded through state annual appropriations at the level necessary to enforce standards statewide.

RECOMMENDATION 3: South Dakota should consider ending its recoupment practice.

RECOMMENDATION 4: South Dakota should prevent prosecutors from speaking with unrepresented defendants who face the possibility of incarceration and have not waived the right to counsel.

RECOMMENDATION 5: UJS should adopt a uniform statewide advisement of rights.

Preface

In January 2023, South Dakota Supreme Court Chief Justice, Steven R. Jensen, called for the creation of an indigent defense study group during his "State of the Judiciary Address to the 98th Session of the South Dakota Legislature." At that time, South Dakota was one of only two states that (1) required local governments to provide and fund all right to counsel services required under the Sixth Amendment; and (2) had no state oversight of those local systems.[1] The Legislature responded, and Governor Kristi Noem signed a bill creating the Indigent Legal Services Task Force ("Task Force") composed of state legislators, judges, prosecutors, county commissioners, public defenders, private attorneys, and the Dean of the University of South Dakota Knudson School of Law.[2]

In the ensuing months, the Task Force held public meetings, convened statewide listening sessions, and collected data to understand indigent defense in South Dakota. In October 2023, the Task Force issued a report finding that the state's "county-based system provides no mechanism for oversight and training for defenders statewide," leading "the counties and the judicial system to question if the current system is meeting the needs of South Dakota."[3] The Task Force recommended that the state (1) create an independent statewide indigent defense commission and state public defender office; and (2) conduct an independent statewide evaluation of trial-level indigent defense services.

Commission on Indigent Legal Services (CILS). To fulfill the first of the Task Force's recommendations, the governor signed a bill in March 2024 creating the first-ever state indigent defense commission, the Commission on Indigent Legal Services (CILS).[4] CILS is a nine-member commission, with members appointed by all three branches of government, to oversee all indigent representation services statewide "to ensure the effective assistance of counsel where there is a right to counsel under state or federal law."[5]

CILS has the statutory authority to: establish, monitor, evaluate, and enforce specified standards; set hourly compensation and travel reimbursement rates; exercise fiscal oversight; collect data from state and local systems; explore funding mechanisms; and advocate for resources and policies that are necessary to ensure effective statewide indigent representation services. CILS must also appoint a chief defender to head the statutorily created Office of Indigent Legal Services, a state agency responsible for administering the commission's duties, and providing statewide indigent representation services in direct appeals in criminal cases, habeas corpus appeals, and abuse or neglect of a child appeals.[6] Finally, South Dakota appropriated $1.4 million for CILS operations, plus a one-time funding of $3 million to CILS to reimburse the cost of indigent defense services to counties, making South Dakota the last state in the nation to contribute state government funds to the constitutional right to counsel.

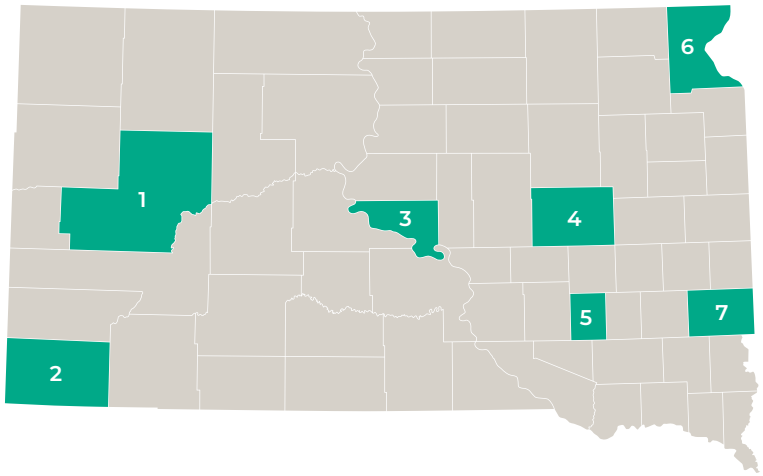
Statewide evaluation of indigent defense services. This report is the independent statewide evaluation of trial-level indigent defense services recommended by the legislative Task Force.

The Sixth Amendment Center (6AC) is a 501(c)(3) non-profit, non-partisan organization seeking to ensure that no person accused of a crime goes to jail without first having the aid of a lawyer with the time, ability, and resources to present an effective defense as required under the United States Constitution. 6AC does so by measuring indigent defense systems against Sixth Amendment caselaw and national indigent defense standards, and then working with policymakers to improve any identified deficiencies.

6AC conducted this evaluation from October 2023 to June 2024.[7] The State Court Administrator's Office of the South Dakota Unified Judicial System selected seven counties (one county in each judicial circuit) as a representative sample of the state's population size, geographic location, and methods of providing indigent defense services: Beadle, Davison, Fall River, Hughes, Meade, Minnehaha, and Roberts.

Recognition. South Dakota state leaders in all three branches of government deserve acclaim for taking these monumental steps forward in ensuring effective representation. However, these are just the first steps. It will take time for CILS to become fully operational, and now the question is: how can CILS use the tools it has been given to ensure the constitutional right to effective counsel services in all the state's trial courts? This evaluation seeks to provide CILS and policymakers with recommendations to best answer that question.

1 MEADE
2 FALL RIVER
3 HUGHES
4 BEADLE
5 DAVISON
6 ROBERTS
7 MINNEHAHA



Evaluation Methodology & Assessment Criteria

Evaluation methodology. 6AC evaluates indigent defense systems through four basic components:

Legal research & analysis. Every state has its own substantive and procedural law through its constitution, statutes, rules, regulations, and caselaw. 6AC independently researches the relevant law of the jurisdiction and analyzes its interactions within the South Dakota criminal justice system.

Data collection & analysis. The Unified Judicial System, South Dakota State Bar, South Dakota Counties (South Dakota Association of County Commissioners and South Dakota Association of County Officials), county government officials, and many other individuals provided information critical to this evaluation. 6AC independently researched the relevant law of the jurisdiction and analyzed its interactions within the South Dakota criminal justice system.

Court observations. 6AC observed over 230 proceedings in front of 13 judges over 15 days during the evaluation period. Proceedings included initial appearances, arraignments, pretrial conferences, guilty pleas, dispositional conferences, and status hearings.

Interviews. 6AC conducted interviews with a broad cross-section of stakeholders throughout the state, including 141 individual judges, clerk magistrates, sheriffs, prosecutors, county government officials, public defenders, private attorneys appointed to represent indigent people, and community members.

Assessment criteria. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on May 14, 1984: *United States v. Cronic* and *Strickland v. Washington*.[a] *Strickland* is applied after a criminal disposition is final to determine whether the lawyer provided ineffective assistance of counsel on an individual case. *Cronic* is applied at the outset of a criminal case and explains that, if certain factors in an indigent defense *system* are absent, then a court should presume that ineffective assistance of counsel will occur. These factors include the early appointment of qualified and trained attorneys under independent supervision who have the time and resources to provide an effective defense.

The U.S. Supreme Court explains in *Cronic* that a deficient indigent defense system can cause any lawyer – even the best lawyer – to perform in a non-adversarial way. This is called the systemic denial of counsel. Under *Cronic*, while a fair fight does not require one-for-one parity between the prosecution and the defense, the adversarial process requires states to ensure that both functions have the resources they need at the level their respective roles demand. As the Court notes: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[b] For nearly a decade, the U.S. Department of Justice has applied *Cronic* in various class action lawsuits alleging the systemic denial of counsel.[c]

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a. United States v. Cronic, 466 U.S. 668 (1984); Strickland v. Washington, 466 U.S. 648 (1984).

b. United States v. Cronic, 466 U.S. 648, 657 (1984) (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

c. *See e.g.,* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, Tucker v. Idaho, No. 43922-2016 (Idaho, filed May 11, 2016), https://www.justice.gov/crt/file/851311/download; Statement of Interest of the United States, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. filed Mar. 13, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf; Statement of Interest of the United States, Hurrell-Harring v. New York, No. 8866-07 (N.Y. Sup. Ct. filed Sept. 1, 2014), https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0010.pdf; Statement of Interest of the United States, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013), http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf; Brief for the United States as Amicus Curiae in Support of Appellants, Kuren v. Luzerne County, Nos. 57 MAP 2015 (Pa., filed Sept. 10, 2015), https://www.justice.gov/opa/file/769806/download.

CHAPTER 1

South Dakota's Indigent Defense System

The right to counsel. South Dakota provided counsel to the indigent accused nearly a century before the landmark U.S. Supreme Court decision in *Gideon v. Wainwright.* As early as 1868, the right to counsel laws that are largely in place today began taking shape. The 1868 Dakota Territory laws required courts to assign counsel to criminal defendants who appeared without counsel at arraignment.[8] In 1874, this right was expanded to require courts to inform unrepresented defendants of their right to counsel before arraignment to assign an attorney to a defendant who was "unable to employ counsel."[9] An amendment in 1879 required courts to "allow and direct" counties to pay "reasonable and just compensation" to appointed counsel for their services.[10] With statehood in 1889, South Dakota enshrined the right to counsel in its constitution which states "[i]n all criminal prosecutions the accused shall have the right to defend in person and by counsel."[11]

This language reflects the Sixth Amendment to the U.S. Constitution.[12] In drafting the Sixth Amendment, the framers constitutionalized existing laws and tradition in the American colonies that appointed attorneys to the criminal accused.[13] As the U.S. Supreme Court noted, "the value of state-appointed counsel was not unappreciated by the Founders[.]"[14] In 1953, the South Dakota Supreme Court also acknowledged America's lengthy history of ensuring the right to counsel:[15]

> The right to counsel is one of historical importance typically American and persistently adopted by the framers of the constitutions of the original colonies to correct a recognized deficiency in the common law of England as it then existed. . . . The dignity attributed to the person in our form of government, that makes man dominant over the state. . . requires that each person charged with a law violation not be denied the assistance necessary to properly present his side of the case. . . . Only thus can this right, written into our constitutions, be made a reality. Any other system would deny justice in a court of law and relegate judicial determination to mob rule. . .

A decade later, the U.S. Supreme Court in *Gideon v. Wainwright* declared it an "obvious truth" that anyone accused of a crime who cannot afford the cost of a lawyer "cannot be assured a fair trial unless counsel is provided for him,"[16] elaborating in a later case that "[of] all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[17] The U.S. Supreme Court held in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment.[18]

Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend them in all federal and state courts if that person faces the potential loss of liberty and is unable to afford an attorney.[19] The Sixth Amendment requires the appointment of counsel to indigent defendants in felonies, jailable misdemeanors,[20] misdemeanors with suspended sentences,[21] direct appeals,[22] appeals challenging a sentence imposed following a guilty finding,[23] certain probation revocation hearings,[24] and children in delinquency proceedings.[25]

The Sixth Amendment right to counsel is so "basic to our adversary system of criminal justice" because it "constitutionalizes the right in an adversary criminal trial to make a defense as we know it."[26] Therefore, an appointed lawyer must be more than a warm body with a bar card.[27] The attorney must be effective[28] and subject the prosecution's case to "the crucible of meaningful adversarial testing."[29]

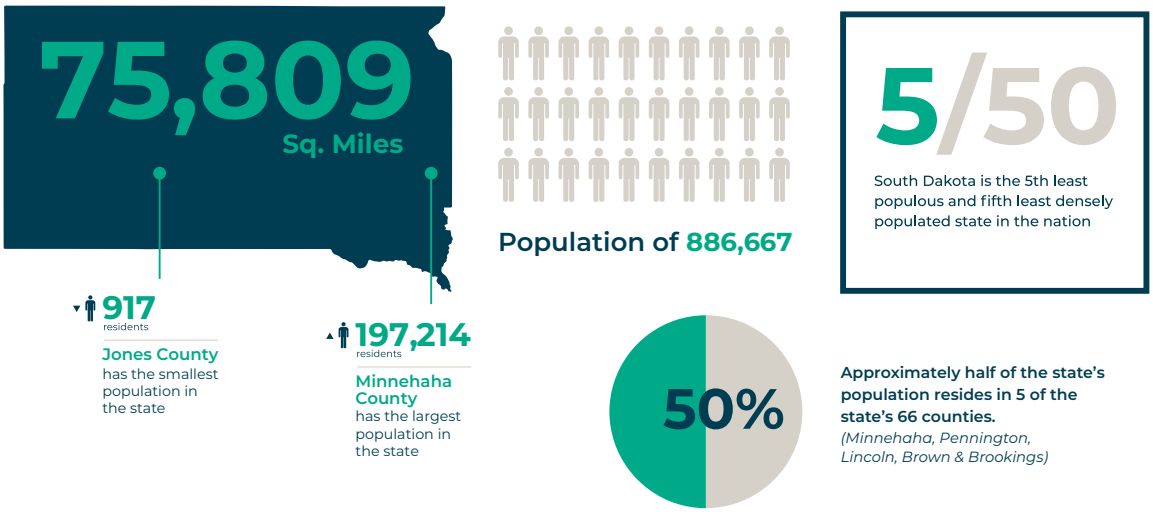
Case types requiring counsel in South Dakota. In South Dakota, counsel must be appointed to a defendant or detained person who "does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses of his representation" in any criminal investigation or criminal action,[30] and appointed counsel must represent the indigent defendant "at every stage of the proceedings."[31]

All crimes enacted by the legislature in South Dakota are either felonies or misdemeanors, and both carry possible imprisonment upon conviction.[32] A felony is punishable by state imprisonment or death,[33] and a misdemeanor is punishable by imprisonment in county jail.[34] As a result, an indigent person charged with either a misdemeanor or felony is entitled to have an attorney provided to represent them at public expense if they face a potential loss of liberty.

The U.S. Supreme Court reminds us that "[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires," but they cannot provide less.[35] South Dakota requires counsel be appointed to indigent people in probation and parole revocation cases;[36] criminal contempt proceedings;[37] habeas corpus writs "if the judge finds that such appointment is necessary to ensure a full, fair, and impartial proceeding;"[38] for children, parents, guardians, and custodians in delinquency, dependency, abuse and neglect, and child in need of protection proceedings;[39] and civil commitment for mental illness, developmental disability, or drug or alcohol abuse.[40]

South Dakota delegates its constitutional obligation to counties. *Gideon v. Wainwright* holds that providing the Sixth Amendment right to counsel is a state – not local – government obligation under the due process clause of the Fourteenth Amendment.[41] Because the "responsibility to provide defense representation rests with the state," national standards unequivocally declare "there should be adequate state funding and oversight of Public Defense Providers."[42] When a state chooses to delegate its right to counsel responsibilities to local governments, the state must guarantee that those local governments can, and do, provide effective representation.[43]

State Demographics



South Dakota: 2020 Census, United States Census Bureau, available at https://www.census.gov/library/stories/state-by-state/-south-dakota-population-change-between-census-decade.html.

In South Dakota, the state fully delegates to county governments the responsibility to fund, administer, and deliver effective indigent defense services. This means that no matter how geographically large or small, or how densely populated or rural, or how wealthy or poor a county is, state law requires each of its 66 county governments to fulfill the entire provision of the effective right to counsel.

The state's delegation of its constitutional duty to the counties, coupled with the absence of state oversight, marks the first finding from our evaluation.

FINDING 1: South Dakota delegates its entire constitutional right to counsel obligation to county governments. This results in counties funding indigent defense systems at levels they can afford instead of at levels that meet the counties' indigent defense needs.

State funding. South Dakota delegates to its counties all responsibility at the outset for funding indigent defense services at the trial level. The state reimburses county governments a portion of indigent defense costs through two state funds established by the Office of the State Treasurer: (1) the court-appointed attorney and public defender payment fund; and (2) the abused and neglected child defense fund.[44] The state does not appropriate money to either fund. Rather, each fund collects a portion of a fee imposed on every person convicted of a crime or an ordinance violation. The state treasurer annually distributes all money collected in the fund to counties on a pro-rata basis based on the counties' total expenditures for indigent defense services.[45]

In state fiscal year 2018, total indigent defense costs for all case types in all counties were $18,200,248.[46] By 2022, this increased by nearly 18% to $21,465,695. Despite rising indigent defense costs, state reimbursement to the counties fell from 3.86% to 3.39% over this four-year period.

State administration. State law requires the board of county commissioners in each county to deliver indigent defense services by: (1) establishing and maintaining a public defender office; (2) arranging with the court in the county to appoint attorneys on an "equitable basis through a systematic, coordinated plan;" or (3) contracting with a licensed attorney to provide indigent defense services (or any combination of these methods).[47]

Public defender offices.[48]

If the board of county commissioners establishes a public defender office, the office must have a five-member public defender advisory committee. Advisory committee members are appointed by county commissioners and the presiding judge of the county's circuit court.[49] The advisory committee has the power to appoint and dismiss the public defender. The board of county commissioners sets the public defender's term of office and salary and may hire staff for the office, such as assistant public defenders, clerks, and investigators that the advisory committee considers necessary to carry out the public defender's duties. The county must provide facilities including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in the jail.

In counties that establish a public defender office, the public defender *shall* represent any indigent person who is:[50]

- detained by a law enforcement officer without charge or judicial process;
- arrested or charged with having committed a crime or of being a juvenile delinquent;
- detained under a conviction of a crime, juvenile delinquency, or mental illness; or
- otherwise, an indigent person entitled to representation by law.

The public defender must continuously represent an indigent person from the "earliest time" that a private lawyer would provide representation, and through appeal and post-conviction proceedings.[51]

Court-appointed attorneys.[52]

The board of county commissioners can arrange with the court to appoint private attorneys using a systematic, coordinated plan. Such appointment is governed by the South Dakota Unified Judicial System (UJS), Court Appointed Attorney Guidelines. Court-appointed attorneys must provide representation until terminated by rule or court order. If an indigent defendant pleads guilty, representation ends after judgment; if convicted at trial, the attorney must ask the court to be appointed on the appeal.

Rural Attorney Recruitment Program[a]

In 2013, the South Dakota legislature authorized UJS to establish the Rural Attorney Recruitment Program to address the shortage of attorneys in rural areas (see Sidebar on Shortage of Indigent Defense Attorneys in South Dakota on page 9). The program provides qualifying attorneys with a financial incentive to practice law in eligible rural jurisdictions. Attorneys who practice in an eligible rural jurisdiction for five consecutive years receive a payment each year equal to 90% of the USD Law's annual tuition, as determined in 2013. The program is funded by the state, the rural jurisdiction, and the state bar. Since the program's start 10 years ago, 31 attorneys have contracted with the program, 15 of whom have completed their commitments.b

a. South Dakota: 2020 Census, UNITED STATES CENSUS BUREAU, available at https://www.census.gov/library/stories/state-by-state/south-dakota-population-change-between-census-decade.html.

State law requires that the county *shall* pay each court-appointed attorney "reasonable and just compensation" in addition to "necessary expenses and costs incident to the proceedings."[53] UJS sets the schedule for court-appointed attorney compensation that must be uniformly applied throughout the state: one fixed hourly rate with no maximum limit in all case types, and one fixed travel mileage reimbursement rate. UJS increases this hourly rate each year by the amount equal to any cost-of-living increase approved by the legislature for state employees. Below is the fee schedule for calendar years 2018 – 2024:[54]

	Attorney Fee	Travel reimbursement
2018	$94/hour	$1.00/mile
2019	$95/hour	$1.00/mile
2020	$97/hour	$1.00/mile
2021	$99/hour	$1.00/mile
2022	$101/hour	$1.00/mile
2023	$107/hour	$1.00/mile
2024	$115/hour	$1.00/mile

After the disposition of each case (unless otherwise specified in the Court Appointed Attorney Guidelines), the trial judge determines the total compensation for the services provided in the case.[55] The amount fixed by the trial judge *shall* be paid by the county.[56]

Private contract attorneys.[57]

The third alternative for the board of county commissioners is to contract with one or more private attorneys licensed in the state to provide indigent defense services. State law does not impose any requirements on the county in selecting the contract attorneys.

State oversight. Until the statutory establishment of CILS in March 2024, South Dakota had no state entity responsible for overseeing county indigent defense systems.

County funding. South Dakota's counties represent the full range of economic strength, from Campbell County's 4.0% poverty rate (one of the lowest in the nation) to Todd County's 55.5% poverty rate (one of the highest in the nation).[58] Eleven counties in the state are in "persistent poverty," maintaining a 20% or higher poverty rate every year from 1990 through 2019.[59] Yet, each county, regardless of its economy or indigent defense needs, bears the same responsibility to fund at the outset the entire provision of the right to counsel.

Property tax is a significant source of revenue for a county government, which funds various government functions, such as law enforcement, prosecution, indigent defense services, emergency services, road maintenance, sanitation, and general government operations. However, counties are restricted in their ability to raise revenue through taxes: state law restricts the rate at which the county government can tax property owners and prohibits the county government from deficit spending.[60] Revenue can be further limited in economically distressed counties, where there is usually a high demand for indigent defense services. Specifically, factors contributing to a county's economic distress – high unemployment, low wages, low property values, and high poverty rates – are often the same factors contributing to higher crime. In economically distressed counties, a larger percentage of people accused of crime will be indigent and qualify for indigent defense services.

In counties without a public defender office, the total cost of the indigent defense system equals:

- total compensation for the appointed private attorneys, plus
- total reimbursements for case-related expenses to the appointed private attorneys, such as travel, transcript expenses, subpoena expenses, filing fees, witness fees, fees charged by other agencies, photocopies, postage, investigators, and experts.

In counties with a public defender office, the total cost of the indigent defense system equals everything listed above for the appointed private attorneys plus all public defender office expenses (e.g., overhead, staff salaries, case-related expenses).

A county's total indigent defense costs may increase as the state-set hourly rate for court-appointed attorneys increases. A county's total indigent defense costs may also increase as the number of appointed cases in the county increases, which can occur for a variety of reasons such as changes in prosecution rates, population growth, or a rise in poverty. From state fiscal years 2018 – 2023, the number of appointed felony cases increased in all seven counties selected for this study, most significantly in Roberts (97.9%), Fall River (91.2%), and Meade (37.7%) counties:[61]

County	Felony	Misdemeanor	Total
Beadle	+21.6%	-7.3%	+7.8%
Davison	+35.1%	-10.6%	+9.2%
Fall River	+91.2%	+6.2%	+34.7%
Hughes	+13.8%	-24.9%	-7.6%
Meade	+37.7%	-4.3%	+16.5%
Minnehaha	+34.4%	-13.0%	+8.0%
Roberts	+97.9%	+1.9%	+60.5%

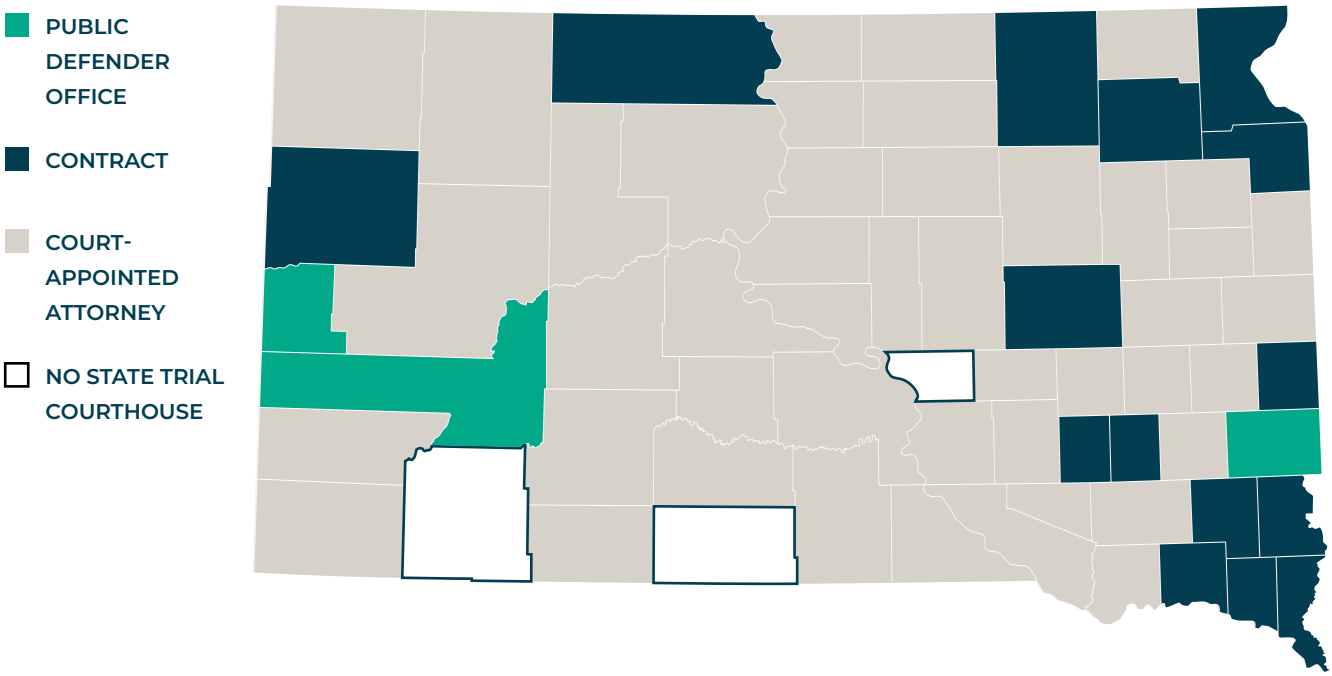
Regardless of the reason for the increase, each county must provide an effective attorney to every person in every appointed case, whether that need increases by 60.5% (Roberts County) or 34.7% (Fall River County). However, a county may not be able to generate enough revenue to keep pace with necessary indigent defense costs. For example, stakeholders in Hughes County expressed the "unpredictable and uncontrolled" indigent defense costs coupled with the property tax cap as the reason the county is "hitting its breaking point." Even though the total number of appointed cases in the county decreased by 7.6% over this six-year period, indigent defense costs increased by 27.4%.[62] Yet, the county's revenue increased by only approximately 3.6%.

In Fall River County, indigent defense costs increased 49.3% over a decade from county fiscal years 2014 – 2023, requiring the county to using its contingency fund and cash supplements to pay for services.

After experiencing consistent costs from county fiscal years 2018 – 2021, Roberts County's indigent defense expenditures increased by 35.8% in 2022, and another 58.3% in 2023. When the county's only indigent defense contract (in which the county paid a flat fee to one private attorney) abruptly terminated, the court could only appoint private attorneys on a case-by-case basis, for which the county was required to pay the state-set hourly rate.

County administration. In county fiscal year 2023, only three counties had a public defender office (Lawrence, Minnehaha, and Pennington); 15 counties contracted with private attorneys; and 48 counties arranged with the court to appoint cases to private attorneys (Buffalo, Oglala Lakota, and Todd counties have an agreement with an adjacent county to provide indigent defense services, and they do so through court-appointed attorneys). To the extent that all counties need a secondary system to provide services when the primary indigent defense system has a conflict of interest, all but two counties arrange with the court to appoint cases to private attorneys.[63]

County oversight. Because the county commissioners in Lawrence, Minnehaha, and Pennington established a public defender office, those three counties are the only ones in South Dakota that have five-member public defender advisory committees. The remaining 63 counties rely on the courts or county commissioners to oversee indigent defense services, if any oversight exist.



Shortage of Indigent Defense Attorneys in South Dakota

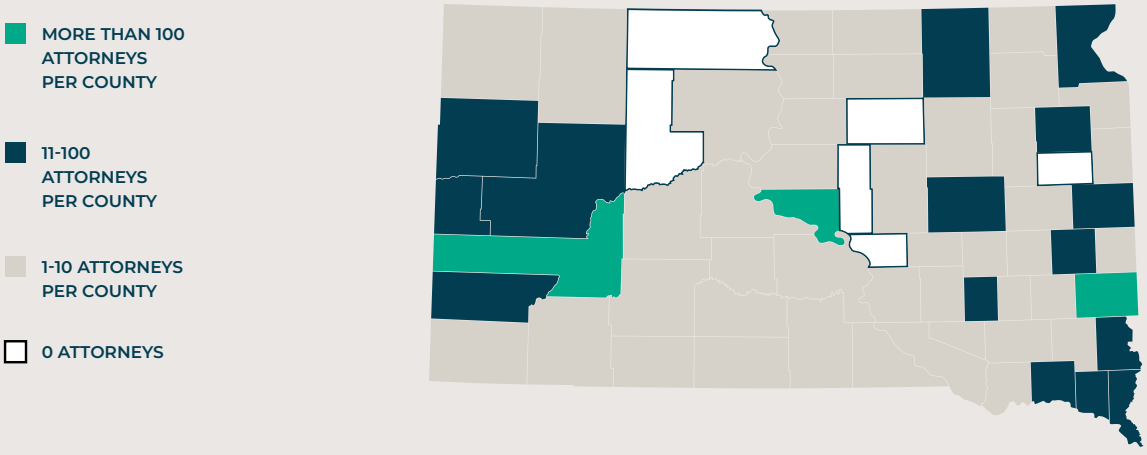
As of November 2023, South Dakota has 2,065 attorneys with active state bar licenses. This number includes individuals with limited or no capacity to represent clients, such as judges and attorneys who do not practice law.

Approximately 69% of all attorneys with active state bar licenses are in Minnehaha, Pennington, and Hughes counties. More than half of all counties have fewer than one attorney for every 1,000 residents (the national average is 3.9 attorneys for every 1,000 residents).[a] Buffalo, Corson, Faulk, Hamlin, Hyde, and Ziebach counties have no attorneys living or working in the county. The University of South Dakota Knudson School of Law is the state's only law school and generally enrolls a class size of 70-80 law students each year, approximately 75% of whom are from South Dakota.

The state does not maintain records of the number of attorneys certified to accept adult criminal trial-level case appointments. Although approximately 400 attorneys are on UJS' list of certified attorneys, this list is not continually updated, and some attorneys on the list have since retired or have become judges and cannot accept appointments.[b]

6AC obtained caseload data for every attorney appointed to a criminal case in the state from state fiscal years 2018 – 2023.[c] Our data analysis shows that the total number of attorneys (private attorneys and public defenders) that accepted appointed cases in the state decreased by 1.5%, from 411 (2018) to 405 (2023). During this period, the most attorneys accepting appointments was 423 (2019) and the least was 384 (2022).

ATTORNEY DISTRIBUTION



a. *Profile of the Legal Profession*, American Bar Ass'n (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf.

b. *Attorneys,* Certified Attorneys, Court-Appointed Defense, South Dakota Unified Judicial System, https://ujs.sd.gov/Attorneys/Certified.aspx (On November 6, 2023, 407 attorneys were on the UJS list of certified court-appointed attorneys).

c. UJS statewide data from FY 2018 through FY 2023.

CHAPTER 2

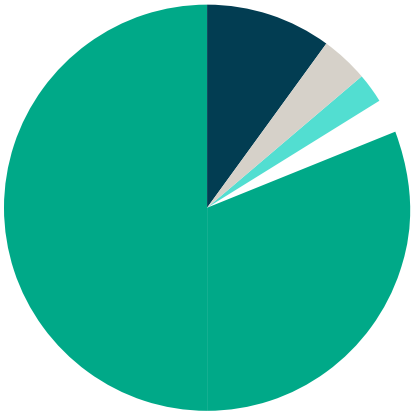
South Dakota's Criminal Justice System

South Dakota is free to enact its own criminal laws, which are enforced by local police and sheriffs, prosecuted by local attorneys, and presided over by circuit judges, magistrate judges, and magistrate clerks in trial circuit courts and magistrate courts across the state. A description of each of these components is necessary to understand the broader criminal justice system in which the various county indigent defense systems operate.

Law enforcement. Each county elects a county sheriff who serves a four-year term.[64] The sheriff "pursues all violations of the criminal laws of this state," makes arrests, files criminal complaints, executes warrants, assists in prosecutions, and oversees the county jail.[65] The county must fund the sheriff's salary, and may fund motor vehicles, uniforms, and other equipment for law enforcement purposes only. It also must reimburse various law enforcement expenses.[66] Within a county, a municipality may also have a police force that can arrest people for a state law violation, municipal ordinance violation, or "any breach of the peace."[67]

Prosecution. Each county elects a "state's attorney" to serve as the prosecutor for a four-year term.[68] The state's attorney also provides "opinions and advice" to the board of county commissioners on official matters related to the county.[69] The state's attorney must work full-time in counties with more than 50,000 people.[70] Since only three counties have population above 50,000, most state's attorneys are part-time. They may serve as a part-time state's attorney in multiple counties and practice law outside their duties as state's attorney, including accepting criminal case appointments in a different county.[71] While the state's attorney's office is funded by the county, it receives support from the Office of the South Dakota Attorney General.

STATE RACIAL & ETHNIC DEMOGRAPHICS[a]



- 80.7% WHITE
- 8.8% NATIVE AMERICAN
- 4.4% HISPANIC OR LATINO
- 2.1% ASIAN
- 2.0% BLACK

The counties with the largest Native American population (more than half of the county population) are Bennett, Buffalo, Corson, Dewey, Jackson, Mellette, Oglala Lakota, Todd, and Ziebach. At 10.8%, Beadle County has the highest Asian alone population of any other county, followed by 2.7% in Brookings County. Minnehaha County has the highest Black alone population at 5.8%, followed by 1.9% in Brookings County.

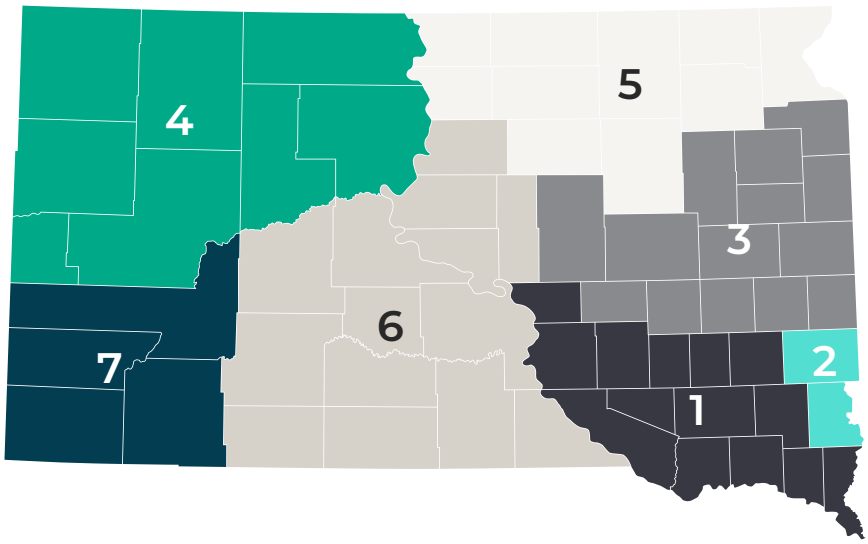
South Dakota: 2020 Census, United States Census Bureau, available at https://www.census.gov/library/stories/state-by-state/south-dakota-population-change-between-census-decade.html.

The Office of the South Dakota Attorney General receives funding from the state and federal governments. The office has a division of 13 full-time attorneys exclusively dedicated to assisting state's attorneys in local criminal prosecutions (usually homicide and serious felony cases), either by prosecuting the case or assisting the state's attorney in the prosecution. The office has access to resources that local state's attorneys do not have, such as an accredited forensic lab. During state fiscal year 2023, this division assisted in 13 homicide and 411 serious felony prosecutions across the state.

Criminal filings in the state.[72] Over a six-year period from 2018 – 2023, 29.8% of all charges filed in the state were felonies and 62.2% were misdemeanors.[73] Of the felony charges, 72.8% were class 5 and 6 felonies, with possession of a controlled substance and unauthorized ingestion of a controlled substance being the most filed felony charges. The most filed misdemeanor charges were first offense driving under the influence and use/possession of drug paraphernalia.

	Percentage of Total Charges Filed (FY 2018-2023)
Felony	**29.8%**
Class A, B, C	0.27%
Class 1, 2, 3, 4	7.86%
Class 5, 6	21.7%
Misdemeanor	**62.2%**
Class 1	44.6%
Class 2	17.6%
Municipal Ordinance	**0.06%**
Petty Offense	**0.72%**
Other[74]	**7.14%**

Courts. South Dakota has a unified judicial system comprised of a state supreme court, circuit courts of general jurisdiction, and magistrate courts of limited jurisdiction.[75] The state must pay the cost of the judicial system.[76] Trial-level cases are heard in circuit courts and magistrate courts across seven judicial circuits.[77]



Circuit courts have original jurisdiction in felony and juvenile delinquency cases,[78] and appeals from all magistrate court decisions.[79] State law prescribes the number of judges in each judicial circuit. Voters elect a total of 44 circuit judges in the circuit they represent to serve an eight-year term.[80] The Chief Justice of the South Dakota Supreme Court appoints one presiding judge for each judicial circuit to administer court operations. For their judicial circuit, each presiding judge: appoints magistrate judges and non-law-trained clerk magistrates; creates a calendar for judges to appear in the courts; creates a list of offenses for which magistrates can accept written appearances, trial waivers, and guilty pleas; and creates a bail and fine schedule.[81]

The magistrate court's jurisdiction depends on whether a magistrate judge or clerk magistrate is presiding. A magistrate judge can preside over misdemeanor cases and the initial appearances for all criminal cases, appoint counsel, set bail, accept pleas, and impose a punishment of up to one year in jail.[82] State law prescribes the number of magistrate judges in each judicial circuit, totaling 17 magistrate judges.[83] While a magistrate judge must be an attorney licensed in South Dakota, a clerk magistrate is not law-trained, but must have a high school diploma or equivalent.[84] Nevertheless, a clerk magistrate has the authority to issue warrants, set bond, conduct the initial appearance of In custody defendants, determine indigency, appoint counsel, accept pleas in class 2 misdemeanors, and impose a punishment of up to 30 days in jail.[85]

Each county has one courthouse, except Buffalo, Oglala Lakota, and Todd counties.[86] Given the rural nature and large geographic span of most counties, many courthouses in the state do not have a judge presiding over cases every day of the week, and judges spend considerable time traveling from courthouse to courthouse, and county to county, to serve the needs of their respective judicial circuit.[87] For example, Fall River County (seventh judicial circuit) has no full-time judge. Generally, the county's magistrate court is in session once a week, and the circuit court is in session twice each month. In the sixth judicial circuit, no county has a courthouse with a judge presiding over cases every day because four circuit judges and one magistrate judge must cover 13 courthouse locations in 14 counties.

The total number of cases varies among the judicial circuits, with the second and seventh judicial circuits handling 62.4% of appointed cases statewide for fiscal years 2018 – 2023.[88]

Judicial Circuit	% Appointed Cases	County in the Circuit with Most Appointed Cases
First	9.3%	Davison
Second	40.4%	Minnehaha
Third	9.5%	Codington
Fourth	6.0%	Lawrence
Fifth	7.4%	Brown
Sixth	5.4%	Hughes
Seventh	22.0%	Pennington

State, tribal & federal government jurisdictions. South Dakota is home to nine federally recognized tribes and nine federally recognized reservations that encompass approximately 12% of the state's land area.[89] In some parts of the state, the distribution of tribal and non-tribal land looks like a checkerboard, as reservation land covers none, some, or all parts of various counties across the state. Thus, it can be challenging to distinguish the boundaries that separate state from reservation from federal land.

The interplay among state, federal, and tribal government jurisdiction as it relates to criminal law is complex, continually subject to litigation, and ever-evolving. Determining which government is authorized to prosecute crimes depends on several factors, including where the crime occurred, the type and severity of the crime, and whether the victim and/or offender is "Indian" as defined under federal law. Generally, federal and tribal governments have criminal law jurisdiction over Indian Country,[90] and state government has criminal jurisdiction over land that is not Indian Country.[91] Importantly, while the Sixth Amendment right to counsel applies in state and federal courts, it does not apply in tribal courts.[92]

CHAPTER 3

Providing Counsel at Critical Stages

In South Dakota, counsel must be appointed to a defendant or detained person "at every stage of the proceedings."[93]

Right to counsel at critical stages. It is "[m]ost obvious," the U.S. Supreme Court said in *Cronic*, that "a trial is unfair if the accused is denied counsel at a critical stage" of a criminal case where there is a potential loss of liberty.[94] All felonies and misdemeanors in South Dakota are punishable by imprisonment, so every person charged with any of these crimes who cannot afford to hire their own attorney is entitled to have an attorney provided to represent them at public expense if they face a potential loss of liberty.[95]

In 2008, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when "formal judicial proceedings have begun."[96] For a person who is arrested, the beginning of formal judicial proceedings is at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,"[97] without regard to whether a prosecutor is aware of the arrest.[98] For all defendants (both those who are arrested and those who are not), the commencement of prosecution signals the beginning of formal judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[99]

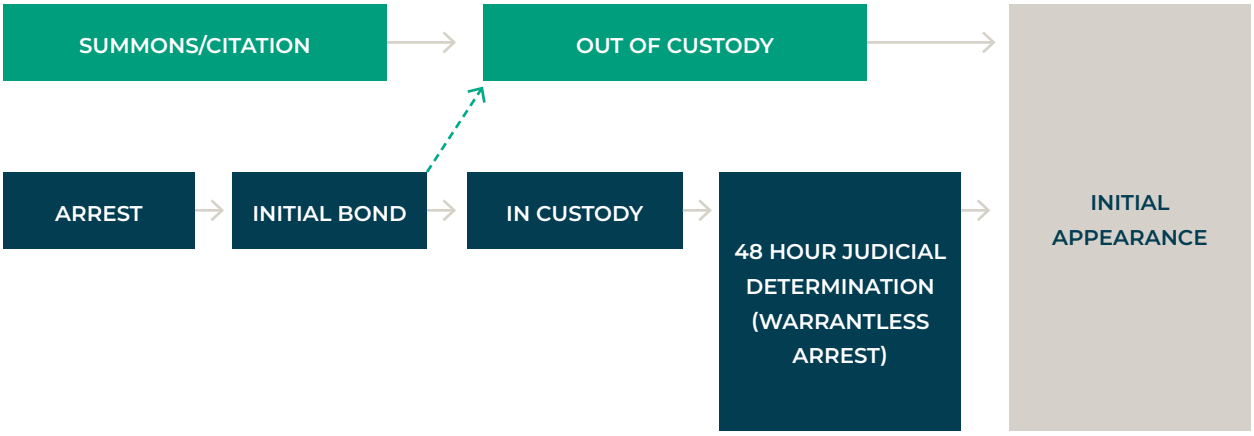
The Court in *Rothgery* carefully explained that "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings . . . ."[100] In other words, the Sixth Amendment requires that no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel. Examples of critical stages include arraignments,[101] plea negotiations,[102] and sentencing hearings.[103]

An indigent defendant who is deprived of counsel at any critical stage is so likely to suffer prejudice that "no amount of showing of want of prejudice would cure it."[104] The U.S. Supreme Court calls this the "actual denial" of the Sixth Amendment right to counsel.

Initial appearance is a critical stage in South Dakota. In South Dakota, initial appearance on the complaint ("initial appearance") is the moment that the right to counsel attaches under *Rothgery*, and it may contain critical stages such as arraignment, plea negotiation, guilty plea, and sentencing. As a result, an attorney is required at initial appearance.

This chapter details the general process of a criminal case that an adult enters and proceeds through in South Dakota, focusing on the early stages of arrest, citation or summons to initial appearance before a committing magistrate (a circuit judge, magistrate judge, or clerk magistrate).[105]

THE PATH TO INITIAL APPEARANCE



Arrest, citation or summons. A person in South Dakota can be arrested for any felony or misdemeanor, with or without a warrant.[106] In some misdemeanor traffic and motor vehicle offenses, an officer can issue a citation with a date to appear in court instead of making an arrest.[107] A circuit or magistrate judge can issue a summons to appear in court instead of a warrant for arrest, when requested by the prosecuting attorney.[108]

Stakeholders report that most misdemeanor and felony cases begin with an arrest.[109] When a person is arrested, a law enforcement officer transports them to a county jail to be booked and processed. There are 24 county jails and one city jail that serve all 66 counties (only five are located west of the Missouri River). This means that depending on the county, a person arrested may be transported to and detained in a county jail "hundreds of miles away" from their families, their court-appointed attorneys, and the courthouse they must appear in for the entirety of their criminal case.

Probable cause determination & appearing without unnecessary delay. Once a person is arrested, the clock starts ticking. The state must adhere to both constitutional and statutory deadlines to determine probable cause and hold initial appearance:

- A judicial probable cause determination must be made within 48 clock hours of a person's warrantless arrest;[110] and
- A law enforcement officer *shall* take the arrested person to the nearest available committing magistrate "without unnecessary delay," [111] at which point a complaint *shall* be filed and bail *shall* be set.[112]

This first appearance before the committing magistrate is a court proceeding called an initial appearance. In some courts, the process from arrest to initial appearance occurs within less than 48 hours. In other courts, initial appearance can take place nearly a week after arrest for In custody defendants and longer for out-of-custody defendants.

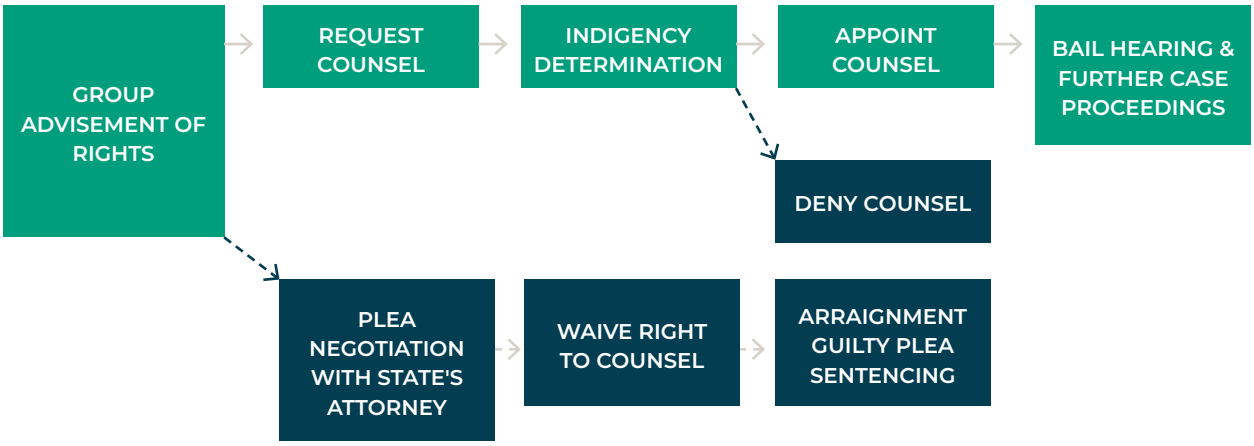
Regardless of how long it takes for an arrested person to be brought before a committing magistrate, a judicial determination of probable cause must be made within 48 clock hours of a person's warrantless

arrest.[113] The probable cause determination may be made at the initial appearance if it is held within 48 hours of arrest. If an arrested person does not appear before a committing magistrate within 48 clock hours of arrest, then typically, a law enforcement officer or member of jail staff provides an affidavit in support of probable cause to the committing magistrate for the judicial determination of probable cause.[114]

Initial bond setting before initial appearance. In each judicial circuit, the presiding judge establishes a fine and bond schedule that authorizes clerk magistrates or "other designated persons" to set bond or allow personal recognizance on an arrested person.[115] For example, the second judicial circuit has its own bond schedule that authorizes law enforcement officers to set bond in class 1 and class 2 misdemeanors,[116] whereas the third judicial circuit requires clerk magistrates to call a judge to set bond in all felonies and certain class 1 misdemeanor offenses but allows clerk magistrates to set personal recognizance bonds in all other offenses.[117]

If an arrested person is released before the next available initial appearance (because they posted bond or were given a personal recognizance bond), they are given an initial appearance court date that is scheduled several days to weeks out. Otherwise, the arrested person remains In custody until the next available initial appearance date in court, which may be days later.

INITIAL APPEARANCE



Advising a person of their right to counsel. At initial appearance, a person has an opportunity to request counsel. However, to do so, they must first be advised of their right to counsel.[118] Broadly, the magistrate judge or clerk magistrate must perform the following duties at initial appearance:

- inform the defendant of the constitutional and statutory rights to which they are entitled (including the right to appointed counsel if indigent), allow the defendant to request appointed counsel, and appoint counsel;
- notify the defendant of the charge in the complaint against them, on which the defendant may enter a plea (except on a felony charge[119]); and
- set conditions of release and set or reconsider previously set bail for bailable offenses.

Despite giving the defendant the opportunity to request an attorney, in most magistrate courts no attorney is present and available to accept court appointments at initial appearance.

Counsel at Initial Appearance

At least four counties in South Dakota, each with a different indigent defense system, provide counsel at some initial appearances. In **Minnehaha County**, attorneys from its two public defender offices – the Minnehaha County Public Defender's Office and the Office of the Public Advocate – provide representation to In custody indigent defendants at initial appearance. Each day, the court sends a docket of these initial appearances to both offices. Both offices check for conflicts of interest for every defendant. Once at the courthouse, legal office assistants or paralegals from each office help defendants fill out the application for a court-appointed attorney and interview them for information relevant to their bail hearing. The state's attorney provides the police report on the case to the public defender if appointed, and the public defender makes a bail argument on behalf of the defendant, including bond and conditions of release. Other counties, such as **Pennington** (a public defender office), **Fall River** (court-appointed attorneys) and **Butte** (private contract attorneys), provide counsel before or at initial appearance to represent indigent people accused of crimes.

Group advisement of rights. South Dakota does not have a uniform, standardized advisement of rights that all judges must provide to defendants. All judges interviewed and observed announced a colloquy of rights to the defendants as a group (In custody and out-of-custody) at the start of initial appearance that roughly included, among other rights: the right to know the charge(s) and maximum possible penalties; the right to a preliminary hearing in a felony case; the right to a speedy, impartial public jury trial; the right to remain silent, to confront witnesses, and call witnesses; and the right to representation by an attorney at all stages of the proceeding, and the right to an appointed attorney if the defendant cannot afford to hire a private attorney.

Advisement on repayment obligations for the right to counsel. In South Dakota, regardless of whether an indigent person receives services from a public defender who is paid a government salary, a private attorney who is paid a flat fee, or a court-appointed attorney who is paid the state-set hourly rate – and regardless of whether the case results in in acquittal, dismissal, or conviction – state law allows the county government to recoup the full cost of representation from an indigent defendant.[120] The full cost of representation includes attorney time and case-related expenses:[121]

- *Attorney time:* the total cost of attorney time is assessed at the state-set hourly rate ($107 per hour in calendar year 2023) and includes all time an attorney spends on the case, such as communicating with a client; communicating with the prosecution, court, and jail; picking up and reviewing discovery;

legal research and analysis; preparing for court; and appearing in court, including wait time.

- *Case-related expenses:* this includes expenditures on a case, such as investigators, experts, paralegals, mileage for travel, transcript expenses, subpoena expenses, filing fees, photocopies (e.g., $0.25 per page of paper), exhibit preparation, and postage.

When it came to advising defendants on their right to counsel, judges generally informed them that the court will provide an attorney if the defendant cannot afford to hire one, but they will have to repay the full cost representation to the county at the end of the case (see Chapter 7 on Attorney Judgment & Recoupment). However, the specifics of this advisement on repayment varied from judge to judge.

Plea-bargaining with unrepresented defendants at initial appearance. The plea-bargaining process is a critical stage of a criminal case during which the defendant has the Sixth Amendment right to "effective assistance of competent counsel"[122] and in which counsel has the "critical obligation" to advise on "the advantages and disadvantages of a plea agreement."[123]

In some courts, after providing the group advisement of rights, the magistrate judge allows the state's attorney to individually meet with defendants to discuss their case and negotiate a plea *before* the defendant is given the opportunity to request appointed counsel. Sometimes referred to as a "pre-conference," this meeting occurs off the record and without defense counsel. There is no state law or court rule that governs this practice.

Requesting counsel & indigency determination. To receive an appointed attorney, the defendant must make a request to the court.[124] "If it is satisfactorily shown" that the defendant "does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses" of representation, then the circuit or magistrate judge must appoint counsel.[125] The defendant "shall certify in writing or by other record such material factors relating to his ability to pay" under the penalties for perjury.[126]

The defendant requests an appointed attorney by filling out and signing an application for an appointed attorney. The form is available in the courtroom for out-of-custody defendants and in the jail for In custody defendants. There is no application fee. Although there is no statewide uniform application, each judicial circuit uses an application modeled after the one created by UJS. The application requests the defendant's personal and financial information, and states at the bottom:[127]

> I understand the court may require verification of the information provided above. I agree to immediately report any change in my financial status to the court. I understand that if the court appoints me an attorney, **the services provided to me by the attorney are a loan and not free to me. I will be asked to repay the county at a later time. The county will file a lien against my property** for any amounts paid to my attorney, and the court may require repayment as a condition of any sentence.

Once a defendant submits the application, the judge or clerk magistrate must determine if the defendant qualifies for an appointed attorney. South Dakota statutes do not provide any guidelines for this determination, so the standards used (if any) vary from judge to judge.

After going through all the steps just described, the indigent defendant is finally appointed an attorney.[128]

FINDINGS 2 – 5

The findings in this chapter reflect issues that the indigent defense system actors and CILS cannot remedy alone. Because the practices and policies of the judiciary and prosecution affect the constitutionality of indigent defense services, we make these four findings:

FINDING 2: The judiciary's group advisement of rights may not ensure that defendants understand their constitutional right to counsel.

At initial appearance, the judge must inform and advise the defendant of their right to appointed counsel.[129] However, defendants must be able to hear and understand the judge's advisement of rights to be adequately informed of and assert their constitutional right to counsel.

During our court observations, in some courts, the group receiving the advisement of rights was as large as 50-80 defendants (out-of-custody and In custody). In one magistrate court, because of the limited available courtroom seating, approximately 20-25 defendants remained outside the courtroom – standing or seated on benches or the floor, with many looking at their phones – while the judge read aloud the entire advisement of rights. Court personnel did not inform the defendants outside the courtroom of the advisement taking place inside nor provide written copies of the advisement of rights. Despite this, no defendant responded "no" when questioned individually by the judge whether they heard and understood the advisement of rights.

In a different county, when the judge asked an individual In custody defendant whether he heard and understood the group advisement of rights, the defendant responded that he had a head injury and could not remember much. Despite this, the judge accepted the defendant's waiver of rights (including his right to an attorney) and guilty pleas on two misdemeanor cases. Prior to being sentenced to suspended jail time for one year, the defendant repeated once more to the judge that he had no memory. No attorney was present to counsel the defendant.

FINDING 3: The judiciary's advisement of rights on recoupment is inconsistent from judge to judge and can chill the right to counsel.

As stated above, at initial appearance, the judge must inform defendants of their right to appointed counsel.[130] In jurisdictions that require defendants to repay the cost of indigent defense services, the U.S. Supreme Court explains that recoupment must not infringe upon or chill the right to counsel.[131]

While all judges in South Dakota explain that the right to counsel is "not free" or a "gift" but rather a "loan," what the "loan" entails is different from county to county. Defendants in one county were told that a guilty disposition would result in repayment becoming a *condition of suspended jail time*. Defendants in another county were told that the entire cost of their attorney services would become a lien on *future earnings*.

Some judges informed defendants that they must repay the full cost of services if they are found guilty, while other judges informed defendants that this is required regardless of the case outcome.

No judge advised defendants of the state-set hourly rate they may be charged for appointed attorney services, the present or future impact of a lien, how the total cost of services is assessed, what happens if they do not have the ability to pay, or the extent that their financial circumstances are considered in assessing repayment.

In Fall River County, defendants must sign an additional form before applying for an appointed attorney, titled **"READ THIS BEFORE FILLING OUT APPLICATION FOR COURT-APPOINTED COUNSEL"**. This form provides more information about the defendant's repayment obligation:[132]

> **PAYMENT of a Court-Appointed attorney should be considered a loan to you, not a gift. You WILL be required to repay the County in full. Further, a lien is created and enforceable upon all property, both real and personal of any person, including the parents of a minor child, for whom legal counsel of a public defender has been appointed.**

The advisement that an indigent defendant must repay the full cost of representation can chill their assertion of the right to counsel. Stakeholders across multiple counties reported that defendants do not request counsel because they cannot afford to pay the cost of counsel, especially in low-level felony and misdemeanor cases. As an illustration, while conducting court observations for this evaluation, 6AC observed at initial appearance an uncounseled defendant with multiple criminal cases asked the judge whether they needed an attorney, to which the judge responded that the defendant should give it serious thought. The defendant then asked the judge, "Will that cost me more money?" to which the judge responded "Yes." The defendant waived their right to counsel and pled that day. (see Chapter 7 on Attorney Judgment & Recoupment).

FINDING 4: Judicial and prosecution practices at the initial appearance can result in the actual denial of counsel.

Plea negotiations are a critical stage at which the defendant must be represented by counsel unless there is a valid waiver of the right to counsel.[133] As mentioned earlier, in some courts the magistrate judge allows the state's attorney to individually meet with defendants to negotiate a plea *before* the defendant is given the opportunity to request an appointed attorney. Typically referred to as a "pre-conference," this occurs off the record and without a lawyer. There is no state law or court rule that governs this practice.

As an illustration, in one county, after the magistrate judge provided the group advisement of rights, the state's attorney introduced themselves to all out-of-custody defendants and told the group they could speak with the state's attorney directly to resolve their case *that day* if they wanted to. The magistrate judge then

got off the bench, the state's attorney left the courtroom, and many out-of-custody defendants followed the state's attorney out. The state's attorney (the only attorney present and available) met individually with each defendant in the jury room to discuss their criminal case and negotiate a plea offer. If a case appeared complex to the state's attorney (e.g., a felony), the state's attorney advised the defendant to apply for an appointed attorney. All of this occurred without a defense attorney present and without the defendant's knowing, voluntary, and intelligent waiver of their right to counsel.[134]

The judge then took the bench. When each defendant's case was called, the judge asked whether the defendant heard the group advisement of rights. The judge then read aloud the complaint, charges, and maximum penalties, and asked the defendant if they wished to speak to an attorney. If the defendant responded "no" – which many defendants who negotiated a plea with the state's attorney did – the judge asked how the defendant wished to proceed, to which they typically responded, "plead no contest" or "plead guilty."

The defendant then orally waived their right to counsel (among other rights mentioned in the group advisement of rights), pled no contest or guilty, and was sentenced immediately. Most often, the sentence is either direct jail time or probation with a suspended jail sentence (which can result in jail time in the future) and court costs.

No state-level entity currently collects accurate data on the defendants that go through the critical stages of plea negotiation, arraignment, entry of plea, and sentencing without an attorney. Stakeholders across the state reported that a significant number of defendants (an estimated range of 40 – 75%) are unrepresented through these critical stages at initial appearance.

FINDING 5: The state has no indigency determination standards. This can result in the unequal treatment of defendants in the state.

National standards state that indigent defense services should be provided "to any person who is financially unable to obtain adequate representation without substantial burden or undue hardship...."[135] Furthermore, "[i]n order to assure fair eligibility determination and equal treatment for defendants similarly situated, it is essential that there be detailed [state] written guidelines that implement" the substantial burden or undue hardship test.[136]

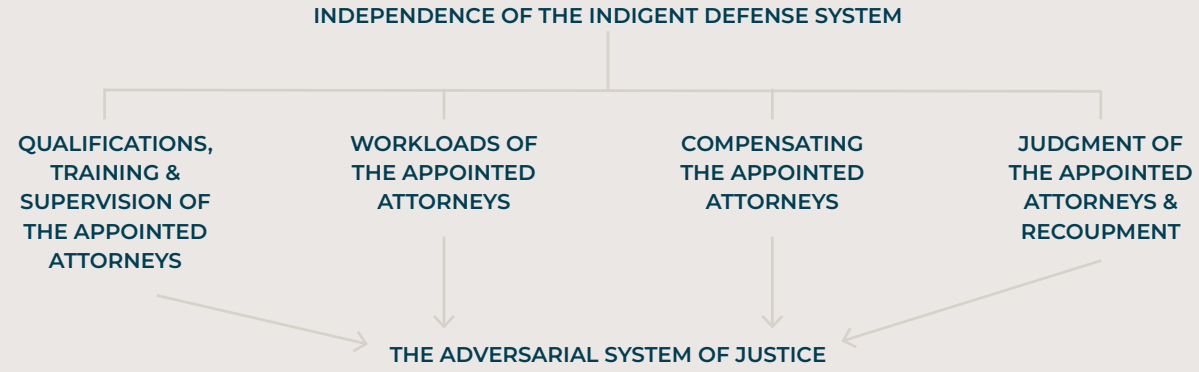
In South Dakota, state law and court rules do not establish any standards or metrics for determining a person's indigency. Nor are there established thresholds at which a defendant is presumed indigent to receive an appointed attorney. The presiding judges also have not adopted standards, metrics, or thresholds that judicial officers in their judicial circuit must follow. Every judge and clerk magistrate in the state is free to adopt their own individual indigency determination standards or use no standards at all.

As a result, a judge in one county may find a person indigent and provide counsel, but a judge in a different county may find that same person not indigent and deny them counsel. In fact, a judge in one courtroom may find a person indigent and provide counsel, but a judge in a different courtroom in the same

courthouse may find that same person not indigent and deny them counsel. Moreover, no one in the state knows how frequently defendants have been denied appointed counsel because a judge or clerk magistrate found them not indigent. State statutes and court rules do not provide a procedure for a defendant to appeal a judge's indigency determination.

Chapters 4 – 8
Independence of the Indigent Defense System

In every county in South Dakota, judges and/or political officials must select, compensate, and oversee the appointed attorneys. Chapters 4 – 8 detail how systemic judicial and political involvement, along with government recoupment practices, impact the independence of the indigent defense system, and thus, the adversarial justice system in South Dakota.



Caselaw & national standards on independence. The Sixth Amendment right to counsel is the right to *effective assistance* of counsel,[137] not just a warm body with a bar card. Satisfying this right by the "mere formal appointment" of an attorney who is present "alongside the accused" would "convert the appointment of counsel into a sham[.]"[138] The South Dakota Supreme Court echoes this sentiment, stating that the court "will not condone a perfunctory compliance through which an accused defendant is given the appearance of the help of a lawyer but is actually denied substantial aid."[139]

Rather, the U.S. Supreme Court explained in *United States v. Cronic*, the Sixth Amendment requires counsel to subject the prosecution's case to "the crucible of meaningful adversarial testing," otherwise the process is presumptively unreliable.[140] A defense lawyer's inability to assume an adversarial role in the criminal justice system constitutes a constructive denial of counsel,[141] and can result from "various kinds of state interference."[142] One kind of state interference is when the government infringes on the appointed lawyer's "constitutionally protected" independence.[143]

The U.S. Supreme Court has explained time and again that an appointed attorney's "ability to act independently of the Government" is an "indispensable element" to effective representation,[144] and the state has a "constitutional obligation to respect the professional independence of the appointed attorneys with whom it engages."[145] When the structure of the indigent defense system allows judges and/or political officials to select, compensate, and oversee the appointed attorneys, it deprives appointed attorneys of their independence. The result is a system-wide constructive denial of counsel. Rather, these decisions should be

made by an independent body to safeguard independence of the appointed attorneys.

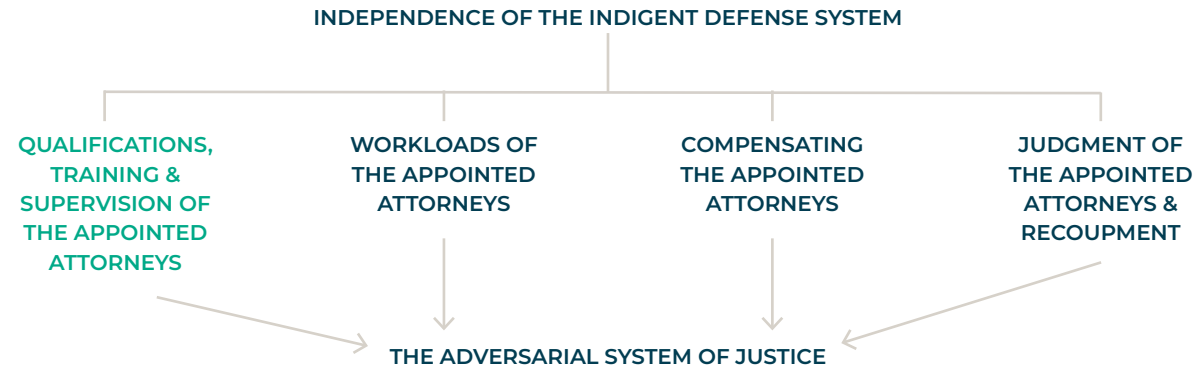
National standards reflect this, stating that appointed attorneys should be overseen by an independent commission to ensure they are "independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers."[146] Only in ensuring the independence of the indigent defense system can there be a true adversarial system of justice: "[A] defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client."[147]

Findings 6 – 10, incorporated in the next five chapters, explain how the lack of independence from undue judicial and political involvement in South Dakota's indigent defense system impacts:

- Attorney qualifications, training & supervision (Chapter 4)
- Attorney workload (Chapter 5)
- Attorney compensation (Chapter 6)
- Attorney judgment & recoupment (Chapter 7)
- The adversarial system of justice (Chapter 8)

CHAPTER 4

Attorney Qualifications, Training & Supervision



Caselaw & national standards on attorney qualification, training & supervision. Before an attorney can be appointed to represent an indigent person, the indigent defense system must first select the attorneys that are eligible for appointment. The selection of attorneys "should not be made by the judiciary or elected officials,"[148] and should be based on certain criteria for representing indigent criminal defendants.[149] In *Cronic*, the U.S. Supreme Court points to the facts in *Powell v. Alabama* to demonstrate the constructive denial of counsel due to attorney selection.[150] In *Powell*, the trial judge appointed a real estate lawyer with no criminal law experience to represent the defendants accused of a capital offense.[151] *The Powell* Court explained that counsel must have the requisite qualifications and skills necessary to be a "guiding hand" for the defendants.[152]

National standards echo the U.S. Supreme Court, stating that appointed attorneys must have the qualifications and training necessary for each type of case to which they are appointed. The selection of attorneys "should not be made by the judiciary or elected officials,"[153] and should be based on certain criteria for representing indigent criminal defendants.[154] An attorney's ability to provide a "guiding hand" to their client in a criminal case depends on their familiarity with "substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction."[155] The American Bar Association observed that "[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty."[156]

To ensure that attorneys are qualified to represent indigent defendants in the types of cases they

are appointed to, national standards require the indigent defense system to provide a "systematic, comprehensive," and mandatory training program for attorneys.[157] Training should be tailored to match the types and complexity of cases for which the attorneys are appointed.[158] For example, an attorney who is appointed to drug-related cases must be trained in the latest forensic sciences and law related to drugs. National standards also require that all appointed attorneys be supervised, systematically reviewed, and evaluated because attorneys could lose their competency to handle cases over time.[159] Ongoing training, therefore, is an important part of ensuring adequate representation.

In South Dakota, judges or the board of county commissioners select the attorneys to be eligible for appointed cases. In some counties that contract with private attorneys, the selection is made in consultation with the state's attorney, who is also the prosecutor.

FINDING 6: The state has no qualification, training, and supervision standards for appointed attorneys.

To receive any adult criminal case appointment (including death penalty and life imprisonment case appointments), state law requires the attorney to have a license in South Dakota and complete a one-time training on mental health. The state does not impose any additional qualification requirements for private attorneys. However, all public defenders must also be "competent to counsel and defend a person charged with a crime" and *the* public defender must "have basic knowledge of, and experience in criminal law."[160]

The one-time mental health training covers mental illness, available mental health services, eligibility criteria and referral processes, and forensic evaluations.[161] This training is available online on the UJS website.[162] Upon completing the training, the attorney's name is sent to the UJS state court administrator's office and added to the list of attorneys certified to receive appointments. This is the only state training requirement, and despite this, it is possible for judges to appoint an attorney who has not completed this training to represent an indigent person on a criminal case. The state does not have a continuing legal education requirement for any attorney.[163]

Court-appointed attorneys (48 counties).[164] In South Dakota, 48 counties provide primary indigent defense services using court-appointed attorneys, three of which were evaluated for this study: Fall River, Hughes, and Meade. In the other four sample counties, court-appointed attorneys were used for conflict representation. None of the seven counties impose additional qualification, training, or supervision requirements for an attorney to receive court appointments.

There is no statewide uniform or formal selection process for court-appointed attorneys. In all three counties, either the presiding judge of the judicial circuit or the clerk of courts (who is appointed by the presiding judge of the judicial circuit) selects individual private attorneys to accept appointed criminal cases. An attorney need only request the clerk of courts in the county or presiding judge in the judicial circuit where they wish to receive appointments to join the court-appointed attorney list. The clerk of courts or presiding judge usually asks the attorney how long they have been practicing law and the attorney's preference for case types. However, matching the attorney with the case type is "assessed subjectively" – "there's no formula." Because of the high demand for appointed attorneys, the court defers to attorneys' preferences

and needs.

There are no qualification, training, or supervision requirements to remain a court-appointed attorney once one has joined the list. There is no uniform or formal metric for determining when an attorney is qualified to be added to the court-appointed attorney list. This assessment is up to each judge or clerk of courts. A judge may learn about an underperforming attorney from a client complaint or in-court observations. However, there are no formal procedures governing the process for removing an attorney from a case or list entirely.

Private contract attorneys (15 counties).[165] In South Dakota, 15 counties contract with private attorneys to provide indigent defense services. Nearly every private contract is a multi-year flat-fee contract where the county pays the attorney a fixed amount of money to represent all appointed cases.

Beadle County has a two-year flat fee contract with a group of seven individual private attorneys to provide indigent defense services in all cases except federal-level appeals and out-of-county parole and mental illness hearings.[166] One of the seven attorneys serves as the administrator of the contract, who employs an administrative assistant to accept appointments at initial appearance and assign cases to individual attorneys. This contract began in 2010 and has been renewed every two years since then.

The *county bar* (composed of only the private lawyers in the county) selects the attorneys into this group. The local private attorneys have "total control" over the selection of attorneys. If the administrator of the contract wants another attorney to join the group, they provide the new attorney with the contract and notify the state's attorney with no prior approval from the board of county commissioners. If a private contract attorney declines a case assignment from the administrative assistant, the administrative assistant reassigns the case to a different contract attorney with no input from the court.

The contract has no qualification, training, or supervision requirements other than the attorney must be licensed in South Dakota. The administrator must report case assignments and year-to-date assignments to all contract attorneys, the court administrator, the county auditor, and the state's attorney each month. Although the contract requires assignments to consider case complexity, one judge recalled an instance when an attorney with no prior trial experience was assigned an attempted murder case. This court appointed a co-counsel in the case, but the indigent defendant quickly pled guilty to a lesser-included offense.

The Davison County Board of County Commissioners has a three-year flat fee contract with two private law firms to provide indigent defense services in all case types.[167] The county did not issue a request for proposals. In 2020, the two law firms informally approached the board of county commissioners. Relying on the advice of the *state's attorney* (the elected prosecutor in the county), the county awarded contracts to both law firms. Both contracts have since been renewed.

The board of county commissioners did not consider including any qualification, training, or supervision requirements for attorneys to be eligible for contracts or appointments other than the attorneys must be licensed in South Dakota. The board of county commissioners' role is primarily limited to overseeing only the

financial aspects of indigent defense. Davison County's state's attorney and county sheriff perform limited supervision of indigent defense services in the county. When the county receives complaints about attorney performance from clients, the complaints are forwarded to the state's attorney.

Roberts County has a four-year flat fee contract with two private attorneys to provide indigent defense services in all case types except class A, B and C felony, post-conviction, and appeals cases.[168] The board of county commissioners seeks advice from the *state's attorney* (the elected prosecutor in the county) on which attorneys to contract with and the state's attorney negotiates the terms of the contract. The contract has no formal qualifications, training, or supervision requirements. Although judges can observe the attorneys' in-court performance, there is no formal supervision of attorney performance.

South Dakota's Indigent Defense Contracts

6AC received copies of contracts from ten additional counties that contract with attorneys to provide indigent representation. Of these, most contracts do not have qualification, training, or supervision requirements beyond what the state requires to be eligible for receiving appointed cases:[a]

- The only qualification requirement in most contracts is the attorney must be licensed in South Dakota. One county (Clay) requires the attorney to maintain a set number of office hours in a location each week for client meetings.
- Many contracts exclude class A, B, and C felony representation from the contract.
- No contract has training or supervision requirements.
- Generally, the contract terms for oversight of the attorneys are limited to reporting the time and expenses incurred on every appointed case to the county for the purposes of compensating the attorneys and recouping the cost of services from the indigent defendants.
- The only performance standard required in most contracts is that the attorney must comply with the standards set by the South Dakota State Bar, South Dakota Supreme Court, and/or South Dakota Rules of Professional Conduct. One county sets a maximum number of appointed felony and misdemeanor cases that a firm can represent (Lincoln), and another county requires the attorneys treat "each indigent defendant the same as any defendant who has retained them privately." (Brown).[b]

a. South Dakota Counties was instrumental in obtaining copies of indigent defense contracts from county governments.

b. "Contract for Representation of Indigents" between Clay County and Peterson, Stuart & Klentz, Prof. LLC for the period of January 1, 2022 through December 31, 2024; "Contract for Representation of Indigent Persons and Other Individuals Requiring Court Appointed Counsel" between Lincoln County and Peterson, Stuart and Klentz, Prof. LLC for the period of January 1, 2024 through December 31, 2026; "Overflow Contract for Representation of Indigent Persons and Other Individuals Requiring Court Appointed Counsel" between Lincoln County and Myers Billion, LLP for the period of January 1, 2024 through December 31, 2026; "Indigent Counsel Agreement Brown County" between Brown County and Contract Attorneys for the period of January 1, 2023 through December 31, 2024.

Public defender office (3 counties).[169] Three counties in South Dakota established a public defender office to provide indigent defense services, one of which was evaluated for this study: Minnehaha County. Minnehaha County has two public defender offices: the Minnehaha County Public Defender Office (PDO) for primary representation (providing approximately 72% of all indigent defense representation in the county) and the Office of the Public Advocate (OPA) for conflict representation (providing approximately 20% of all indigent defense representation in the county).[170]

As required by state law, each public defender office has a public defender advisory committee,[171] so in Minnehaha County, there are two public defender advisory committees.[172] Each advisory committee has five members: one person appointed by the board of county commissioners who cannot be a lawyer, county employee, or law enforcement officer; two county commissioners appointed by the chairman of the board of county commissioners; and two attorneys practicing in the county appointed by the presiding judge of the county's circuit court.[173]

There is no formal selection process or term limits for advisory committee members. There are also no formal rules outlining the advisory committee's structure, duties, or authority. State law requires the public defender to submit an annual report to their advisory committee on the number of indigent people represented by the office, the offenses involved, the outcome of each case, and expenditures to their advisory committee.[174] However, the advisory committee does not vote on any action taken by the public defender offices, set policies, approve the budget, or approve expenses. Rather, each committee acts as an advisor to the public defender on matters such as policies, new initiatives, and hiring decisions, and acts as an advisor to the board of county commissioners on actions to take concerning the public defender office.

Qualifications.

Each public defender office in Minnehaha County is headed by the public defender, referred to as "the public defender" for PDO and "the public advocate" for OPA.

Although state law gives the advisory committee the power to appoint and dismiss the public defender, in Minnehaha County, this power has been transferred to the board of county commissioners.[175] There is no formal rule, ordinance, or policy authorizing this transfer of power and it is unclear when or how this occurred. The board of county commissioners appointed the current public defender of the PDO in 2005, and the current public advocate of OPA in 2015. Neither public defender has a term limit.

The board of county commissioners is free to impose additional minimum qualifications for the public defender and the various "assistant public defender" positions beyond what the state requires.[176] For example, at PDO:[177]

- the public defender must have four years of experience as a deputy public defender.
- the chief deputy public defender, who is second in charge to and assists the public defender in administering the office, must have four years of experience as a deputy public defender.
- a senior trial attorney, who assists the public defender and chief deputy public defender in overseeing, training, and supervising assistant public defenders, must have at least five years of

trial experience.

- a senior deputy public defender, who can supervise support staff and interns, must have two years of legal experience.
- a deputy public defender, usually an entry-level position for a recent law school graduate, must have a J.D. from an accredited law school and a law license in South Dakota.

The board of county commissioners sets similar minimum qualification requirements for the various assistant public defender positions at OPA. At the time of this evaluation, the office employed only attorneys with prior criminal defense experience – four of the five senior deputy public advocates had over 10 years of experience as a public defender, and five of the seven attorneys in the office previously worked for PDO.

The public defender office – not the judges or clerk of courts – assigns cases to individual attorneys in their office.[178] At PDO, the public defender assigns new assistant public defenders to misdemeanor cases first, and only once the leadership and supervisors of the office determine that an attorney has developed the necessary skillset to represent more serious cases will the attorney gradually be assigned nonviolent felony cases, and then violent felony cases. Generally, an assistant public defender is assigned misdemeanor cases for one year before getting assigned nonviolent felony cases. The public defender does not assign homicide or death penalty cases to any assistant public defender until they have second-chaired one with the public defender or chief deputy public defender.

Training & supervision.

The training and supervision of assistant public defenders are set and enforced by the public defender office's internal policies and practices.

The PDO requires all new assistant public defenders to undergo a two-week orientation that encompasses trainings on topics such as client relationships, bond hearings, expert requests, motions to suppress, conflicts of interests, plea negotiations, collateral consequences, and trial preparation; touring the county jail, and courthouse; shadowing attorney-client meetings; and observing court hearings at the courthouse. All new assistant public defenders must also attend a one-week training at the Minnesota State Public Defender Trial School to learn trial skills, such as developing a theory of the case, and conducting opening statements, direct examinations, cross-examinations, and closing arguments.

Although PDO strives to provide attorneys with 23 hours of continuing legal education every 20 months through internal and external training opportunities, the office does not have minimum *ongoing* training requirements. The office has a training budget for external trainings that include airfare and hotel expenses. However, every incurred training expense must be approved by the board of county commissioners, which can discourage attorneys from attending external trainings.

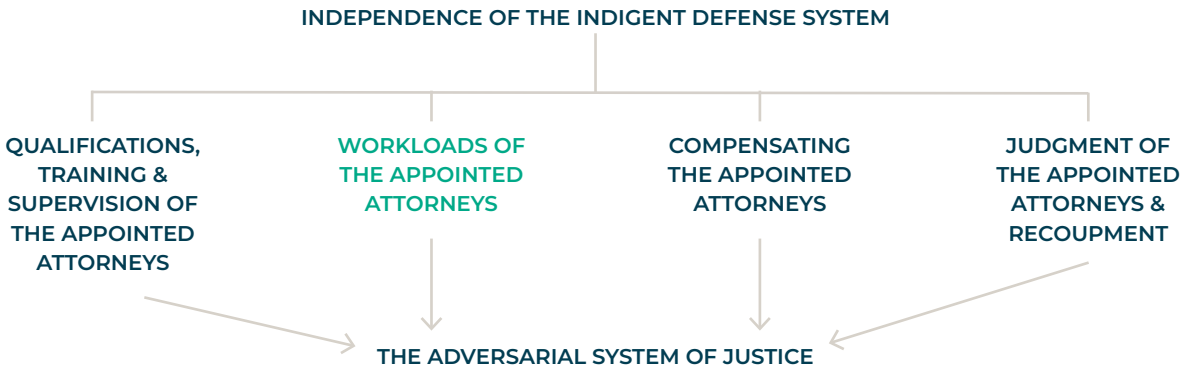
The PDO is structured with divisions (misdemeanor, nonviolent felony, felony, and miscellaneous) and supervisory roles to allow for the progression in the seriousness of cases handled by attorneys. The leadership and supervisors meet each week to discuss attorney caseloads, attorney performance, and client

complaints, and each division holds monthly strategy sessions on their cases. All assistant public defenders receive an annual performance review (the public defender receives an annual performance review by the board of county commissioners) and are subject to a random review of their case files by their supervisor. All new assistant public defenders are accompanied in court by their supervisor for the first two months of their practice and in their first trial. The office has an open-door policy to allow attorneys to ask one another questions, and employees report that the office culture is "great" and "supportive."

The OPA does not have training and supervision requirements for staff attorneys. The office has a training budget for external trainings, which is typically used for attorneys to attend the National Association of Criminal Defense Lawyers' annual conference, the South Dakota State Bar's annual conference, and trainings by the South Dakota Association of Criminal Defense Lawyers. One assistant public defender in the office felt like attorneys do not attend enough trainings, reporting that attendance by the office at in-state trainings is poor. Another attorney reported they were too busy to attend any trainings on the type of case they are assigned.

CHAPTER 5

Attorney Workload



Caselaw & national standards on attorney workload. An attorney must have *sufficient time* to put the prosecution's case through the "crucible of meaningful adversarial testing."[179] The U.S. Supreme Court in *Powell v. Alabama* explains that lacking "sufficient time" to consult and prepare constitutes a constructive denial of counsel, noting that the pre-trial stages of a criminal case are "vitally important" because that is when "consultation, thorough-going investigation and preparation" must occur.[180] The Court reiterated this in *Kansas v. Ventris*, stating that the "core" of the Sixth Amendment right to counsel "has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial."[181] Infringing on counsel's time, the Court explains, "is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."[182]

No matter how simple or minor a case may seem, each attorney must have sufficient time to perform certain fundamental tasks for every client, including: [183]

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in custody;
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution, such as body camera footage;
- independently investigate the case, which may include learning about the defendant's background, interviewing lay and expert witnesses, viewing the crime scene, examining physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings and preserve the client's rights in those

hearings;

- develop and continually reassess the theory of the case;
- assess all possible sentencing and collateral consequence outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for trial (because the decision about whether to plead or go to trial belongs to the client).

Excessive caseloads and workloads "impinge[s] upon a lawyer's ability to provide competent and effective representation to all clients" because the lawyer does not have sufficient time to perform these fundamental tasks on every criminal case.[184] Excessive caseloads and workloads also "create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services."[185] National standards define "caseload" as the number of assigned cases that an attorney has at any moment in time in any given system, and "workload" as the attorney's caseload plus all other tasks that the attorney is responsible for, including private cases, appointed cases in other jurisdictions, and professional obligations such as training and supervision (workload must also consider the attorney's qualifications and resources).[186]

The question then is: how many cases is too many cases for an attorney?

National workload standards. In 1973, the first national standards for caseloads of appointed attorneys were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC standards) as part of an initiative funded by the U.S. Department of Justice.[187] *NAC Standard 13.12* prescribes that a single attorney should not handle in a year any more than the maximum caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.

This calculation presumes that the attorney devotes 100% of their time to providing representation in their appointed cases. Many criminal justice experts believe that the NAC caseload standards are too high.[188] In 2023, the National Public Defense Workload Study (NPDWS) was published with the intention to replace the 1973 NAC standards to reflect "the changes in defense practice that have occurred in the fifty years since the creation of the NAC Standards, including the significant role of digital evidence from body-worn cameras to smart phone data and forensics in modern defense practice, as well as the expanded role of defense attorneys."[189] The NPDWS prescribes that a single attorney should not handle in a year any more than the maximum caseload of:

- seven life-without-parole felonies; or
- eight felony murders; or
- 12 felony sex crimes; or

- 21 – 59 felonies, depending on severity; or
- 93 – 150 misdemeanors, depending on severity.

National workload standards "should never be exceeded," though appropriately developed jurisdiction-specific workload standards can also be used.[190] An independent entity should monitor and control the workloads of all appointed attorneys on an ongoing basis to ensure effective and competent representation on every appointed case.[191]

There are no workload standards or limits in South Dakota. Nor is there an entity that monitors workloads of the appointed attorneys on an ongoing basis. Although a judge may know the number of cases they appoint to a particular attorney, they cannot know the number of cases that attorney has been appointed to in other counties, judicial circuits, and the federal district court, or the number of privately retained and pro bono cases that attorney handles at any given time. Similarly, even though the public defender must submit a monthly report of case dispositions to the presiding judge of the circuit court, this is only "for the purpose of setting liens" for recoupment, and the reporting is not used to track attorney workloads.[192]

FINDING 7: The state has no workload standards, resulting in appointed attorneys carrying workloads that exceed national standards.

6AC obtained caseload data for every attorney (private attorney and public defender) appointed to an adult criminal case in the state from 2018 to 2023.[193]

Caseload of Minnehaha County public defenders. 6AC measured caseloads against NAC standards ("NAC analysis") of all Minnehaha County public defenders from county fiscal years 2018 – 2023. 6AC's NAC analysis only includes adult felony, adult misdemeanor, juvenile delinquency, and appeal cases. Other case types (e.g., abuse and neglect, motions to revoke, parole violations, mental health commitments), and case-related responsibilities (e.g., problem solving court) were not factored into the NAC analysis. Both offices have consistently exceeded the NAC standards:

6AC conducted a NAC analysis of each attorney representing primarily adult felony and misdemeanor cases in both offices. Every attorney in OPA carried caseloads exceeding NAC standards every year from 2018 – 2023, ranging from:[194]

- 136% to 176% in FY 2018.
- 182% to 201% in FY 2019.
- 137% to 184% in FY 2020.
- 143% to 159% in FY 2021.
- 135% to 176% in FY 2022.
- 114% to 127% in FY 2023.

	PDO Annual Caseload	PDO % of NAC Standard	OPA Annual Caseload	OPA % of NAC Standard
2018	5008	123%	2205	113%
2019	6192	127%	2069	110%
2020	6148	125%	2311	119%
2021	5901	109%	1826	115%
2022	5922	122%	2142	116%
2023	7992	122%	1934	107%

The same was true for nearly every attorney at PDO, except in county fiscal year 2020.[195] At the time of this study, open and pending caseloads of individual attorneys in the office ranged from 150 to 216 cases for misdemeanor attorneys; 110 to 130 cases for non-violent felony attorneys; and 50 to 90 cases for violent felony attorneys. One misdemeanor attorney recalled having an open caseload as high as 250 cases at one point and having 12 cases scheduled for trial in one week. A felony attorney reported having four or five felony cases scheduled for trial in the same week. The leadership and supervisors in the office also carried caseloads that exceeded NAC standards, resulting in less time for supervision, training, and mentoring for less experienced attorneys in the office.

Over this six-year period, a PDO attorney spent an average of 5.9 hours on a felony case (including homicide and life without parole cases) and two hours on a misdemeanor case.[196] The table below shows the average number of hours that both public defender offices spent on each case, by case type:

	Adult Felony	Adult Misdemeanor	Juvenile Deliquency	Abuse & Neglect	Appeal
Public Defender Office	6.4	2.6	2.9	13.4	26.6
Public Advocate Office	5.5	1.4	2.9	12.9	33.3
Average Hours Per Case	5.9	2.0	2.9	13.1	29.9

In comparison, the NPDWS estimates that the average time to spend on a felony case should be between 35 hours (lowest level of seriousness) to 286 hours (highest level of seriousness), and 13.8 to 22.3 hours on a misdemeanor case depending on the case complexity.[197]

Excessive caseloads was named as the main weakness of the public defender offices by stakeholders. One OPA attorney estimated having over 100 juvenile delinquency cases in addition to 10 criminal appeals but was unsure of the exact numbers due to the daily demands of managing cases. This attorney did appellate work between juvenile delinquency cases in the courtroom and at home after 9:30 pm on weekdays and on the weekends. One PDO attorney, who left the office, expressed that it is difficult to realize how bad the situation is while in the middle of it, analogizing the situation to a frog in boiling water who does not realize the water is boiling until it is too late.

Neither office can decline appointments for reasons other than conflict of interest. Moreover, although the public defender can request funding from the board of county commissioners to hire additional staff attorneys and support staff, undue political involvement in the compensation and resources of the public defender can restrict the public defender from ever making this request (see Chapter 6 on Attorney Compensation).

Caseloads of appointed private attorneys. Whereas full-time public defenders cannot have a private law practice, appointed private attorneys can. A NAC analysis of appointed private attorneys cannot generate an accurate result of their caseloads because the statewide caseload data provided to 6AC does not include the following case types:

- appointments in juvenile delinquency cases, civil cases (e.g., abuse and neglect, and mental health commitments), and other case types (e.g., motions to revoke, probation violations, appeals);
- appointments in federal cases;
- private criminal law cases;
- private juvenile delinquency cases;
- private civil law cases, such as property, probate, family, agricultural, business, and corporate law cases; and
- private and appointed cases in tribal courts.

Though a NAC analysis cannot show the full extent of private attorneys' caseloads, it did reveal how certain private attorneys carry excessive caseloads just with their adult criminal case appointments. One attorney represented 404 appointed cases in one year (including 230 felonies), a caseload that is 157% of NAC standards. This attorney averaged 201.5 felonies and 129.5 misdemeanors each year over the six-year period, reporting, "I do legal triage." Another private attorney handled 348 appointed cases in one year (including 186 felonies), a caseload that is 130% of NAC standards. Another private attorney's caseload has fluctuated between 100.4% and 135.3% of NAC standards over the last four years.

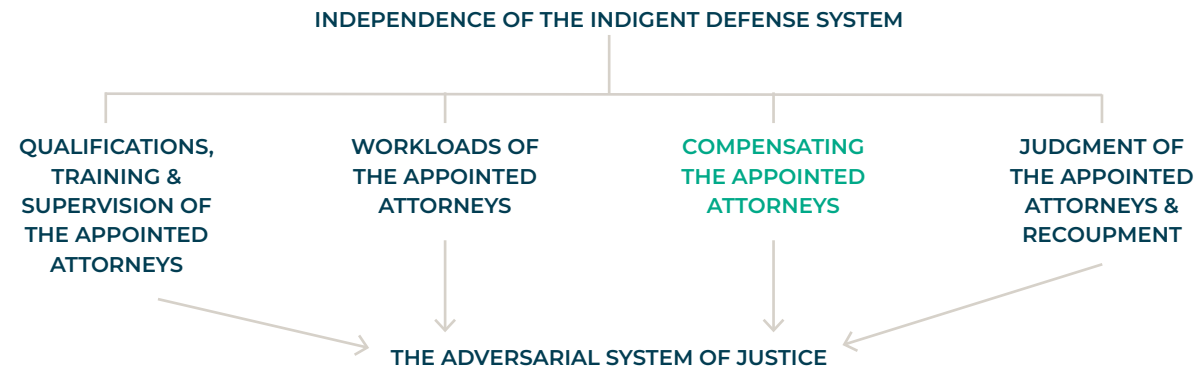
About one-quarter of private attorneys who accept adult criminal cases in South Dakota also accept federal

appointments in the U.S. District Court, District of South Dakota. Many also maintain a private practice. This means that even if private attorneys carry a caseload of appointed state cases under NAC standards, their caseload may still be excessive when considering the other appointed and private case types that make up their entire caseload.

The workload issue is compounded by travel time. For example, a private attorney represented 73 cases (40 felonies and 33 misdemeanors) in one year, which falls within NAC standards *before* considering that these cases occurred in 20 counties across six judicial circuits. A different attorney reported that their open caseload comprised of 130 to 160 appointed criminal cases in five counties across two judicial circuits, three federal case appointments, and three or four private cases. This attorney handled 16 cases in magistrate court that day, including standing in for other attorneys at the law firm. Another private attorney reported holding an indigent defense contract in one county and accepting appointments in nine other counties, regularly appearing in one county in the morning, another county that afternoon, and a third county the following day – all on top of privately retained cases that comprised 30% of this attorney's law practice.

CHAPTER 6

Attorney Compensation



Caselaw & national standards on attorney compensation. An appointed attorney must have the resources necessary to put the prosecution's case through the "crucible of meaningful adversarial testing."[198] Otherwise, "the process loses its character as a confrontation between adversaries," resulting in the constructive denial of counsel.[199] The government is responsible for providing these resources, so when it does not provide the indigent defense system with resources for attorneys to meaningfully challenge the prosecution's case, the result is a *system-wide* constructive denial of counsel.

The government can either fund and provide a building stocked with all the necessary supplies, equipment and a budget for investigators, experts, and support staff; or it can pay or repay the appointed private attorneys for these expenses. What the government cannot do is place the burden of paying for the indigent defense system onto appointed attorneys.[200] An attorney needs three types of resources to effectively represent each client:

- *Compensation.* This is the appointed attorney's pay. Counsel should be paid "reasonable compensation" for "all hours necessary to provide quality legal representation,"[201] and at an hourly rate that factors in overhead costs and out-of-pocket expenses to "encourage vigorous defense representation[.]"[202]
- *Case-related expenses.* These are expenses that the attorney would not incur but for representing a particular client. They vary from case to case but often include postage to communicate with the client, witnesses, and the court system; long-distance and collect telephone charges; mileage and other travel costs to and from court and to conduct investigations; preparation of copies and exhibits; and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case.
- *Overhead.* Attorneys must incur overhead expenses before representing any appointed client. These expenses include office rent, furniture, equipment, computers, telephones, printers, scanners, cellphones, internet, software necessary for case management and/or reviewing discovery, office

supplies, malpractice insurance, state licensing and bar dues, and legal research tools. Overhead also includes the cost of support staff, such as secretaries, paralegals, or legal assistants.

Because judges and political officials cannot know the "hours necessary to provide quality legal representation" on each case, independence must extend to the payment of and resources for appointed attorneys.[203] That is, administrators of the independent indigent defense system should be responsible for approving attorney compensation and requesting necessary resources.

In South Dakota, state law requires judges or the board of county commissioners to compensate attorneys and provide resources on their appointed cases.

FINDING 8: The state lacks compensation standards, creating a lack of fiscal oversight, financial conflicts of interests, and insufficient resources on appointed cases.

State law requires that the county *shall* pay each court-appointed attorney "reasonable and just compensation" in addition to "necessary expenses and costs incident to the proceedings."[204]

Judicial oversight of compensation & resources. UJS sets one fixed hourly rate for all court-appointed attorneys to cover attorney compensation and overhead expenses. In calendar year 2023, court-appointed attorneys were paid $107 per hour with no maximum limit for all case types.[205] Some case-related expenses, such as copying costs, subpoena service fees, telephone charges, fax charges, fees for obtaining records, and mileage are reimbursed to the attorney. UJS sets the travel reimbursement rate at $1.00 per mile for vehicle use and attorney time. However, reimbursements for out-of-county travel require prior approval by the judge (except to and from the attorney's office, court, or a detention facility). For other case-related expenses, such as experts, investigators, and paralegals, the attorney must submit a motion to the judge setting forth the reasons for the service, and if approved, the county must fund these expenses.

Generally, to get paid by the county, a court-appointed attorney must submit an itemized list of all fees and expenses incurred on each case to the circuit or magistrate judge within 30 days of completion of the case. This itemized list is referred to as an "attorney voucher." If the judge approves the total expenses claimed in the attorney voucher, the court signs and submits the voucher to the county auditor, who is directed by the court to pay the attorney.[206] If the judge denies part or all of the expenses claimed in the attorney voucher, the attorney can request a review hearing before a three-judge panel.

Stakeholders across the state expressed frustration that the hourly and travel reimbursement rates set by UJS are so low that they discourage private attorneys from working on their appointed cases. This is a financial conflict of interest. A private attorney can *lose* money for performing fundamental tasks on an appointed case – such as a visiting a client in jail, appearing in court, or viewing a crime scene – because of the travel time involved. As an illustration, if an attorney spends one hour traveling to and from their office to the jail, and 30 minutes with the indigent client at the jail, the attorney can only bill for 30 minutes of attorney time with the client plus mileage reimbursements, even though the attorney spent a total of 1.5 hours on the task:

In this one example alone, the attorney's hourly rate is diluted to approximately $76/hour on an appointed case ($113.50 / 1.5 hours), which is far lower than the state-set hourly rate and the private attorney rate. In other words, one hour for an attorney does not equate to one *billable* hour, and "in the meantime, you have to pay the phone bill, Westlaw, malpractice insurance, printer, paper, office rent, bar dues, taxes . . ." One private attorney estimated spending approximately 6-8 months of the year working to cover overhead expenses on appointed cases.

Task	Time	Miles	UJS State-Set Rate	Total Attorney Can Charge
Travel From Office To Jail	0.5 hour	30	$1.00/mile	$30.00
Visit With Client	0.5 hour	-	$107/hour	$53.50
Travel From Jail To Office	0.5 hour	30	$1.00/mile	$30.00
	1.5 hours			**$113.50**

An attorney has full discretion on what to include and charge in the attorney voucher. Stakeholders expressed concern that court-appointed attorneys overbill for attorney time. There is no state law, rule, or guide on how judges are supposed to review attorney vouchers, and judges are limited in their ability to do so because they do not oversee the attorneys' work on cases. Additionally, judicial circuits vary in assessing maximum limits on compensation. For example, total fees should be less than $1,500 on a misdemeanor case and $2,500 on a felony case in the fifth judicial circuit (and anything higher requires prior approval by the judge), while the fourth judicial circuit has an informal rule that total fees should be less than $500 on a misdemeanor case and $1,000 on a low-level felony case.[207] This is contrary to the UJS guidelines of no maximum limits on all case types.

Political oversight of compensation & resources.

Private contract attorneys.

The board of county commissioners sets and approves compensation and resources for private contract attorneys. Every county in the state that contracts with private attorneys, except Butte County, pays attorneys on a flat fee basis.[208] Typically, the contract is an annual flat fee paid in monthly installments to the attorney to cover attorney pay and overhead expenses (but not case-related expenses), without regard to how little or how much time the attorney must actually spend to effectively represent the indigent defendants in their cases. The attorneys then request reimbursements for case-related expenses.

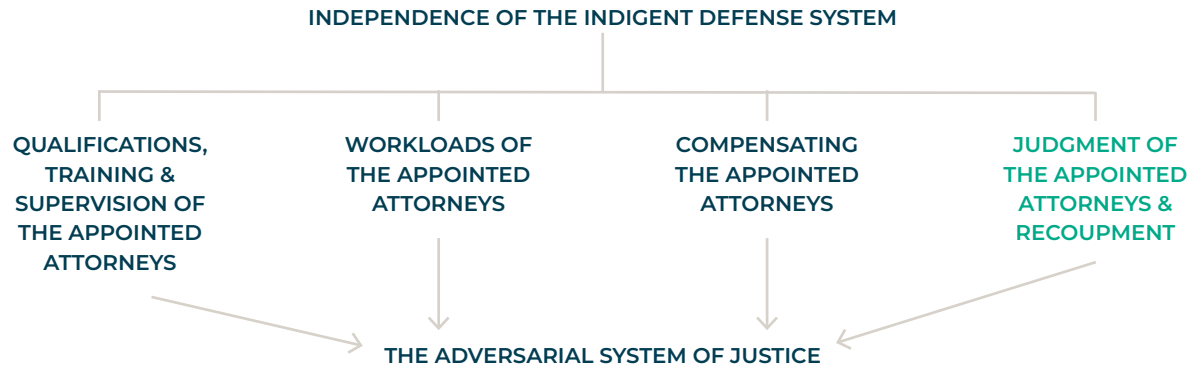
Although flat fee contracts can save costs for county governments, appointed attorneys should not be paid on a flat fee basis because flat fee payment structures "reward counsel for doing as little work as possible"[209] or "what is minimally necessary to qualify for the flat payment."[210]

Public defender offices.

In counties with a public defender office, state law requires the board of county commissioners to set the annual compensation for the public defender; provide facilities such as office space, furniture, equipment, books, postage, and supplies; and hire staff such as assistant public defenders, clerks, and investigators that "the advisory committee considers necessary for carrying out the public defender's duties."[211] However, having these requirements also gives county commissioners the power to scrutinize and restrict the functioning of the public defender offices.

CHAPTER 7

Attorney Judgment & Recoupment



"Recoupment" is a form of repayment and the term for when a defendant is ordered to pay the cost of appointed representation at the conclusion of the case.[212]

Caselaw & national standards on recoupment. The U.S. Supreme Court cautions the government against recouping the cost of legal representation from indigent defendants. As the Court stated: "We don't inquire whether [a recoupment] statute is wise or desirable… Misguided laws may nonetheless be constitutional."[213]

In *Fuller v. Oregon*, the U.S. Supreme Court explains that recoupment must be limited to "and clearly directed" only at those who have the ability to pay the expenses of legal representation, and certain procedural safeguards must be in place if the government has a recoupment practice:[214]

- the court must find that the indigent defendant has the present ability to pay;
- defendants must have the opportunity, at any time, to show that repayment will impose "manifest hardship" on the defendant or their family;
- the same protections and exemptions that are available to civil judgment debtors must be available to indigent defendants in recoupment actions;
- defendants must only be held in contempt for failure to repay if there is an "intentional refusal to obey the order of the court or a failure on his part to make a good faith effort to make the payment;" and
- recoupment must not infringe upon or have a chilling effect on the right to counsel.

This chapter describes the South Dakota recoupment statute, recoupment efforts in the counties, and the impact recoupment has on the appointed attorney's ability to subject the prosecution's case to the "crucible

of meaningful adversarial testing."[215]

Recoupment in South Dakota.[216] South Dakota law requires indigent defendants to repay the full cost of their representation, regardless of whether services were provided by a public defender who is paid a government salary, a private attorney who is paid a flat fee, or a court-appointed attorney who is paid the state hourly rate – and regardless of the case outcome.[217] The full cost of representation includes attorney time and case-related expenses:[218]

- *Attorney time.* The total cost of attorney time is assessed at the state-set hourly rate ($107 per hour in calendar year 2023) and includes all time an attorney spends on the case, such as communicating with a client; communicating with the prosecution, court, and jail; picking up and reviewing discovery; legal research and analysis; preparing for court; and appearing in court, including wait time.
- *Case-related expenses.* This includes expenditures on a case, such as investigators, experts, paralegals, mileage for travel, transcript expenses, subpoena expenses, filing fees, photocopies (e.g., $0.25 per page of paper), exhibit preparation, and postage.

When an indigent defendant exercises their right to appointed counsel, the county must file a lien against the defendant's real and personal property. The lien amount is set by the judge (this is the amount that the judge approves in the attorney voucher). The lien is enforced by the county and *may* be enforced by the court. The board of county commissioners can choose to "enforce, foreclose, satisfy, compromise, settle, subordinate, release, or otherwise dispose of any lien hereby imposed."[219] The court may order the defendant to repay the cost of representation "as court costs or as a condition of probation" or "in the form of installments or wage assignments."[220] Whatever amount of money the defendant repays is credited to the lien.

Recoupment & collections practice in counties. Generally, at the final hearing in a criminal case, the judge assesses and orders the defendant to repay the full cost of representation. At that hearing however, the judge, attorney, and defendant do not know the total cost of representation because the attorney voucher is typically submitted to the court days *after* the case is completed.[221] Once the judge approves the attorney voucher, the county auditor automatically files a lien against the defendant's real and personal property for the dollar amount approved in the attorney voucher. The county register of deeds then records the lien.

The county is responsible for recouping the indigent defense service fees from indigent defendants and can delegate the responsibility to collections agencies. In some counties, the court plays no role in recoupment. Rather, the defendant makes payments directly to the county auditor, and all money collected by the county auditor is credited to the lien. Some counties create a payment installment plan for the defendants, while others do not, and some counties contract with a private collection agency, while others do not.

In other counties, the court orders the defendant to make payments to the clerk of the courts as a condition of probation. The judge creates a payment installment plan that the defendant must follow, typically by asking the defendant how much money they can pay each month and when they can start paying. If the defendant does not make payments, then two things may happen:

- if the county has an informal agreement with UJS to assist in recouping representation costs, the clerk

of courts forwards all unpaid amounts to UJS, which has a formal agreement with the South Dakota Obligation Recovery Center (ORC), the state collections agency, to recoup the representation costs. ORC adds a 20% cost recovery fee to the principal balance and can suspend a defendant's hunting/fishing license, motor vehicle registration, and driver's license to force payment.[222] All money recouped by ORC is forwarded to the county auditor and credited to the lien; or

- if the county does not seek assistance from UJS, the clerk of courts forwards all unpaid amounts to the county auditor, and the county is responsible for recouping representation costs.

In county fiscal year 2023, 44 of the 66 counties had an agreement with UJS to assist in recouping the cost of legal representation provided to indigent defendants.[223]

Notice. The defendant is first informed that they will have to repay the cost of representation and that a lien will be placed on their property at the initial appearance. However, the defendant learns of the total cost they must repay to the county after the case is completed.

State law does not allow defendants to contest the fees with the judge. The total expenses in the attorney voucher that the judge approves eventually become the total amount of the lien that the county files against the defendant's real and personal property. Yet, the judge reviews the attorney voucher without input or verification from the defendant and often outside the defendant's presence.

State law also does not require the court or county to give notice to the defendant of the lien or the final lien amount *before* the lien is filed. None of the seven counties evaluated provided notice to the defendants before filing the lien. Davison and Fall River counties send notices to defendants after filing the liens; in Davison County, the county auditor mails a letter to the defendant every other month after the lien is filed for one year before sending the debt to a collection agency. Due to a lack of uniform notice requirements, people often do not know about their liens until after the debt goes to a collection agency or they are disqualified from a loan to purchase a house. For example, Minnehaha County does not call, or mail a letter, bill, or provide any other notice to a person informing them that they owe the county money for the cost of their indigent defense services and that a civil lien has been imposed. The board of county commissioners has discussed sending letters but has decided not to because they believe the cost of mailing letters would outweigh any benefit.[224]

Ability to pay. Because recoupment can chill an indigent person from asserting their right to counsel, the *Fuller* Court found that an ability to pay assessment is a necessary procedural safeguard in any government recoupment practice.[225]

However, similar to the state having no standards for determining a person's indigency to qualify for an appointed attorney (see Chapter 3 on Providing Counsel at Critical Stages), state law and court rules do not establish any standards, metrics, or thresholds at which a defendant is unable to pay. The statutes state only that indigent defendants must repay the costs "[i]f the court finds that funds are available for payment"[226] and that the court cannot revoke probation for nonpayment without a hearing if the defendant does not have the ability to pay.[227] Every judge in the state is free to adopt their own criteria and process for making this determination. But how much available money must an indigent defendant have to be able, or unable, to pay?

Contrary to national standards, South Dakota does not require an ability to pay hearing where an "attorney is present and with the opportunity to present witnesses and to have a written record of the judicial findings" on the actual costs of representation and the defendant's present ability to pay those costs.[228] The statute does not provide the defendant with an opportunity to assert the right to "petition for remission of fees, in the event of future inability to pay."[229] In all seven counties evaluated for this study, no judge has presided over a hearing for determining an indigent defendant's ability to pay recoupment, and no appointed attorney has contested a court-ordered recoupment on behalf of their client.

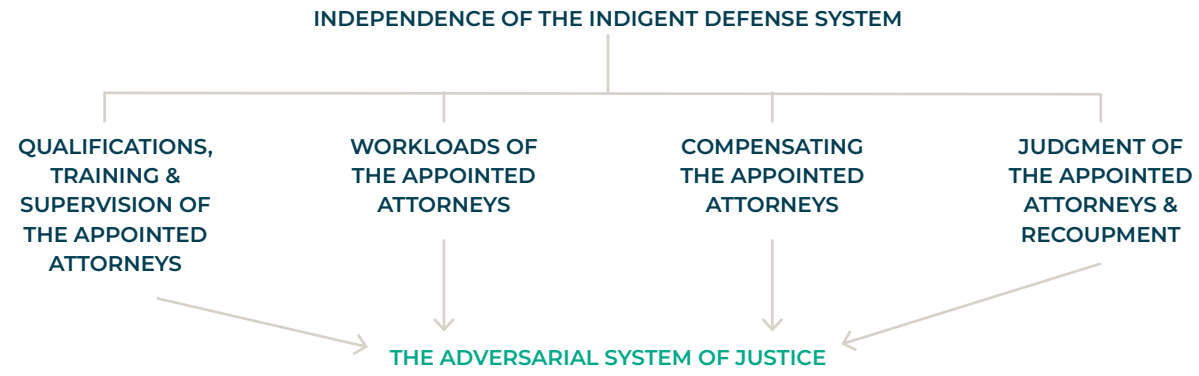
FINDING 9: The state's recoupment practice can interfere with the appointed attorneys' constitutional duty to exercise independent judgment about how to conduct the defense.

The state's recoupment practice can interfere with the ability of counsel to make independent decisions in conducting indigent defense. During this evaluation, appointed attorneys across the state reported that recoupment impacted their ability to adequately represent their clients because the *cost* of representation dictated the attorney-client relationship and decisions on the case. Attorneys reported they were reluctant to: contact or speak with their appointed clients; conduct legal research, file motions, and request investigators and experts on their appointed cases; and that their appointed clients were unwilling to go to trial because of the recoupment costs.

Regardless of the severity of the charge, the Sixth Amendment mandate is designed to avoid poor defendants from having to make this calculation at all because "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided" for them.[231]

CHAPTER 8

The Adversarial System of Justice



The U.S. Supreme Court has explained time and again that "an indispensable element of the effective performance of [counsel's] responsibilities is the ability to act independently of government and to oppose it in adversary litigation."[232] Only in ensuring the independence of the indigent defense *system* can there be a true adversarial *system* of justice.

The preceding chapters described undue judicial and political involvement with the selection, oversight, compensation, and independent judgment of the appointed attorneys. Each of these components alone, or in combination, can impede an attorney's ability to subject the prosecution's case to "the crucible of meaningful adversarial testing."[233] For example, an unqualified or untrained attorney with a reasonable workload and sufficient resources may not know *how* to defend a client; the most qualified and trained attorney may have so few resources or so many cases that they are *conflicted* out of defending client; or the most qualified and trained attorney with a reasonable workload and all the necessary resources *cannot* adequately defend a client because the client cannot risk repaying the cost of representation. The independence of all components to the indigent defense system is necessary to realize an adversarial justice system.

FINDING 10: South Dakota's current indigent defense system may impair the ability of appointed attorneys to be adversarial.

Attorney-client communication. A defendant has a right to consult with their attorney and an attorney has a duty to communicate with their client.[234] Attorney-client communication is part and parcel to preparing an adequate defense and assuming an adversarial role in the criminal justice system. Yet, various stakeholders across the state, including sheriffs, judges, and prosecutors, expressed concerns about the lack of attorney-

client communication in appointed cases and having to field complaints from indigent defendants about their appointed attorneys.

Investigators & experts. Other than the Minnehaha County PDO, which employs one investigator, most appointed attorneys must request funds from a judge to hire an investigator and expert (and then spend time locating an investigator or expert who will agree to work on the case). Judges across the state reported only seeing defense motions for experts and investigators in serious appointed felony cases, but not in appointed misdemeanor and lower-level felony cases.

Discovery, motions & trials. Reviewing discovery from the prosecution is necessary to determining which motions to file and litigate. One attorney described their discovery practice as client-driven – if a client confirms that the police report is accurate, the attorney will not watch the discovery videos, or if a client says there is an issue with the search, the attorney will watch until the end of the search but not through the end of the video. Other attorneys reported a similar practice. A state's attorney in one county reported that appointed attorneys file "boilerplate" discovery motions only, and only one attorney on this county's court-appointed attorney list regularly files suppression motions (a different attorney on this list has filed only one motion to suppress in nearly four years).

A similar observation was made regarding trial practice. Statewide, the trial rate for appointed cases (handled by all public defenders and private attorneys) over the six-year period from 2018 – 2023 averaged 1.51%.[235] In each of the counties evaluated, the trial rate in appointed cases is shown in the chart below:

	2018	2019	2020	2021	2022	2023	Average
Beadle	10.91%	3.85%	3.11%	1.38%	1.82%	4.24%	4.22%
Davison	1.25%	1.21%	0.46%	0.88%	1.60%	0.19%	0.93%
Fall River	1.75%	1.36%	0.99%	0.99%	0.53%	1.31%	1.16%
Hughes	0.00%	0.48%	0.22%	0.58%	0.33%	0.60%	0.37%
Meade	2.15%	2.20%	1.06%	0.95%	0.61%	1.23%	1.37%
Minnehaha	2.49%	1.84%	1.24%	0.90%	1.44%	1.99%	1.65%
Roberts	2.72%	3.24%	3.23%	2.99%	2.11%	1.38%	2.61%

CHAPTER 9

Recommendations

This is not the first evaluation of indigent defense services in South Dakota. In 1976, the Conference of Presiding Court Judges of South Dakota requested a statewide evaluation of indigent defense services. Funded by the U.S. Department of Justice, the National Center for Defense Management conducted the evaluation and issued a 153-page report in January 1977 titled "Systems Development Study of Indigent Defense Delivery Systems for the State of South Dakota."[236]

Observations made by 6AC evaluators are similar to observations made by the 1977 report evaluators nearly 50 years ago, specifically on the economic pressures faced by county governments and private attorneys, and the quality of right to counsel services. As the 1977 report stated: "While it is not impossible, it is difficult to be an effective yet aggressive defender lawyer in South Dakota."[237] Based on our evaluation, we believe this remains an apt description of indigent defense in South Dakota.

Because the state did not make changes to the *structure* of the indigent defense *system* back then, the right to counsel issues that existed nearly 50 years ago have been passed down, institutionalized, and inherited to present day. No single person today can, or should, be blamed for the right to counsel deficiencies detailed in this report – they predate any of today's system actors. South Dakota's right to counsel deficiencies are structural (not individual) and can only be remedied at the state-level, by the state.

> 6AC conducted 141 interviews for this evaluation. In our professional opinion, South Dakota's criminal justice system actors are not intentionally or maliciously trying to discourage or deprive anyone of counsel. Rather, many stakeholders, including judges, prosecutors, sheriffs, private attorneys, and state and county officials, expressed a sincere desire and hope to improve the quality and effectiveness of South Dakota's indigent defense system.

Our Recommendations ensure that every indigent person accused of a crime in South Dakota is afforded their right to counsel under the Sixth and Fourteenth Amendments, today and in the future.

RECOMMENDATIONS 1 – 2

To ensure South Dakota's indigent defense system remains independent of undue judicial and political involvement, the newly established Commission on Indigent Legal Services (CILS) should exercise its statutory authority and be an independent administrator of the indigent defense system.

CILS is a state commission with the statutory obligation to "oversee all indigent representation services in South Dakota to ensure the effective assistance of counsel where there is a right to counsel under state or federal law."[238] CILS must accomplish this by (1) promulgating standards; and (2) enforcing standards statewide.

RECOMMENDATION 1: CILS should promulgate standards necessary to ensure the effective assistance of counsel.

The statute currently authorizes CILS to establish minimum standards on attorney training, caseloads, and conflict reassignment; establish attorney compensation and travel reimbursement rates; and oversee attorney billing.[239] CILS should promulgate the following standards:

> (a) Independence. The selection, compensation, and oversight of all indigent defense attorneys must be independent from undue judicial and political influence. The indigent defense system and the attorneys serving under it should be subject to judicial and political oversight only to the same extent as retained counsel or the prosecution.[240]
>
> (b) Indigency determination. CILS and the UJS should establish a statewide standard for determining a person's indigency to qualify for an appointed attorney through court rule and establish a procedure for defendants to appeal a court's determination of indigency.
>
> CILS and UJS should periodically undergo this process to ensure that the established indigency determination standard reflects the state's current economy.
>
> (c) Counsel at critical stages. CILS should assign attorneys to staff initial appearance in every magistrate court. At initial appearance, the attorney's responsibilities should include assisting defendants applying for appointed counsel; advising defendants of the potential consequences of waiving their right to counsel; and representing indigent defendants who qualify for appointed counsel at initial appearance. Once assigned to a case, CILS should require that the same attorney continuously represents the client in every critical stage of each case, and personally appears at every court appearance through the pendency of an assigned case.
>
> (d) Attorney qualification, education & training. Currently, a licensed attorney with no criminal defense experience can be assigned to represent an indigent person in every type of criminal case, from a class 1 misdemeanor to a class A felony. CILS should establish minimum attorney qualification and training standards by case type so that an attorney's ability, training, and experience match the complexity of the case they are appointed to.
>
> CILS should establish a training center that offers statewide trainings and conferences on indigent defense for appointed attorneys. These trainings can include topics such as developments in substantive criminal law, fostering attorney-client relationships, litigation skills, and advancements in technology. Attorneys new to indigent defense (public defenders and private attorneys) should be required to attend a rigorous training course on indigent defense

practice prior to being appointed cases. All appointed attorneys should be required to attend continuing legal education relevant to the attorneys' indigent defense clients.

(e) Attorney caseloads. CILS should conduct a case-weighting study to establish jurisdiction-specific attorney caseload standards. The caseload standards that CILS establishes should consider the attorney's full workload, including travel and non-appointed case responsibilities.

(f) Attorney compensation. CILS should set the attorney hourly compensation and travel reimbursement rates at levels that pay private attorneys for overhead expenses plus a reasonable fee. CILS should ban all compensation schemes that create financial conflicts of interest, including flat fees, low hourly rates, and hourly rates with caps on total case compensation. CILS should obtain modern case management and billing software necessary for efficient fiscal oversight of attorney time and billing. Attorney billing should be standardized across the state and include attorney time and expenses spent on each task on an appointed case.

CILS should periodically reevaluate the attorney compensation and travel reimbursement rates to ensure that the rates reflect the state's current economy.

(g) Attorney performance. CILS should establish minimum standards for attorney performance, including initial client interview; ongoing attorney-client communication; discovery and motions practice; use of experts and investigators; plea negotiation and collateral consequences; trial; mitigation and sentencing; and case management.

(h) Attorney supervision. CILS should establish supervision standards so that all appointed attorneys are systematically reviewed for effective representation according to CILS' standards. This review should include observing court, monitoring client complaints, and reviewing attorney time and billing.

(i) Additional standards that CILS determines are necessary to fulfill its statutory obligation. As a state commission responsible for ensuring effective indigent defense services statewide, CILS should be authorized to promulgate additional standards it determines necessary without the need for statutory amendments.

RECOMMENDATION 2: CILS should be funded through state annual appropriations at the level necessary to enforce standards statewide.

CILS must be funded at the level necessary to enforce the standards it promulgates statewide to ensure statewide oversight of adult trial-level indigent defense services. CILS should design an indigent defense model that best accomplishes this goal in keeping with the unique needs of South Dakota.

South Dakota can adopt a number of different indigent defense models to meet this goal, and 6AC can assist CILS with this process as it designs the model that is best for the state. For now, below are examples of

two models to consider. Either model can develop gradually over time. Both models rely on government-employed public defenders and private attorneys to meet the state's indigent defense needs, and both models enable CILS to exercise statewide oversight of adult trial-level indigent defense services.

Option 1: 100% State Model. The state funds CILS to provide statewide indigent defense services in all adult trial-level criminal cases, using a combination of regionalized public defender offices and a statewide managed private assigned counsel system. This fully relieves the counties from funding and providing indigent defense services.[241]

Option 2: Hybrid State-Local Model. In counties with a population less than 100,000 people, the state funds CILS to provide indigent defense services in all adult trial-level criminal cases, using a combination of regionalized public defender offices and a managed private assigned counsel system. This fully relieves county governments from funding and providing indigent defense services in these counties.

In counties with a population greater than 100,000,[242] CILS requires the county to submit compliance plans to CILS detailing how the county intends to meet CILS' standards and the cost of meeting those standards. The county funds the "county share" of indigent defense (the average amount the county spent on indigent defense in the last five consecutive county fiscal years), and the state funds the difference between the county share and the costs required for meeting CILS' standards.

The following components must be included for these two models to operate:

Regionalized public defender offices (both models). Given the state's large geographic span, both models call for CILS to establish regionalized public defender offices where each office provides representation in its home county and several surrounding counties. Counties with existing public defender offices (Lawrence, Minnehaha, and Pennington) could expand into providing representation in surrounding counties.

Each regional public defender office is headed by a regional public defender and consists of state government-employed attorneys and support staff. The office can administer an internal supervisory structure that efficiently ensures all attorneys follow CILS' standards.

The locations of the regional public defender offices should consider factors such as geographic span coverage, travel, detention facility locations, courthouse locations, access to client communities, and the number of criminal case filings in each county. Below is a list of the counties with the highest portion of criminal case filings in the state from state fiscal years 2018 – 2023.[243] Almost 50% of all adult trial-level criminal cases in the state are filed in Minnehaha and Pennington counties:

Of the 54 counties not included in the list above, six counties each assumed between 1 – 2% of criminal case filings,[244] and each of the remaining 48 counties assumed less than 1% of criminal case filings – altogether encompassing less than 20% of all adult trial-level criminal cases in the state. Based on this data, CILS may consider establishing multiple regional public defender offices in the eastern, central, and western regions of the state.

	County	% Criminal Case Filings Statewide
1	Minnehaha	29.58%
2	Pennington	17.81%
	SUBTOTAL	47.39%
3	Codington	4.68%
4	Brown	4.43%
5	Lawrence	3.97%
6	Lincoln	3.84%
7	Meade	3.52%
8	Brookings	3.21%
9	Yankton	2.51%
10	Hughes	2.42%
11	Davison	2.41%
12	Roberts	2.37%
	TOTAL	80.75%

Managed Private Assigned Counsel System (both models). South Dakota's indigent defense system must also rely on private attorneys to meet the state's indigent defense needs. A Managed Private Assigned Counsel program (MPAC program) is a coordinated system in which a government entity creates, maintains, and manages a list of qualified private attorneys to provide indigent defense services.

Currently, UJS manages a list of private attorneys for appointed cases. To ensure the independence of the indigent defense system, CILS should establish, manage, and oversee a statewide MPAC program comprised of qualified private attorneys that contract with CILS to comply with CILS' standards. Only those private attorneys in the MPAC program can be appointed to adult criminal cases in the trial courts, and CILS must ensure that appointments are made in a fair and equitable manner. CILS should collaborate with local private lawyers to create regional private assigned counsel lists and participate in advising, training, supervising, and assuming leadership roles within the MPAC program. MPAC program attorneys should be scheduled to staff initial appearances and represent defendants from appointment through the completion of each case.

County compliance plans (Hybrid State-Local Model only). To ensure a county outside the state delivery system is following the CILS standards, the county government must submit to CILS a compliance plan for approval, including a cost analysis of current expenditures and costs required for the county to meet the CILS standards. The county government must be subject to periodic reviews by CILS. The state legislature must appropriate funds to CILS in the total amount approved by CILS in the compliance plans. CILS must be authorized to require the county to provide documentation of indigent defense system expenditures and collect information from indigent defense systems. The county government should be required to provide

quarterly compliance plan progress reports and financial status reports to CILS.

CILS must be able to review county compliance plans, cost analyses, and progress reports; administer state grant distributions; and ensure that the county follows the compliance plan. If the county government breaches its duty to comply with the CILS standards, CILS must be authorized to enforce compliance by taking over the delivery of indigent defense services in the county and billing the county government for its costs.

RECOMMENDATIONS 3 – 5

Our findings elaborate on state practices that chill the right to counsel. Recommendations 3 – 5 resolve this issue by ensuring indigent defendants are properly advised of and are not discouraged from asserting and exercising their right to counsel.

RECOMMENDATION 3: South Dakota should consider ending its recoupment practice.

South Dakota's recoupment practice chills indigent defendants from exercising their right to counsel. The state should follow national standards and not require indigent defendants to "contribute to or reimburse defense services."[245]

Once CILS establishes, and UJS adopts as court rule a statewide indigency determination standard that is applied at the outset of every criminal case, the state can be assured that only those who are truly indigent receive services from an appointed attorney. The state should presume that an indigent person who qualified for appointed counsel at the start of the case cannot reimburse the cost of indigent defense services at the conclusion of the case.

However, in some circumstances (although uncommon), a person's indigency status can change during the pendency of a case. If the state determines that it is in its best financial interest to ensure this smaller subset of poor defendants repay the cost of services, then the state legislature should mandate minimum procedural safeguards to mitigate recoupment's chilling effect. At the conclusion of each appointed case for each defendant:

- The court must conduct a hearing to determine the defendant's present ability to pay the cost of services. This ability-to-pay hearing must be an evidentiary hearing on the imposition of costs and determination of the defendant's present ability to pay those costs, with an attorney representing the defendant and with the opportunity to present evidence, including witnesses, and to have a written record of the judicial findings and the right to petition for review.[246] The statute should make clear the standard of proof and burden of proof.
- If at the conclusion of this hearing the court finds the defendant has the ability to pay, the court may assess a fee *up to a fixed amount,* based on a fee schedule by case type set by the state.

All payments should be made to UJS, and the state should not use a collections agency to enforce payment. All revenue collected should go to the state general fund.

RECOMMENDATION 4: South Dakota should prevent prosecutors from speaking with unrepresented defendants who face the possibility of incarceration and have not waived the right to counsel.

The state should bar communication between prosecutors and unrepresented defendants, unless the defendants have knowingly, intelligently, and voluntarily waived their right to counsel. No waiver of counsel should be accepted without the defendant first being informed of their right to counsel and having the opportunity to "confer with a defense lawyer who can explain the dangers and disadvantages of proceeding without counsel, and if relevant, the implications of pleading guilty, including the direct and collateral consequences of a conviction."[247] All waivers of counsel should be on the record and executed in writing.

Prosecutors who speak directly with defendants, either on their own volition or at the suggestion of the judge, risk violating their ethical duties. National standards have repeatedly cautioned against this practice because prosecutors have a professional responsibility "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel."[248] The American Bar Association recommends that prosecutors refrain from negotiating with or seeking waivers of pretrial rights from unrepresented defendants. Rather, prosecutors should ensure that unrepresented defendants have been advised of their right to counsel and afforded an opportunity to obtain counsel.

RECOMMENDATION 5: UJS should adopt a uniform statewide advisement of rights.

UJS should adopt a statewide, uniform advisement of rights to inform every individual of their constitutional and statutory rights across the state. UJS should adopt a standardized procedure that every committing magistrate must follow to administer the advisement of rights. UJS should train, supervise, and oversee all committing magistrates in the state on an ongoing basis to ensure that every person in the state is properly informed of, and understands, their right to counsel. The language in the advisement of rights must be legally accurate and must not discourage indigent defendants from asserting and exercising their right to counsel.must appropriate funds to CILS in the total amount approved by CILS in the compliance plans. CILS must be authorized to require the county to provide documentation of indigent defense system expenditures and collect information from indigent defense systems. The county government should be required to provide quarterly compliance plan progress reports and financial status reports to CILS.

CILS must be able to review county compliance plans, cost analyses, and progress reports; administer state grant distributions; and ensure that the county follows the compliance plan. If the county government breaches its duty to comply with the CILS standards, CILS must be authorized to enforce compliance by taking over the delivery of indigent defense services in the county and billing the county government for its costs.exercising their right to counsel.

Endnotes

Preface

1. Pennsylvania was the other state. In August 2023, Pennsylvania for the first time appropriated state funds for indigent defense services.

2. H.B. 1064, 98th Leg. Sess. (S.D. 2023).

3. *Indigent Legal Services Task Force Final Report and Recommendations,* SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM (Oct. 1, 2023), https://ujs.sd.gov/uploads/committees/Indigent/ILSTaskForceFinalReportRecommendations.pdf.

4. H.B. 1057, 99th Leg. Sess. (S.D. 2024).

5. S.D. CODIFIED LAWS §§ 23A-51-1 to 23A-51-14 (2024) ("Indigent Legal Services").

6. The state office may expand its scope of direct representation services to include additional case types, if approved by CILS. S.D. CODIFIED LAWS § 23A-51-8 (2024).

7. Whereas CILS convened its first meeting on May 16, 2024, this evaluation describes indigent defense in South Dakota prior to CILS exercising its statutory authority.

Chapter 1

8. Gen. Laws Of S.D. Terr. § 273 (1868).

9. Gen. Laws Of S.D. Terr. § 249 (1874).

10. Gen. Laws Of S.D. Terr. ch. 7 (1879). See also S.D. Codified Laws § 23A-40-8 (2023) (the county must pay counsel reasonable and just compensation).

11. S.D. Const. art. 6 § 7.

12. U.S. Const. amend. VI.

13. *See* Faretta v. California, 422 U.S. 806, fn. 38 (1975) ("Article IX of the Pennsylvania Declaration of Rights in 1776 guaranteed '(t)hat in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . ..' The Vermont Declaration of Rights (Art. X) in 1777 protected the right of self-representation with virtually identical language. The Georgia Constitution (Art. LVIII) in 1777 declared that its provisions barring the unauthorized practice of law were 'not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.' In 1780 the Massachusetts Declaration of Rights, Art. XII, provided that the accused had a right to be heard 'by himself, or his counsel, at his election.' The New Hampshire Bill of Rights (Art. XV) in 1783 affirmed the right of the accused 'to be fully heard in his defence by himself, and counsel.' In 1792 the Delaware Constitution (Art. I, s 7) preserved the right in language modeled after Art. IX of the Pennsylvania Declaration of Rights. Similarly, in 1798 Georgia included in its Constitution (Art. III, s 8) a provision that protected the right of the accused to defend 'by himself or counsel, or both…"); *see also* The Act of April 30, 1790, ch. 9, 1 Stat. 118 (1790) (prior to the ratification of the Sixth Amendment, federal law mandated "[e]very person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.").

14. Faretta v. California, 422 U.S. 806, 833 (1975).

15. State *ex rel.* Parker v. Jameson, 61 N.W.2d 832, 833 (S.D. 1953).

16. Gideon v. Wainwright, 372 U.S. 335 (1963).

17. United States v. Cronic, 466 U.S. 648, 654 (1984); *see also* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

18. Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

19. Gideon v. Wainwright, 372 U.S. 335 (1963).

20. Argersinger v. Hamlin, 407 U.S. 25 (1972).

21. Alabama v. Shelton, 505 U.S. 654 (2002).

22. Douglas v. California, 372 U.S. 353 (1963).

23. Halbert v. Michigan, 545 U.S. 605 (2005).

24. Mempa v. Rhay, 389 U.S. 128 (1967).

25. In re Gault, 387 U.S. 1 (1967).

26. Faretta v. California, 422 U.S. 806, 818 (1975).

27. Strickland v. Washington, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

28. McMann v. Richardson, 397 U.S. 759, 771 n.14 ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

29. United States v. Cronic, 466 U.S. 648, 656 (1984).

30. S.D. Codified Laws § 23A-40-6 (2023).

31. S.D. Codified Laws § 23A-7-4 (2023).

32. S.D. Codified Laws § 22-6-1 (2023) (felonies); S.D. Codified Laws § 22-6-2 (2023) (misdemeanors). Non-criminal offenses include ordinance violations and petty offenses. Counties and municipalities can enact ordinances that carry a penalty of up to 30 days of imprisonment and/or a fine. S.D. Codified Laws § 7-18A-2 (2023) (counties); S.D. Codified Laws § 9-19-3 (2023) (municipalities).

In class 2 misdemeanor, ordinance violation, and petty offense cases, the judge or magistrate may state on the record at arraignment (or hearing in a petty offense case) that an out-of-custody defendant will not be imprisoned if convicted. In this case, counsel need not be appointed. S.D. Codified Laws § 23A-40-6.1 (2023).

33. S.D. Codified Laws §§ 22-1-4, 22-6-1 (2023).

34. S.D. Codified Laws §§ 22-1-4, 22-6-2 (2023).

35. California v. Ramos, 463 U.S. 992, 1014 (1983); *see* South Dakota v. Opperman, 247 N.W.2d 673 (S.D. 1976) ("There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.").

36. S.D. Codified Laws § 23A-40-6 (2023); *see also* Mempa v. Rhay, 389 U.S. 128 (1967).

37. S.D. Codified Laws § 23A-38-6 (2023).

38. S.D. Codified Laws § 21-27-4 (2023).

39. S.D. Codified Laws §§ 26-7A-30, 26-7A-31 (2023); *see also* S.D. Codified Laws § 26-8A-18 (2023) ("[T]he court shall appoint an attorney for any child alleged to be abused or neglected in any judicial proceeding.").

40. S.D. CODIFIED LAWS § 27-11A-7 (2023) (mental illness); S.D. Codified Laws § 27B-7-41 (2023) (developmental disability); S.D. Codified Laws § 34A-20-85 (drug or alcohol abuse).

41. Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

42. AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 (2023).

43. Cf. Robertson v. Jackson, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, "'ultimate responsibility' . . . remains at the state level."); Osmunson v. Idaho, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains "ultimate responsibility" and must step in if the local agency cannot provide the necessary services); Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002) ("While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process."); Letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) ("While a state may delegate obligations imposed by

the constitution, 'it must do so in a manner that does not abdicate the constitutional duty it owes to the people.'"); Ruling on Demurrers in Phillips v. California, No. 15CECG02201 at 4 (Cal. Super. Ct. Fresno County filed Apr. 13, 2016) ("If the State created an indigent defense system that is systematically flawed and underfunded, . . . the State remains responsible, even if it delegated this responsibility to political subdivisions."); Davison v. State, 466 P.3d 231 (Wash. 2020) (holding that the state legislature has delegated the duty to provide indigent public defense services to local governments, and thus the state and OPD are not liable for the local government's failure to comply with its statutory obligations. However, the court left open that, to the extent the plaintiff class has alleged systemic and structural deficiencies in Washington's system delegating authority to local governments, that is a valid ground for state liability, though the plaintiff class must show that the current statutory scheme systematically fails to provide local governments, across Washington, with the authority and means necessary to furnish constitutionally adequate indigent public defense services).

44. S.D. Codified Laws § 23A-40-17 (2023) (court appointed attorney and public defender payment fund); S.D. Codified Laws § 26-8A-19 (2023) (abused and neglected child defense fund). The county legal expense relief fund, established by statute in the association of county commissioners, is exclusively county-funded and provides financial relief to participating counties in costly prosecutions. *See* S.D. Codified Laws § 7-16B (2023); S.D. Admin. R. art. 22:01 (2023).

45. S.D. Codified Laws §§ 23-3-52, 23-3-53 (2023).

46. *Indigent Legal Services Task Force Final Report and Recommendations,* South Dakota Unified Judiciall System (Oct. 1, 2023), https://ujs.sd.gov/uploads/committees/Indigent/ILSTaskForceFinalReportRecommendations.pdf. S.D. CODIFIED LAWS § 4-10-10 (2023) (the state fiscal year is July 1 to June 30); S.D. CODIFIED LAWS § 7-21-1 (2023) (the county fiscal year is January 1 to December 31).

47.S.D. Codified Laws § 23A-40-7 (2023).

48. S.D. Codified Laws §§ 7-16A-1 through 7-16A-18 (2023).

49. S.D. Codified Laws § 7-16A-4 (2023) (the county commissioners appoint one member who cannot be a lawyer, a county employee or a law enforcement officer; the chairman of the board of county commissioners appoint two members who must be county commissioners; and the presiding judge of the county's circuit court appoints two members who must be attorneys practicing in the county).

50. S.D. Codified Laws § 7-16A-9 (2023).

51. S.D. Codified Laws §§ 7-16A-10, 23A-40-7 (2023).

52. S.D. Codified Laws § 23A-40-7 (2023); *see also Court Appointed Attorney Guidelines*, South Dakota Unified Judiciall System (Nov. 15, 2023), https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf.

53. S.D. Codified Laws §§ 23A-40-8, 7-16A-12 (2023).

54. Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2018 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2017); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2019 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2018); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2020 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2019); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2021 Court-Appointed Attorney Fees and Mileage" (Nov. 12, 2020); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2022 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2021); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2023 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2022); Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2024 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2023).

55. S.D. Codified Laws § 23A-40-8 (2023).

56. S.D. Codified Laws §§ 23A-40-8, 7-16A-12 (2023).

57. S.D. Codified Laws § 23A-40-7 (2023).

58. *Percentage of People in Poverty by County: 2015-2019*, United States Census Bureau (DEC. 10, 2020), https://www.census.gov/library/visualizations/interactive/acs-percentage-poverty-2015-2019.html.

59. Bennett, Buffalo, Clay, Corson, Dewey, Jackson, Mellette, Oglala Lakota, Roberts, Todd, and Ziebach counties are in persistent poverty. *See* Craig Benson, Alemayehu Bishaw & Brian Glassman, *Persistent Poverty in Counties and Census Tracks,* United States Census Bureau (May 2023), https://www.census.gov/content/dam/Census/library/publications/2023/acs/acs-51%20persistent%20poverty.pdf.

60. S.D. Codified Laws §§ 7-21-18, 7-21-19 (2023); *see also* S.D. Codified Laws §§ 10-1-1 through10-65-8 (2023).

61. South Dakota has a unified court system, meaning all courts use the same Odyssey-based, case-management system. On November 11, 2023, 6AC met with South Dakota State Court Administrator, Greg Sattizahn, and Information Technology (IT) Project Manager, Bill Poppenga to discuss data analysis. 6AC subsequently requested a six-month data sample to check its reliability. 6AC requested all data on case party data (location, demographics, and fee assessments); charges; attorney data (bar number, dates attorneys were added/removed from cases); hearings (date, type, result); and other events. No proprietary information (defendant's name, social security number, etc.) was shared. Each of the requested data categories was linked by unique identifiers for each case. On November 20, 2023, 6AC received the requested six-month data sample via email from Greg Sattizahn. The data consisted of all court data from January 1, 2023, through June 30, 2023. After obtaining clarity on the data received, 6AC requested similar data for every court from the start of fiscal year 2018 (July 1, 2017) through the end of fiscal year 2023 (June 30, 2023). All statewide data analysis for this evaluation was conducted using the data set sent from a secure link via email from the IT Project Manager and downloaded onto secure computers by 6AC. To our knowledge, no person or entity in South Dakota has ever comprehensively analyzed the State Court Administration indigent defense data prior to this study.

All data analysis in this report that relies on this six-year data set will be cited as "UJS statewide data from FY 2018 through FY 2023."

62. South Dakota State Treasurer's County Expense Form Court-Appointed Attorneys and Public Defender Payments and Abused and Neglected Children Defense, Office Of The State Treasurer (state fiscal years 2018 – 2023).

63. Since 2000, Pennington County contracts with Dakota Plains Legal Services (formerly known as Black Hills Legal Services, Inc.), a private 501(c)(3) nonprofit corporation, to provide representation in cases when the county public defender office has a conflict of interest or is otherwise unable to provide representation; habeas corpus proceedings; appeals of criminal convictions; juveniles, parents, guardians, or custodians in abuse and neglect petitions, delinquency cases, and child in need of supervision petitions; and civil commitment for a person alleged to be mentally ill. When Dakota Plains Legal Services has a conflict of interest, then the county arranges with the court to appoint cases to private attorneys.

Minnehaha County's secondary indigent defense system is a public defender office, the Office of the Public Advocate. When the Office of the Public Advocate has a conflict of interest, the county arranges with the court to appoint cases to private attorneys.

Chapter 2

64. S.D. Codified Laws § 7-7-1.1 (2023).

65. S.D. Codified Laws §§ 7-12-5, 24-11-3 (2023); *see also Justice Center Overview & Clarification*, Fall River County Sheriff's Office (Jan. 18, 2024), https://fallriver.sdcounties.org/files/2024/01/1-26-24-Overview-and-Clarification.pdf (the state has 25 local jails that serve all 66 counties, many of which contract to hold inmates for surrounding county governments, the state government, and/or the federal government).

66. S.D. Codified Laws § 7-12 (2023).

67. S.D. Codified Laws §§ 9-29-2, 9-29-19 (2023).

68. S.D. Codified Laws § 7-7-1.1 (2023).

69. S.D. Codified Laws § 7-16-8 (2023).

70. S.D. Codified Laws §§ 7-7-12, 7-16-19 (2023).

71. *SD State's Attorneys*, SD State's attorneys Association, https://sdstatesattorneys.org/sd-states-attorneys/ (last visited July 30, 2024) (The following counties have the same state's attorney: Corson, Dewey, Perkins, and Ziebach counties in the fourth judicial circuit; Edmunds and Walworth counties in the fifth judicial circuit; Haakon and Stanley counties in the sixth judicial circuit; Jones and Mellette counties in the sixth judicial circuit; and Fall River and Oglala Lakota counties in the seventh judicial circuit.).

72. UJS statewide data from FY 2018 through FY 2023.

73. There are nine classes of felonies and two classes of misdemeanors, each authorizing a maximum penalty upon a conviction:

- class A felony – a minimum punishment of death or life in state prison; a $50,000 fine may also be imposed.
- class B felony – a minimum punishment of life in state prison; a $50,000 fine may also be imposed.
- class C felony – life in state prison; a $50,000 fine may also be imposed.
- class 1 felony – 50 years in state prison; a $50,000 fine may also be imposed.
- class 2 felony – 25 years in state prison; a $50,000 fine may also be imposed.
- class 3 felony – 15 years in state prison; a $30,000 fine may also be imposed.
- class 4 felony – 10 years in state prison; a $20,000 fine may also be imposed.
- class 5 felony – 5 years in state prison; a $10,000 fine may also be imposed.
- class 6 felony – 2 years in state prison or a fine of $4,000, or both.
- class 1 misdemeanor – 1 year imprisonment in county jail, or a $2,000 fine, or both.
- class 2 misdemeanor – 30 days imprisonment in county jail, or a $500 fine, or both. S.D. Codified Laws §§ 22-6-1, 22-6-2 (2023).

74. "None" includes probation violation, certain habitual offender violations, and violation of a valid court order.

75. S.D. Const art. V, § 1.

76. S.D. Const art. V, § 11. The unified judicial system also receives funding collected from various fines, fees, penalties, and costs imposed on people utilizing the court system. In state fiscal year 2023, 84.9% of its expenditures were funded by the state general fund; 13.3% by the court automation fund (a statutory-set fee assessed on all criminal prosecutions and civil actions to fund court automation costs); and less than 2% by the law enforcement officer training fund, child support referees fund, federal funds, and drug screening fund. *See Annual Report State Fiscal Year 2023*, South Dakota Unified Judicial System, https://ujs.sd.gov/uploads/pubs/UJSFY2023AnnualReport.pdf.

77. S.D. Codified Laws § 16-5-1.2 (2023).

78. S.D. Codified Laws § 16-6-12 (2023).

79. S.D. Codified Laws §§ 16-12A-27.1, 16-12B-16, 16-12C-15 (2023).

80. S.D. Codified Laws § 16-6-1 (2023). In 2024, this increased to 46 circuit judges.

81. S.D. Const. art. V, § 11; S.D. Codified Laws § 16-2-21 (2023).

82. S.D. Codified Laws § 16-12B-8 (2023).

83. S.D. Codified Laws § 16-12B-1.1 (2023).

84. S.D. Codified Laws § 16-12C-2 (2023).

85. S.D. Codified Laws § 16-12C-11 (2023).

86. Offenses prosecuted by the state government in these three counties are heard in a courthouse in an adjacent county: Oglala Lakota County cases are heard in Fall River County, Todd County cases are heard in Tripp County, and Buffalo County cases are heard in Brule County.

87. In state fiscal year 2023, circuit court judges traveled a total of 166,763 miles to conduct official court business. Travel by circuit court judges ranged from the lowest at 7,440 miles in the second judicial circuit to the highest at 44,523 miles in the first judicial circuit. *See Annual Report State Fiscal Year 2023,* South Dakota Unified Judicial System,, https://ujs.sd.gov/uploads/pubs/UJSFY2023AnnualReport.pdf.

88. UJS statewide data from FY 2018 through FY 2023.

89. There are 574 federally recognized tribes in the United States, 347 of which are within the contiguous 48 states and the remaining 227 are within Alaska. The nine federally recognized tribes in South Dakota are: Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Oglala Sioux Tribe; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota. *See The 574 Federally Recognized Indian Tribes in the United States*, Congressional Research Service (JAN. 18, 2024), https://crsreports.congress.gov/product/pdf/R/R47414.

The nine federally recognized reservations in South Dakota are: Cheyenne River Indian Reservation; Crow Creek Indian Reservation; Flandreau Indian Reservation; Lower Brulé Indian Reservation; Rosebud Indian Reservation; Pine Ridge Indian Reservation; Lake Traverse Reservation; Standing Rock Indian Reservation; and Yankton Indian Reservation. *See The Tribes of South Dakota,* South Dakota Department Of Tribal Relations, https://sdtribalrelations.sd.gov/tribes/nine-tribes.aspx (last visited July 30, 2024).

90. Indian Country is statutorily defined as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the

original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151 (2024).

91. There are two exceptions to state government jurisdiction in Indian Country. For offenses against a person or person's property, the state can enforce state law in Indian Country when: (1) the offender is not Indian and the victim is Indian, see Oklahoma v. Castro-Huerto, 597 U.S. 629 (2022); and (2) the offender is not Indian and the victim is not Indian, see U.S. v. McBratney, 104 U.S. 621 (1881).

92. United States v. Bryant, 769 F. 3d 671 (9th Cir. 2016) ("The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed, *Scott v. Illinois,* 440 U.S. 367, 373-374, but it does not apply in tribal-court proceedings, *see Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 337."). Although the Indian Civil Rights Act of 1968, which governs tribal-court proceedings, is a federal statute that entitles indigent defendants to the right to effective assistance of counsel in certain case types, this right is "similar, but not identical to those contained in the Bill of Rights and the Fourteenth Amendments." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978).

Chapter 3

93. S.D. Codified Laws § 23A-7-4 (2023).

94. United States v. Cronic, 4665 U.S. 648, 659 (1984).

95. Halbert v. Michigan, 545 U.S. 605 (2005); Alabama v. Shelton, 505 U.S. 654 (2002); Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

96. Rothgery v. Gillespie County, 554 U.S. 191, 211 (2008); *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 388-89 (1977).

97. Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

98. Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008).

99. Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986).

100. Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008).

101. Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961).

102. Lafler v. Cooper, 566 U.S. 156, 165 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).

103. Lafler v. Cooper, 566 U.S. 156, 165 (2012); Wiggins v. Smith, 539 U.S. 510, 538 (2003); Glover v. United States, 531 U.S. 198, 203-04 (2001); Mempa v. Rhay, 389 U.S. 128, 134, 137 (1967).

104. United States v. Cronic, 466 U.S. 648, 658-59 (1984) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

105. S.D. Codified Laws § 23A-45-9 (2023).

106. S.D. Codified Laws §§ 23A-3-2, 23A-3-2.1, 23A-3-16, 23A-3-17, 32-23-1.1 (2023).

107. S.D. Codified Laws § 22-1-2 (2023) (definition of offense and public offense); S.D. Codified Laws § 23-1A-2 (2023) (traffic petty and misdemeanor offenses); S.D. Codified Laws § 23-1A-7 (2023) (any public offense while detained for petty offense); S.D. Codified Laws § 32-33-2 (2023) (misdemeanor motor vehicle violations).

108. S.D. Codified Laws § 23A-6-26 (2023).

109. Minnehaha and Fall River counties reported that class 2 misdemeanors generally begin with a citation.

110. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein v. Pugh, 420 U.S. 103 (1975). See also State v. Larson, 2009 S.D. 107 (2009).

111. S.D. Codified Laws § 23A-4-1 (2023).

112. S.D. Codified Laws §§ 23A-4-1, 23A-2-1 (defining complaint), 23A-4-3 (2023).

113. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein v. Pugh, 420 U.S. 103 (1975). *See also* State v. Larson, 2009 S.D. 107 (2009).

114. In Fall River County, because the magistrate judge holds magistrate court only twice each month, the clerk magistrate conducts an "Initial Arraignment" of In custody defendants at the county jail, which includes reading the advisement of rights, setting bond, and making the 48-hour probable cause determination. The complaint is provided to the defendant (but not read aloud) and there is no entry of plea.

115. S.D. Codified Laws § 16-2-21 (2023).

116. Bond Schedule for Use by Law Enforcement Officers, in Circuit Court State of South Dakota Second Judicial Circuit Lincoln and Minnehaha Counties (last revised Sept. 19, 2023).

117. FY23 Fine and Bond Schedule for Use by Clerk Magistrates, in Circuit Court Third Judicial Circuit State of South Dakota (eff. July 1, 2022).

118. S.D. Codified Laws § 23A-4-3 (2023).

119. A defendant charged with a felony cannot enter a plea at initial appearance. On all other offenses, the defendant may enter a plea of not guilty; not guilty by reason of insanity; guilty; nolo contendere; or guilty but mentally ill. *See* S.D. Codified Laws §§ 23A-4-3, 23A-7-2 (2023).

120. S.D. Codified Laws §§ 23A-40-11, 23A-40-12, 23A-40-13 (2023).

121. S.D. Codified Laws §§ 23A-40-10 through23A-40-16 (2023).

This does not include court costs and fees that the court may order an indigent defendant to pay upon a felony or misdemeanor conviction. *See* S.D. Codified Laws §§ 23A-27-27, 23A-35B-4, 23A-35B-10, 22-22-26.1 (2023) (the costs of prosecution, which includes "statutory fees of the sheriff incurred in connection with the prosecution and witnesses' fees and mileage paid or ordered paid by the county including fees of witnesses, cost of transcripts, court-appointed counsel fees, filing fees, breathalyzer fees, blood test fees, and other chemical test fees."); S.D. Codified Laws § 23A-28B-42 (2023) ($5 crime victims' compensation surcharge); S.D. Codified Laws §§ 16-2-41, 16-2-42 (2023) (a court automation surcharge in the amount of $17.50 for a local ordinance violation, $23.50 for a class 2 misdemeanor conviction, $41.50 for a class 1 misdemeanor conviction, and $61.50 for a felony conviction); S.D. Codified Laws § 23-3-52 (2023) ($50 liquidated costs "for partial reimbursement to state government and its subdivisions for law enforcement and judicial expenses incurred in providing the personnel, training, and facilities relative to the criminal justice system and to the 911 emergency reporting system."); S.D. Codified Laws §§ 24-2-28, 24-11-45 (2023) (a person confined in a state facility or in a jail is liable for the cost of the confinement, including "room and board charges; medical, dental, optometric, and psychiatric services charges; [and] vocational education training.").

122. Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970).

123. Libretti v. United States, 516 U.S. 29, 50–51 (1995).

124. S.D. Codified Laws § 23A-40-6 (2023).

125. S.D. Codified Laws § 23A-40-6 (2023).

126. S.D. Codified Laws § 23A-40-6 (2023).

127. *Confidential Application for Court-Appointed Attorney*, UJS224R Confidential Application for Court-Appointed Attorney, South Dakota Unified Judicial System (Oct. 2019) (emphasis added).

128. S.D. Codified Laws § 23A-40-6 (2023).

129. S.D. Codified Laws § 23A-4-3 (2023).

130. S.D. Codified Laws § 23A-4-3 (2023).

131. Fuller v. Oregon, 417 U.S. 40, 49 (1974).

132. Application for Court-Appointed Counsel (Rev. 9/09), Fall River County.

133. Lafler v. Cooper, 566 U.S. 156, 165 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).

134. Faretta v. California, 422 U.S. 806, 835 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits.").

135. American Bar Ass'n, ABA Ten Principles Of a Public Defense Delivery System, principle 5 (2023).

136. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-7.1 & cmt. (3rd ed. 1992).

137. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

138. United States v. Cronic, 466 U.S. 648, 655-656 (1984) (quoting Avery v. Alabama, 308 U.S. 444 (1940)); Strickland v. Washington, 466 U.S. 668, 685 (1984).

139. State *ex rel.* Parker v. Jameson, 61 N.W.2d 832, 833 (S.D. 1953) (citing Powell v. State of Alabama, 287 U.S. 45, 53 (1932)).

140. United States v. Cronic, 466 U.S. 648, 659-60 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Powell v. Alabama, 287 U.S. 45 (1932), was such a case.").

141. United States v. Cronic, 466 U.S. 648, 660 (1984).

142. Strickland v. Washington, 466 U.S. 668 (1984).

143. United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668, 686 (1984).

144. Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

145. Polk County v. Dodson, 454 U.S. 312 (1981).

146. American Bar Ass'n, ABA Ten Principles Of a Public Defense Delivery System, principle 1 (2023); American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-1.3(b) (3rd ed. 1992); National Study Comm'n On Def. Servs., Guidelines For Legal Defense Systems In The United States, guideline 2.10 (1976).

147. Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

Chapter 4

148. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-1.3(a) & cmt. (3rd ed. 1992).

149. American Bar Ass'n, Standards For Criminal Justice: Defense Function, standard 4-2.1 (4th ed. 2017) ("The government has an obligation to provide . . . services of qualified defense counsel for indigent criminal defendants.").

150. Powell v. Alabama, 287 U.S. 45, 53-56 (1932).

151. A retired Alabama attorney who had not practiced in years was also appointed to assist in the representation of all defendants.

152. Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

153. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-1.3(a) & cmt. (3rd ed. 1992).

154. American Bar Ass'n Criminal Justice Standards For The Defense Function, standard 4-2.1 (4th ed. 2017) ("The government has an obligation to provide . . . services of qualified defense counsel for indigent criminal defendants.").

155. National Legal Aid & Def. Ass'n, Performance Guideleines For Criminal Defense Representation, guideline 1.2(a) (2006).

156. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-1.5 & cmt. (3d ed. 1992).

157. National Advisory Comm'n On Crim. Just. Standards And Goals, Report Of the Task Force On The Courts, ch. 13 (The Defense), standard 13.16 (1973); National Legal Aid & Def Ass'n, Guidelines For Legal Defense Systems In The United States, guidelines 5.7, 5.8 (1976); American Bar Ass'n Criminal Justice Standards For The Defense Function, standard 4-1.12 (4th ed. 2017).

158. American Bar Ass'n Criminal Justice Standards For The Defense Function, standard 4-1.12(c) (4th ed. 2017).

159. National Legal Aid & Def Ass'n, Guidelines For Legal Defense Systems In The United States, guidelines 5.4, 5.5 (1976); American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 7 (2023).

160. S.D. Codified Laws § 7-16A-5 (2023) (public defender); S.D. Codified Laws § 7-16A-7 (2023) (assistant public defender).

161. S.D. Codified Laws § 23A-40-21 (2023).

162. *Attorneys Representing a Client with a Mental Illness,* UJS Video Training Series, South Dakota Unified Judicial System, https://ujsmil.sd.gov/ (last visited July 30, 2024).

163. S.D. Codified Laws § 16-17-A (2023); *see also* Continuing Education, State Bar Of South Dakota, https://www.statebarofsouthdakota.com/continuing-education/ (last visited July 30, 2024).

164. This data point applies to county fiscal year 2023 (January 1, 2023, to December 1, 2023).

165. This data point applies to county fiscal year 2023 (January 1, 2023, to December 1, 2023). Pennington County, which is not included in this group of 15 counties, contracts with a private 501(c)(3) nonprofit corporation to provide conflict representation in all case types.

166. "2022-2023 Indigent Counsel Agreement Beadle County" between Beadle County and Contract Attorneys for the period of January 1, 2022 through December 31, 2023.

167. "Indigent Public Defender Contract" between Davison County and Alvine Weidenaar LLP for the period of January 1, 2022 through December 31, 2024 (stating in the contract that the second private law firm is Stiles, Papendick & Kliner).

168. "Contract for Services Public Defender Contract" between Roberts County and Doody Law Office and Cameron Law for the period of May 16, 2023 through December 31, 2023; *see also* "Contract for Services Public Defender Contract" between Roberts County and Doody Law Office and Cameron Law for the period of January 1, 2024 through December 31, 2025.

169. This data point applies to county fiscal year 2023 (January 1, 2023, to December 1, 2023). The other two counties are Lawrence and Pennington.

170. South Dakota Indigent Defense Task Force, Minnehaha County Presentation (Mar. 31, 2023).

171. S.D. Codified Laws § 7-16A-4 (2023).

172. S.D. Codified Laws § 7-16A-4 (2023).

173. S.D. Codified Laws §§ 7-16A-3(1), 7-16A-4 (2023).

174. S.D. Codified Laws § 7-16A-18 (2023).

175. See job postings for Minnehaha County, Public Defender and Minnehaha County, Public Advocate stating that the public defender/public advocate "serves at the pleasure of the Board of County Commissioners[.]".

176."Assistant public defender" refers to any staff attorney employed by the county public defender offices. The PDO assistant public defenders include positions such as the chief deputy public defender, senior trial attorney, senior deputy public defender, and deputy public defender. The OPA assistant public defenders include positions such as the senior deputy public advocate and deputy public advocate. See also S.D. CODIFIED LAWS § 7-16A-3(1) (2023).

177. See county job positions for Minnehaha County, Public Defender; Minnehaha County, Chief Deputy Public Defender; Minnehaha County, Senior Trial Attorney; Minnehaha County, Senior Deputy Public Defender; and Minnehaha County, Deputy Public Defender.

178. S.D. Codified Laws § 7-16A-7 (2023).

Chapter 5

179. United States v. Cronic, 466 U.S. 648, 656-57 (1984).

180. Powell v. Alabama, 287 U.S. 45, 57-59 (1932).

181. Kansas v. Ventris, 556 U.S. 586 (2009) (citing Michigan v. Harvey, 494 U.S. 344, 348 (1990)).

182. Powell v. Alabama, 287 U.S. 45, 59 (1932).

183. McCoy v. Louisiana, 584 U.S. 414 (2018); Jones v. Barnes, 463 U.S. 745, 751 (1983); see National Legal Aid & Def. Ass'n, Performance Guidleines For Criminal Defense Representation (2006).

184. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 3 (2023); National Legal Aid & Def. Ass'n, Performance Guidleines For Criminal Defense Representation guideline 1.3 (2006).

185. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 3. (2023); American Bar Ass'n, Eight Guidelines Of Public Defense Related To Excessive Workloads, guideline 1 & cmt. (2009).

186. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard. 5-5.3 & cmt. (3d ed. 1992); National Study Comm'n On Defense Servs., Guidelines FOR Legal Defense Systems In The United States guideline 5.1 (1976); *see also* Statement of Interest of the United States at 9, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013), http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf.

187. National Advisory Comm'n On Crim. Just. Standards And Goals, Report Of The Task Force On The Courts, ch. 13 (The Defense), standard 13.12 (1973).

188. *See, e.g.*, Norman Lefstein, , *Securing Reasonable Caseloads: Ethics and Law in Public Defense,* American Bar Ass'n Standing Committee On Legal Aid And Indigent Defendants 43-49 (2011) (commenting that the NAC standards have "significant influence in the field of public defense respecting annual caseloads of public defenders" despite being "too high" and not suitable for reliance by local policymakers); American Council Of Chief Defenders, Statement On Caseloads And Workloads (Aug. 24, 2007) ("In many jurisdictions, caseload limits should be lower than the NAC standards."); State Bar Of California, Guidelines On Indigent Defense Services Delivery Systems, comment to Guideline VII (2006) (noting that, because "[n]umerical caseload goals can be affected by many variables, such as the policies and procedures within a local jurisdiction," jurisdictions should adopt more localized caseload standards providing greater utility than the NAC standards).

189. The NPDWS generated a consensus for the average amount of hours needed for an attorney to complete the tasks for a specific case type, resulting in these caseload maximums (the study assumes the conservative estimate that an attorney has 2,080 hours available for only case-related work in one year, which is equivalent to 40 hours a week, 52 weeks a year with no holidays, sick days, or paid time off). Pace, Nicholas M., Malia N. Brink, Cynthia G. Lee &Stephen F. Hanlon, National Public Defense Workload Study, Rand Corporation (2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html; American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 3 (2023).

190. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 3 (2023).

191. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-5.3 & cmt. (3d ed. 1992).

192. S.D. Codified Laws § 7-16A-17 (2023).

193. In January 2024, 6AC met with the public defender of both Minnehaha County public defender offices to discuss data analysis. 6AC subsequently requested caseload data, first for PDO, then for OPA, via email to the Minnehaha County Information Technology (IT) Department. 6AC initially requested, for fiscal years 2018 to 2023, by case type and by attorney, (1) the number of open cases at the start of each fiscal year, (2) the number of cases assigned during each fiscal year, and (3) the number of cases disposed during each fiscal year. After obtaining clarity on the data set with Vince Fluckey from the Minnehaha County IT Department, 6AC requested two datasets: (1) all open cases for each fiscal year (2018 – 2023), and (2) all closed cases for each fiscal year (2018 – 2023). 6AC requested that each dataset include case number, open date, close date, billing type, total time, trial code, case type, and attorney. The county could not provide data on the number of open cases at the start of each fiscal year (which would show the number of cases that continue over more than one fiscal year) and so the data received underreports the actual caseload for each year. 6AC received the requested data for PDO in February 2024 and for OPA on April 11, 2024. The data was sent via email in Excel spreadsheets. No proprietary information (client name, social security numbers, etc.) was shared. 6AC also met with Minnehaha County Human Resources Director, Carey Deaver, and requested employment data for both public defender offices. 6AC received the requested dates of employment and promotions for attorneys for fiscal years 2018 to 2023 on February 9, 2024, via email from Carey Deaver. All data analysis in this report that relies on this six-year data set will be cited as "Minnehaha County data from FY 2018 through FY 2023." See also UJS statewide data from FY 2018 through FY 2023.

194. Minnehaha County data from FY 2018 through FY 2023.

195. Minnehaha County data from FY 2018 through FY 2023.

196. Minnehaha County data from FY 2018 through FY 2023. This time analysis is an estimate because of anecdotal reports that PDO attorneys underreport the time they spend on their cases. Despite these reports, the time estimates still reflect the excessive caseloads carried by individual attorneys in the office.

197. Pace, Nicholas M., Malia N. Brink, Cynthia G. Lee, and Stephen F. Hanlon, National Public Defense Workload Study (2023), available at https://www.rand.org/pubs/research_reports/RRA2559-1.html

Chapter 6

198. United States v. Cronic, 466 U.S. 648, 656-57 (1984).

199. United States v. Cronic, 466 U.S. 648, 656-57 (1984).

200. *See, e.g.*, Wright v. Childree, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (concluding that "requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;" and that Alaska's constitution "does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden," because doing so would be taking "private property for a public purpose without just compensation"); Kansas *ex rel.* Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987) (the state "has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses."); Louisiana v. Wigley, 624 So.2d 425, 429 (La. 1993) (finding that "in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs."); Wilson v. Mississippi, 574 So.2d 1338, 1340 (Miss. 1990) (holding indigent defense attorneys are entitled to "reimbursement of actual expenses" including "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," in addition to a reasonable sum); Oklahoma v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990) (finding that the state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses."); Jewell v. Maynard, 383 S.E.2d 536, 540 (W. Va. 1989) (finding that, because compensation rates did not cover attorney overhead, court appointed attorneys were forced to "involuntarily subsidize the State with out-of-pocket cash;" "[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.").

201. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-2.4 & cmt. (3d ed. 1992).

202. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-2.4 & cmt. (3d ed. 1992); American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 2 (2023).

203. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-2.4 & cmt. (3d ed. 1992) ("[w]here the discretion to approve payment claims is vested in the judiciary, the necessary independence of counsel is compromised."); National Legal Aid & Def. Ass'n, Standards For The Administration Of Assigned Counsel Systems, standard 2.2(1) (1989) ("the amount of compensation sought shall be reviewed by the Administrator and approved unless there is cause to believe the amount is unwarranted[.]"); *see also* Powell v. Alabama, 287 U.S. 45, 61 (1932) ("But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.").

204. S.D. Codified Laws §§ 23A-40-8, 7-16A-12 (2023).

205. Memo from State Court Administrator Greg Sattizahn to State Bar of South Dakota RE "2023 Court-Appointed Attorney Fees and Mileage" (Nov. 15, 2022); *Court Appointed Attorney Guidelines,* South Dakota Unified Judicial System (Nov. 15, 2023), https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf.

206. S.D. Codified Laws § 23A-40-8 (2023).

207. *Court Appointed Attorney Guidelines*, South Dakota Unified Judicial System (Nov. 15, 2023), https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf.

208. "Contract for Representation of Indigent Defendants" between Butte County and Barnaud Law Firm, Prof. LLC for the period of January 1, 2023 through December 31, 2025 (the county paid the attorney the UJS state hourly rate).

209. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, principle 2 (2023) (citing Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1132(W.D. Wash., Dec. 4, 2013) finding that a flat fee contract "left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable.").

210. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services,, standard 5-2.4 & cmt. (3d ed. 1992).

211. S.D. Codified Laws § 7-16A-3 (2023) (public defender annual compensation); S.D. Codified Laws § 7-16A-8 (2023) (facilities and supplies for the office); S.D. Codified Laws § 7-16A-6 (2023) (employment of staff).

Chapter 7

212. American Bar Ass'n, Standards For Criminal Justice -- Providing Defense Services, standard 5-7.2 & cmt. (3rd ed.1992).

213. Fuller v. Oregon, 417 U.S. 40, 49 (1974) (citing James v. Strange, 407 U.S. 128, 133 (1972)).

214. Fuller v. Oregon, 417 U.S. 40, 49 (1974).

215. United States v. Cronic, 466 U.S. 648, 656-57 (1984).

216. S.D. Codified Laws §§ 23A-40-10 through 23A-40-16 (2023).

217. S.D. Codified Laws §§ 23A-40-10, § 23A-40-13 (2023).

218. S.D. Codified Laws §§ 23A-40-10 through23A-40-16 (2023).

219. S.D. Codified Laws § 23A-40-14 (2023).

220. S.D. Codified Laws § 23A-40-10 (2023).

221. *Court Appointed Attorney Guidelines*, South Dakota Unified Judicial System (Nov. 15, 2023), https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf.

222. Obligation Recovery Center (Center) Debt Collection Process, State Of South Dakota Bureau Of Administration, available at https://boa.sd.gov/obligation-recovery/docs/ORC%20Flow%20Chart%202017.pdf.

223. The 22 counties that did not have an agreement with UJS were Aurora, Bon Homme, Brule, Buffalo, Butte, Charles Mix, Clay, Corson, Davison, Dewey, Fall River, Harding, Hutchinson, Lawrence, McCook, Meade, Minnehaha, Perkins, Turner, Union, Yankton, and Ziebach counties.

224. County stakeholders reported that they believe many letters would be returned because there is a long delay between case disposition and lien imposition and many defendants will have changed addresses in that time.

225. Fuller v. Oregon, 417 U.S. 40 (1974).

226. S.D. Codified Laws § 23A-40-10 (2023).

227. S.D. Codified Laws § 23A-27-25.5 (2023). Stakeholders reported that it is rare for the court to revoke probation for the nonpayment of legal representation expenses, so a hearing on the issue of nonpayment rarely occurs.

228. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-7.2 & cmt. (3rd ed. 1992).

229. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-7.2 & cmt. (3rd ed. 1992).

230. Strickland v. Washington, 466 U.S. 668, 686 (1984); Polk County v. Dodson, 454 U.S. 312, 321 (1981).

231. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

Chapter 8

232. Ferri v. Ackerman, 444 U.S. 193, 194 (1979); see also Polk County v. Dodson, 454 U.S. 312, 321-22 (1981) (government has a constitutional obligation "to respect the professional independence of the public defenders whom it engages."); Strickland v. Washington, 466 U.S. 668, 686 (1984) (government violates the right to counsel "when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); United States v. Cronic, 466 U.S. 648, 659-60 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Powell v. Alabama, 287 U.S. 45 (1932), was such a case.").

233. United States v. Cronic, 466 U.S. 648, 656 (1984).

234. Kansas v. Ventris, 556 U.S. 586 (2009) (citing Michigan v. Harvey, 494 U.S. 344, 348 (1990)); Powell v. Alabama, 287 U.S. 45, 59 (1932); *see also* South Dakota Rules Of Professional Conduct r. 1.4.

235. UJS statewide data from FY 2018 through FY 2023.

Chapter 9

236. *Systems Development Study of Indigent Defense Delivery Systems for the State of South Dakota*, National Center For Defense Management, National Legal Aid And Defender Association (Jan. 1977), https://www.ojp.gov/pdffiles1/Digitization/40393NCJRS.pdf.

Additionally, in October 1977, the South Dakota Advisory Committee to the United States Commission on Civil Rights published a report on the issues Native American communities face in South Dakota's criminal justice system. That report recommended that the South Dakota Legislature establish a statewide indigent defense system to "deliver quality indigent criminal defense services in accordance with appropriate national standards." *See Liberty and Justice for All*, South Dakota Advisory Committee To The United States Commission On Civil Rights (Oct. 1977), https://www.ojp.gov/pdffiles1/Digitization/53212NCJRS.pdf.

237. *Systems Development Study of Indigent Defense Delivery Systems for the State of South Dakota*, National Center For Defense Management, National Legal Aid And Defender Association (Jan. 1977), https://www.ojp.gov/pdffiles1/Digitization/40393NCJRS.pdf.

238. S.D. Codified Laws § 23A-51-2 (2024).

239. S.D. Codified Laws §§ 23A-51-6(a), 6(c), 6(d) (2024).

240. The composition of CILS does not fully meet independence standards. While all three branches of government appoint members to the nine-member commission, the statute allows for one actively serving judge, one appointed private attorney, and one public defender to serve on the commission. The commission's responsibilities include overseeing all right to counsel services in the state and selecting the Chief Defender of the state office. To remove undue judicial and political involvement, and conflicts of interest, from the selection and oversight of indigent defense, no actively serving judge and no indigent defense attorney should serve on the commission. National standards allow *former* judges and indigent defense attorneys to serve on the commission so that the indigent defense system strikes the right balance in gaining relevant perspective without undue involvement from these actors.

Analogously at the county level, insofar as the state has county public defender offices, an independent 5- to 7-member county indigent defense commission should oversee all indigent representation services in the county and govern the selection, compensation, budgeting process, resources, and supervision of the indigent defense attorneys.

241. Five of South Dakota's neighboring states fund 100% of indigent defense services for state crimes (Iowa, Minnesota, Montana, and North Dakota) as do other states in the region (Colorado, Idaho, Missouri and Oregon). Wyoming requires funding be shared by the state and counties, with 85% of total appropriations coming from state general funds and 15% from counties. Wyo. Stat. Ann. § 7-6-113(a), (b), (c) (2024).

242. Minnehaha and Pennington counties are the only two counties that have a population greater than 100,000 people. Minnehaha County established its public defender office in 1982, and Pennington County established its public defender office in 1973.

243. UJS statewide data from FY 2018 through FY 2023.

244. The six counties are Beadle, Butte, Charles Mix, Clay, Fall River, and Union.

245. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, Principle 5 (2023).

246. American Bar Ass'n, Standards For Criminal Justice - Providing Defense Services, standard 5-7.2 & cmt. (3rd ed. 1992).

247. American Bar Ass'n, Aba Ten Principles Of a Public Defense Delivery System, Principle 6 (2023) ("Waiver of the right to counsel . . . should never be coerced or encouraged.").

248. American Bar Ass'n, Model Rules Of Prof. Conduct 4.3; American Bar Ass'n, Standards For Criminal Justice: Prosecution Function 3-4.1(b), 3-3.10(a), 3-3.10(c) (3d ed. 1993).