



# THE RIGHT TO COUNSEL: CONSTITUTIONAL REQUIREMENTS, STANDARDS & STATE TRENDS

DAVID  
CARROLL

Executive  
Director

Sixth  
Amendment  
Center

August 15,  
2013



# PRESENTATION TOPICS

## 1. THE MEANING OF THE AMERICAN RIGHT TO COUNSEL



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

“...any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seem to us to be an obvious truth.”

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3. INDIGENT DEFENSE TRENDS



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1. THE MEANING OF THE AMERICAN RIGHT TO COUNSEL
2. NATIONAL STANDARDS OF JUSTICE
3. INDIGENT DEFENSE TRENDS
1. CONSEQUENCES OF NOT MEETING 6<sup>TH</sup> AMENDMENT REQUIREMENTS



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# OUR BOARD



**WILLIAM MAUPIN**  
Former Chief Justice  
Supreme Court of Nevada



**KARLA GRAY**  
Former Chief Justice  
Montana Supreme Court

# OUR BOARD



**ERIC LUNA**  
Adjunct Professor  
CATO Institute,  
originally from Utah



**LYDIA JACKSON**  
Former State Senator  
State of Louisiana



**NICHOLAS CHIARKAS**  
Former NYC Police Officer &  
Reagan Appointee on President's  
Organized Crime Commission

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## 1. THE MEANING OF THE AMERICAN RIGHT TO COUNSEL



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# LIBERTY



# BILL OF RIGHTS

## AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## AMENDMENT II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

## AMENDMENT III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

## AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

# BILL OF RIGHTS

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

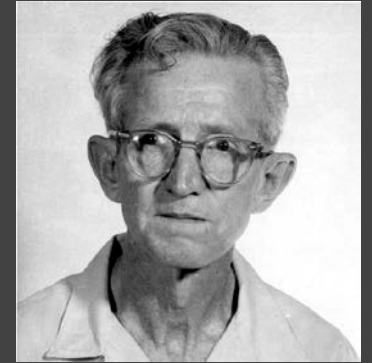
## AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.



JOHN  
ADAMS

“Counsel  
ought to be  
the very last  
thing an  
accused  
person  
should [be  
without] in a  
free country.”



**“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”**

*Gideon v. Wainwright*  
(1963)



## THE ROBERTS COURT

*Rothgery v.  
Gillespie  
County, Tex.,  
554 U.S.  
191 (2008)*

**“[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”**





## THE ROBERTS COURT

*Padilla v.  
Kentucky,*  
30 U.S.  
1473 (2010)

**“It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents ... demand no less.”**



## THE ROBERTS COURT

*Missouri v.  
Frye*, 566  
U.S. \_\_\_\_  
(2012)

**“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”**

# THE MEANING OF THE RIGHT TO COUNSEL

## WARREN COURT (1953-69)

Felonies: *Gideon v. Wainwright* ('63)

Direct Appeals: *Douglas v. CA.* ('63)

Police Interrogations: *Miranda v. AZ* ('66)

Delinquencies: *In Re Gault* ('67)

## BURGER COURT (1969-86)

Prelim. Hearings: *Coleman v. AL* ('70)

Plea Negotiations: *Brady v. US* ('70)

Right to "Effective" Rep.: *McMann v. Richardson* ('70)

Msdmr.: *Argersinger v. Hamlin* ('72)

Right to "Effective" System: *US v. Cronin* ('84)

## REHNQUIST COURT (1986-05)

Msdmr. w/suspended sentence: *Shelton v. Alabama* ('02)

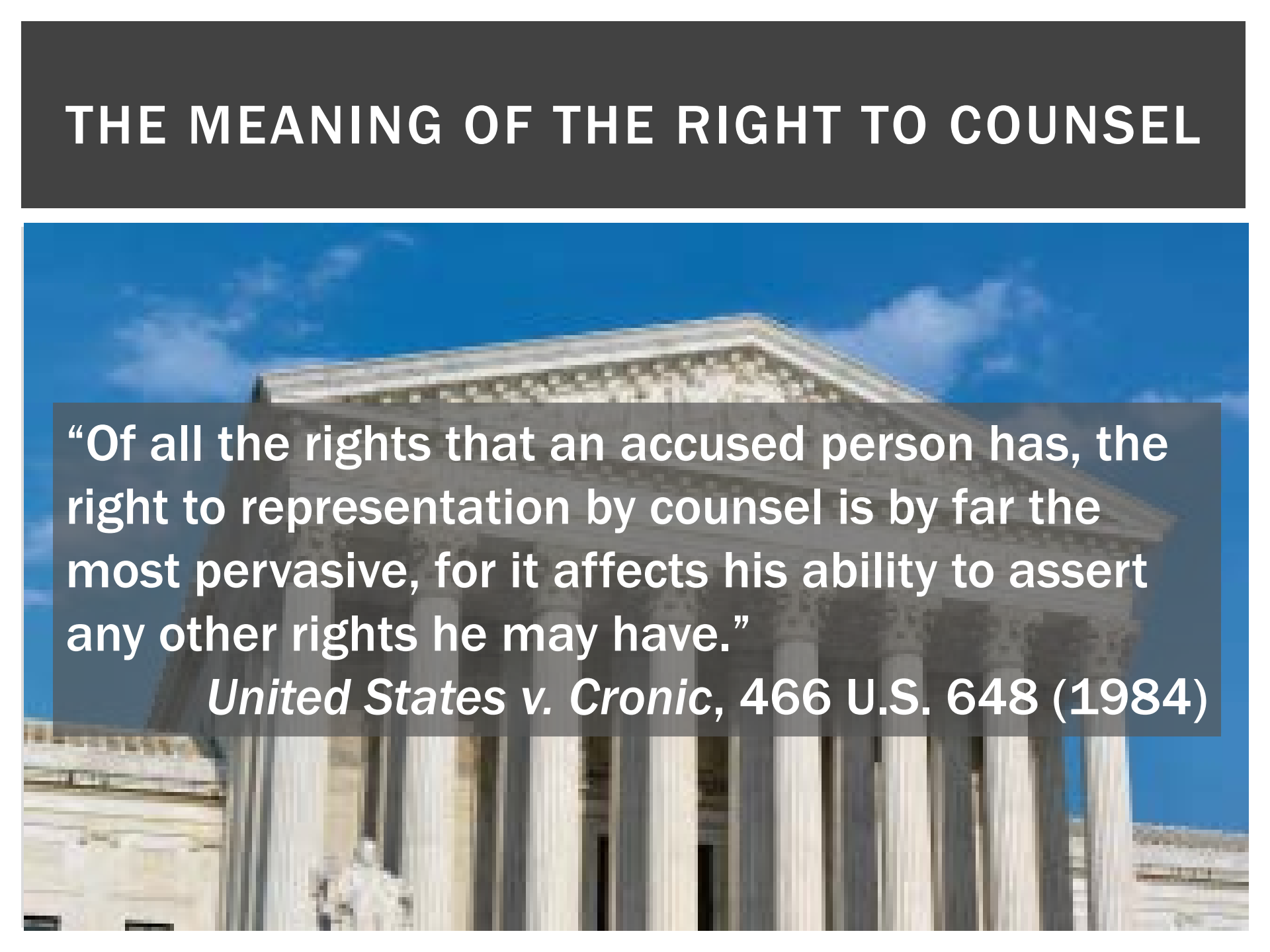
Appeal Challenging the sentence of a guilty plea: *Halbert v. Michigan* (2005)

## ROBERTS COURT (2005-Today)

Arraignments/Bail Review: *Rothgery v. Gillespie Cnty.* ('08)

"Effective" related to Collateral Consequences: *Padilla v. KY* ('10)

# THE MEANING OF THE RIGHT TO COUNSEL

A photograph of the Supreme Court building in Washington, D.C., featuring its iconic neoclassical architecture with tall columns and a pediment. The image is used as a background for the text.

“Of all the rights that an accused person has, the right to representation by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”

*United States v. Cronin*, 466 U.S. 648 (1984)

# COUNTY FUNDING OF INDIGENT DEFENSE

## Indicators of Limited Revenue

LOW PROPERTY VALUES

HIGH UNEMPLOYMENT

HIGH POVERTY RATES

LOW MEDIAN INCOMES

LOW HIGH SCHOOL GRADUTATION RATES

# COUNTY FUNDING OF INDIGENT DEFENSE

## Indicators of Limited Revenue

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## Indicators of Increased Crime

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# COUNTY FUNDING OF INDIGENT DEFENSE

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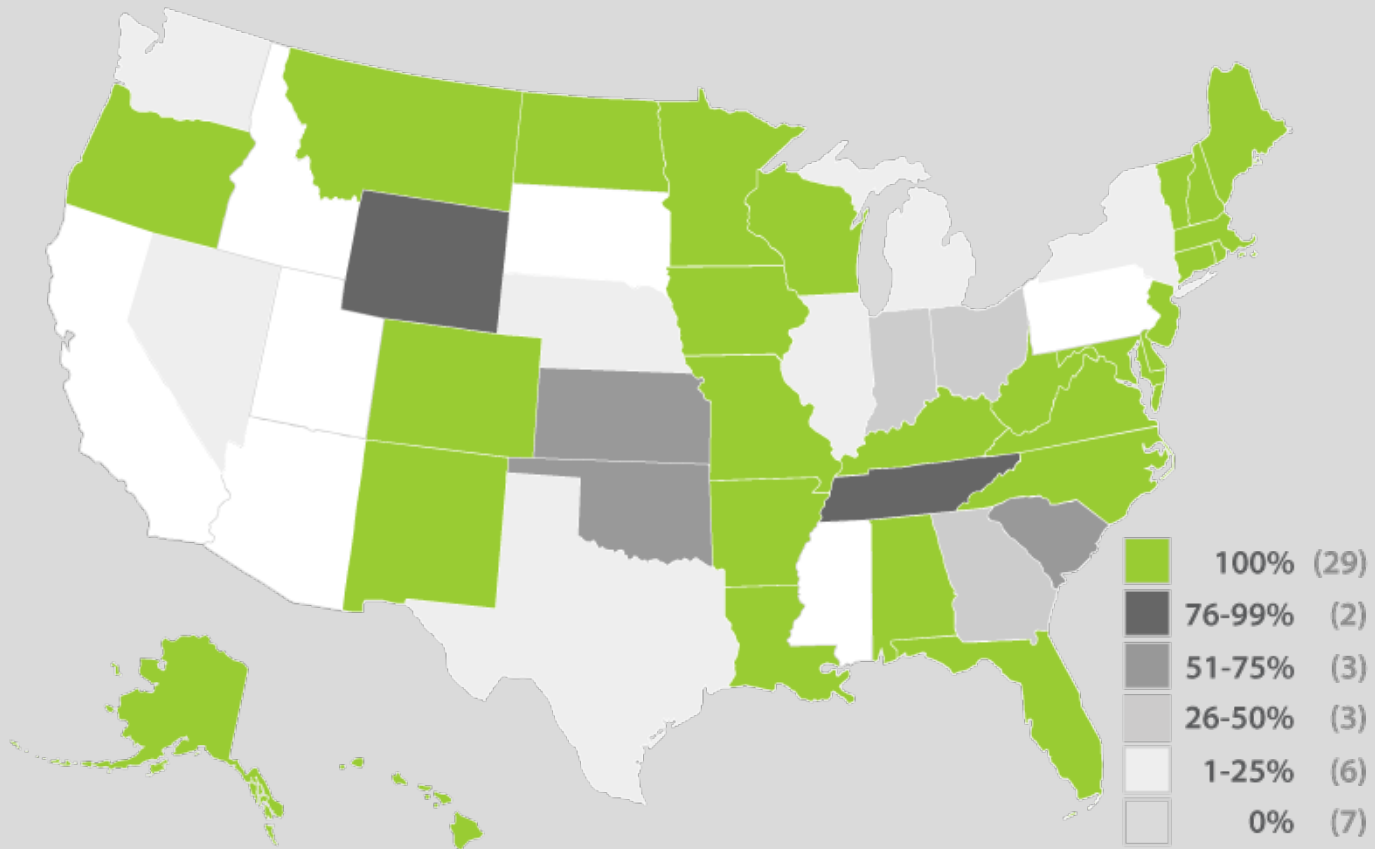
## Indicators of Increased Crime

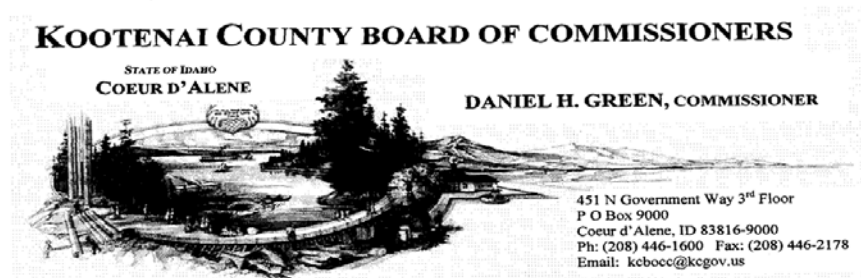
LOW PROPERTY VALUES  
HIGH UNEMPLOYMENT  
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LOW MEDIAN INCOMES  
LOW HIGH SCHOOL GRADUTATION RATES

Greater Need for Other Social  
Services

# COUNTY FUNDING OF INDIGENT DEFENSE

Percentage of Total Funding provided by the State





August 9, 2013

David J. Carroll, Executive Director  
Sixth Amendment Center  
PO Box 15556  
Boston, MA. 02215

Dear David:

Please present my comments to the legislative committee you are addressing on August 15<sup>th</sup>. I appreciated your insight and help as we struggled with the issues of addressing the implementation of a public defender's office that not only meets the constitutional requirements of the 6<sup>th</sup> amendment and balancing those needs with the political reality of limited funding.

Anyone who believes this is not a political issue is sadly mistaken. The task of balancing a proper legal defense and responding to our citizens at large often creates a difficult challenge

**“... a ‘reverse’ revenue sharing plan where the counties would fund a state indigent defense system by paying a prorated share to the state. The state could provide defense by county or districts.”**

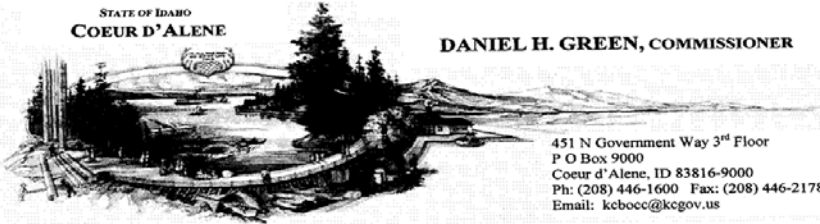
**KOOTENAI  
COUNTY –  
BOARD OF  
CTY.  
COMM.**

*Letter to the  
Sixth  
Amendment  
Center,  
August 12,  
2013*

## KOOTENAI COUNTY BOARD OF COMMISSIONERS

STATE OF IDAHO  
COEUR D'ALENE

DANIEL H. GREEN, COMMISSIONER



451 N Government Way 3<sup>rd</sup> Floor  
P O Box 9000  
Coeur d'Alene, ID 83816-9000  
Ph: (208) 446-1600 Fax: (208) 446-2178  
Email: kboccc@kegov.us

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**“... greater state involvement in establishing at least guidelines if not outright mandates to provide consistent standards for indigent defense throughout our state.”**

**KOOTENAI  
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# TEN PRINCIPLES

OF A PUBLIC DEFENSE DELIVERY SYSTEM



*February 2002*

## Ten Principles:

“The  
fundamental  
criteria  
necessary to  
design a  
system that  
provides  
effective,  
efficient,  
high-quality,  
ethical,  
conflict free  
legal  
represent-  
ation.”



# ***ABA TEN PRINCIPLES***


1. INDEPENDENCE OF THE DEFENSE FUNCTION
2. STATE FUNDING & PARTICIPATION OF THE PRIVATE BAR
3. EARLY APPOINTMENT OF COUNSEL
4. SUFFICIENT TIME & CONFIDENTIAL SPACE
5. WORKLOAD CONTROLS
6. ATTORNEY QUALIFICATIONS MATCH COMPLEXITY OF THE
7. CONTINUOUS REPRESENTATION BY SAME ATTORNEY
8. DEFENSE TREATED AS EQUAL PARTNER BY CRIMINAL JUSTICE SYSTEM
9. TRAINING
10. SYSTEMIC EVALUATION OF ATTORNEY PERFORMANCE

# INDEPENDENCE



AVOZELLES PARISH

# INDEPENDENCE



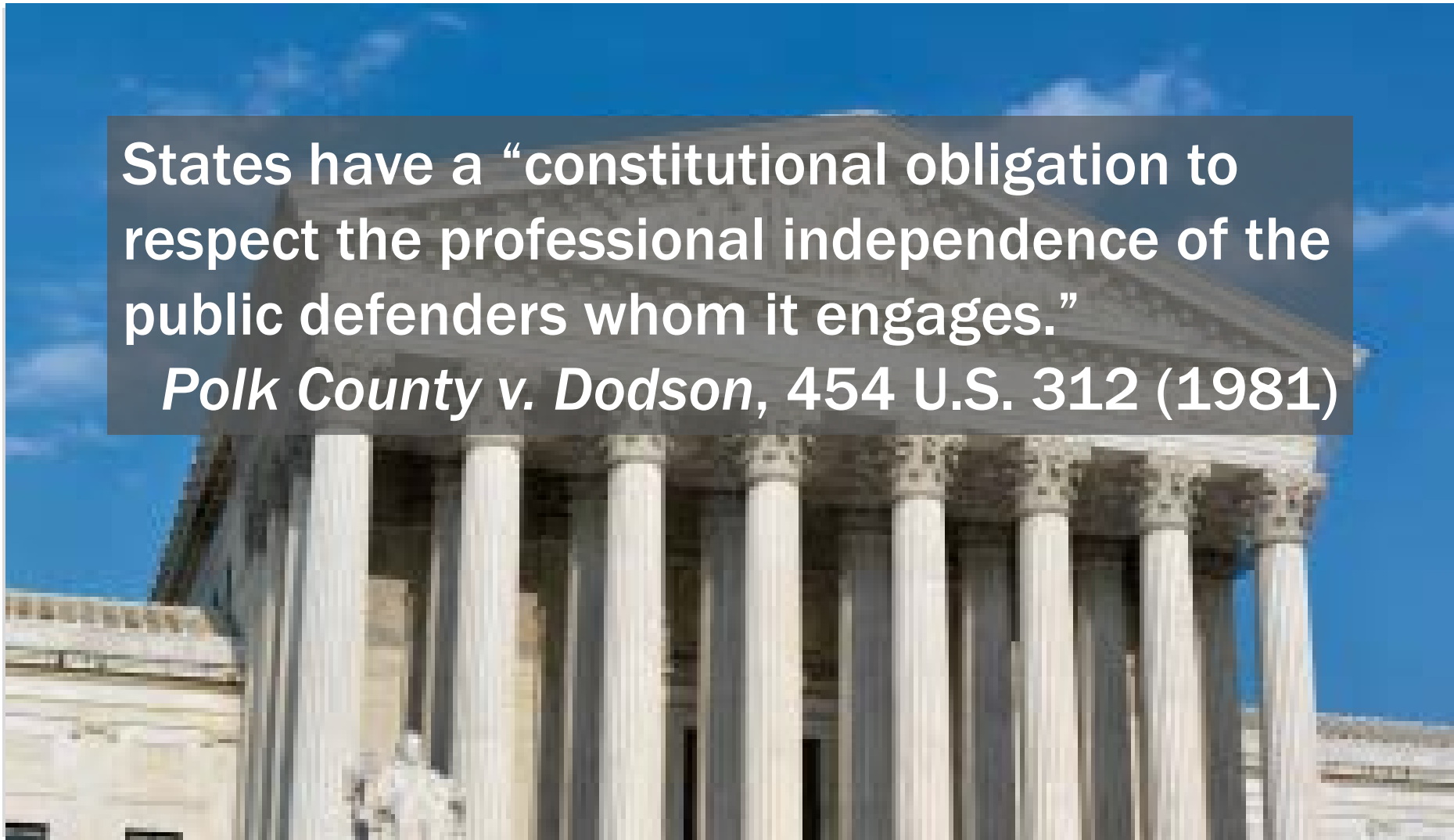
“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”

*United States v. Cronin*, 466 U.S. 648 (1984)

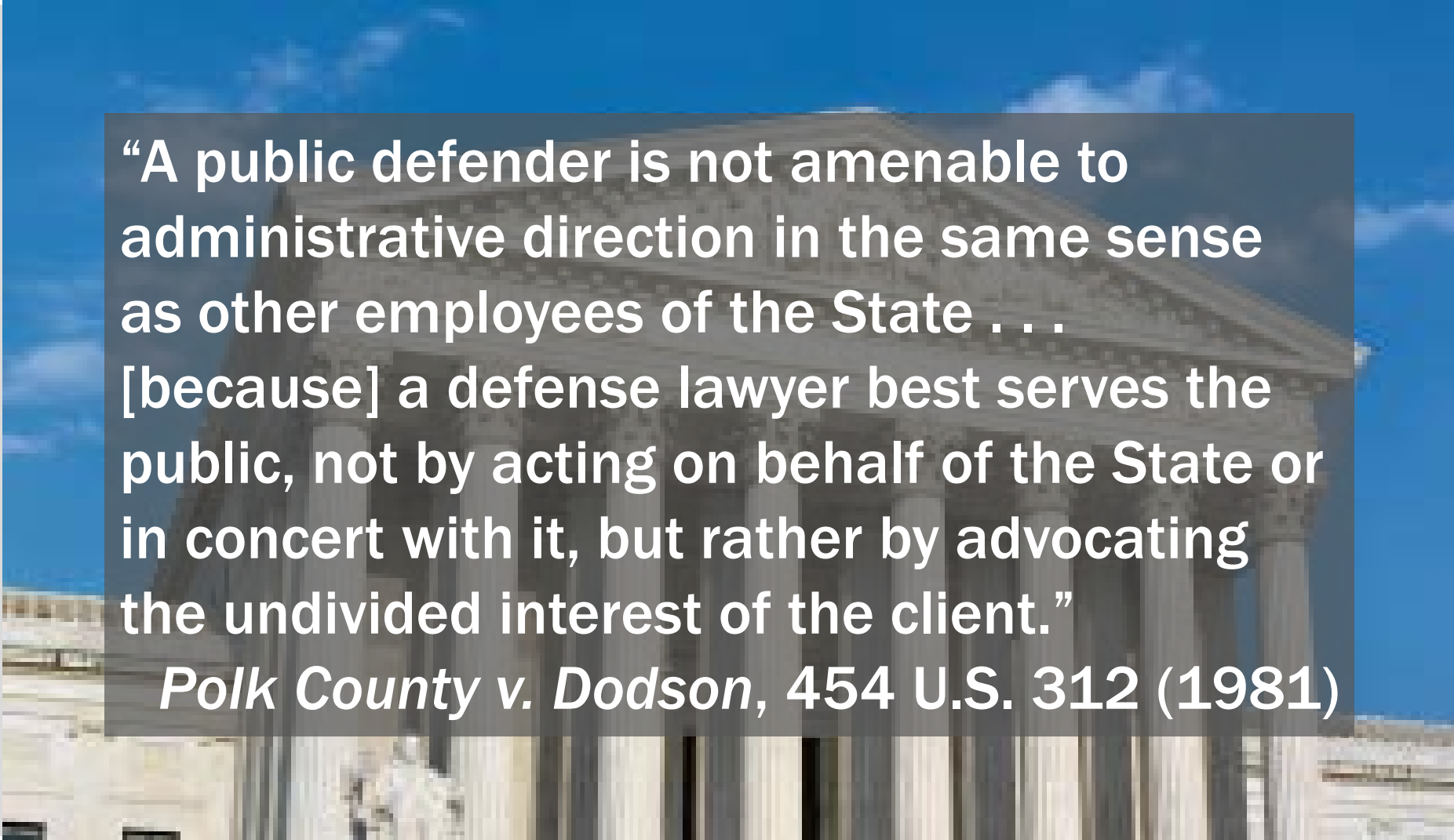
# INDEPENDENCE

States have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”

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



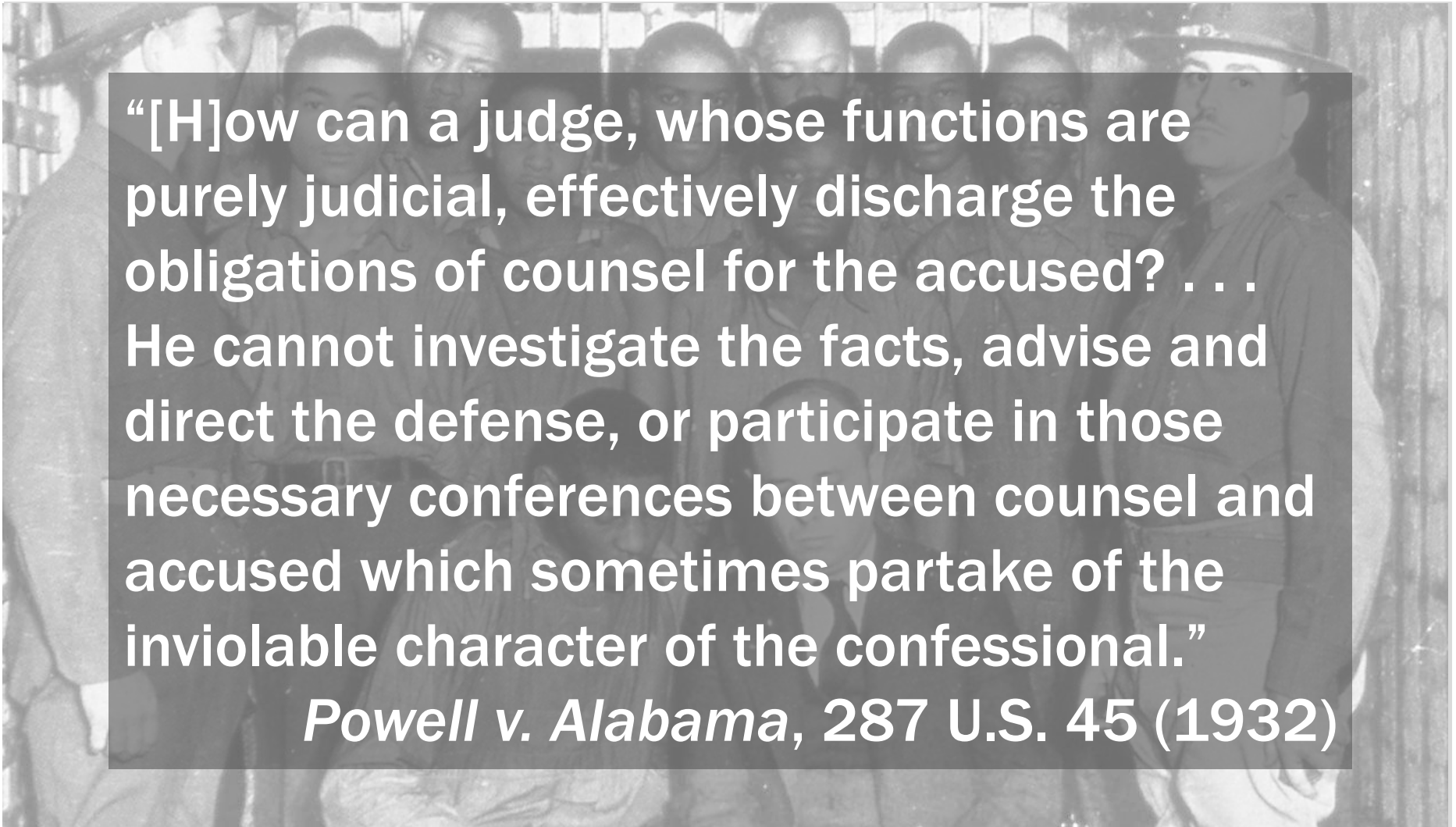
# INDEPENDENCE



“A public defender is not amenable to administrative direction in the same sense as other employees of the State . . . [because] a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advocating the undivided interest of the client.”

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

# INDEPENDENCE



“[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . 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.”

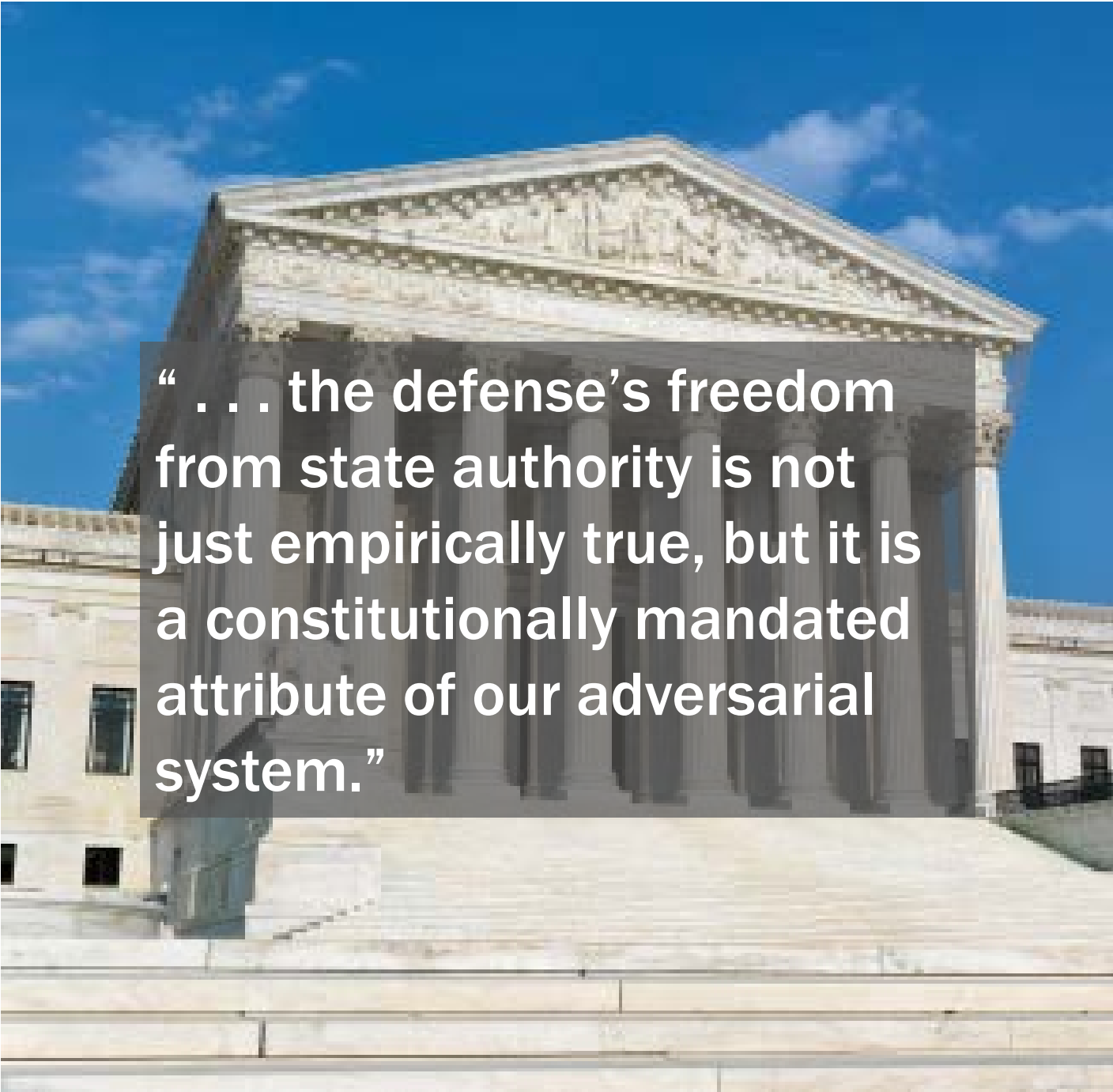
*Powell v. Alabama*, 287 U.S. 45 (1932)



“[W]e pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon* ... ‘established the right of state criminal defendants to the guiding hand of counsel at every step in the proceeding against [them].’ Implicit in this right ‘is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.’”



*Georgia v.  
McCollum*,  
505 U.S. 42  
(1992)

A photograph of the United States Supreme Court Building, a neoclassical structure with a prominent portico supported by tall columns. The building is set against a clear blue sky with a few wispy clouds. A wide set of stone steps leads up to the entrance.

“ . . . the defense’s freedom from state authority is not just empirically true, but it is a constitutionally mandated attribute of our adversarial system.”



*Georgia v.  
McCullum*,  
505 U.S. 42  
(1992)

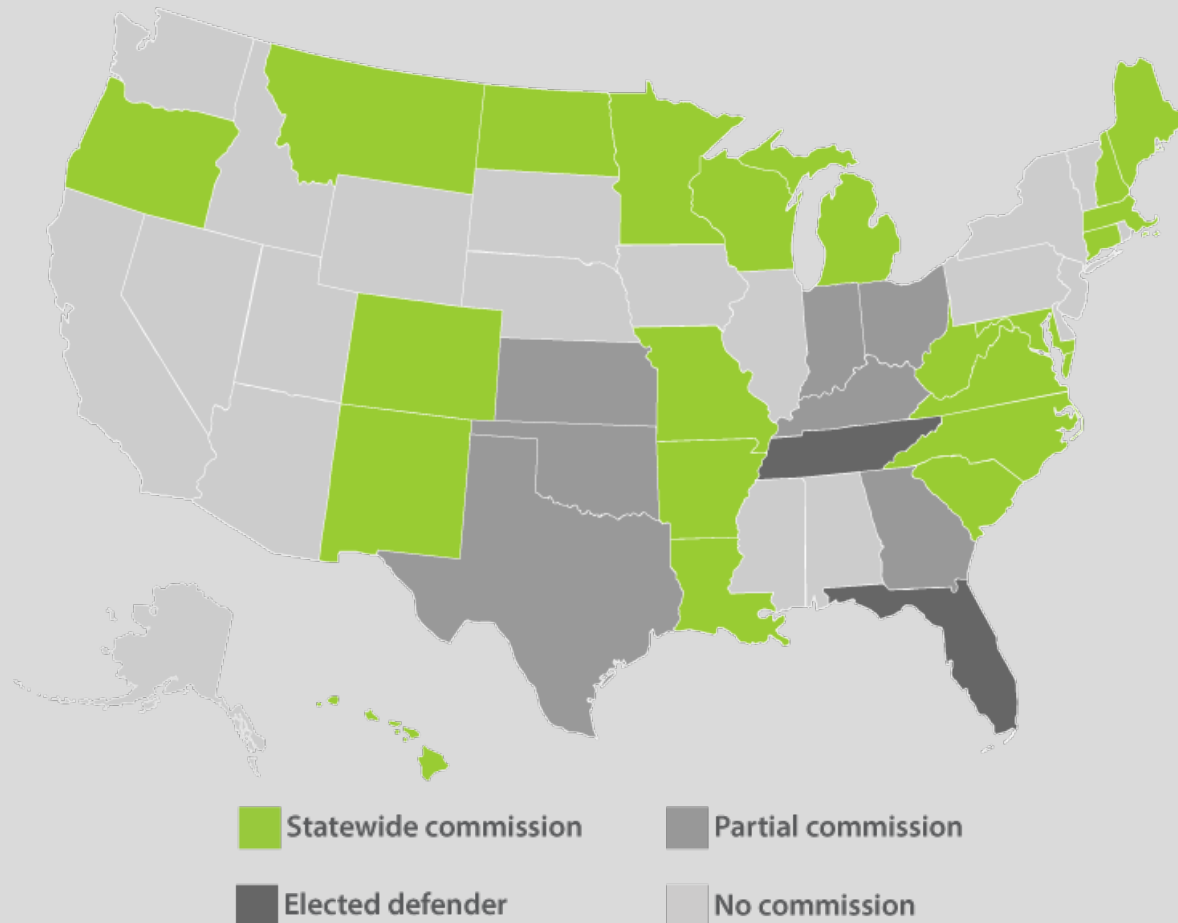
# EARLY APPOINTMENT OF COUNSEL & SUFFICIENT TIME

“The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”

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

# INDIGENT DEFENSE COMMISSIONS

Independence: states with commissions overseeing right to counsel services



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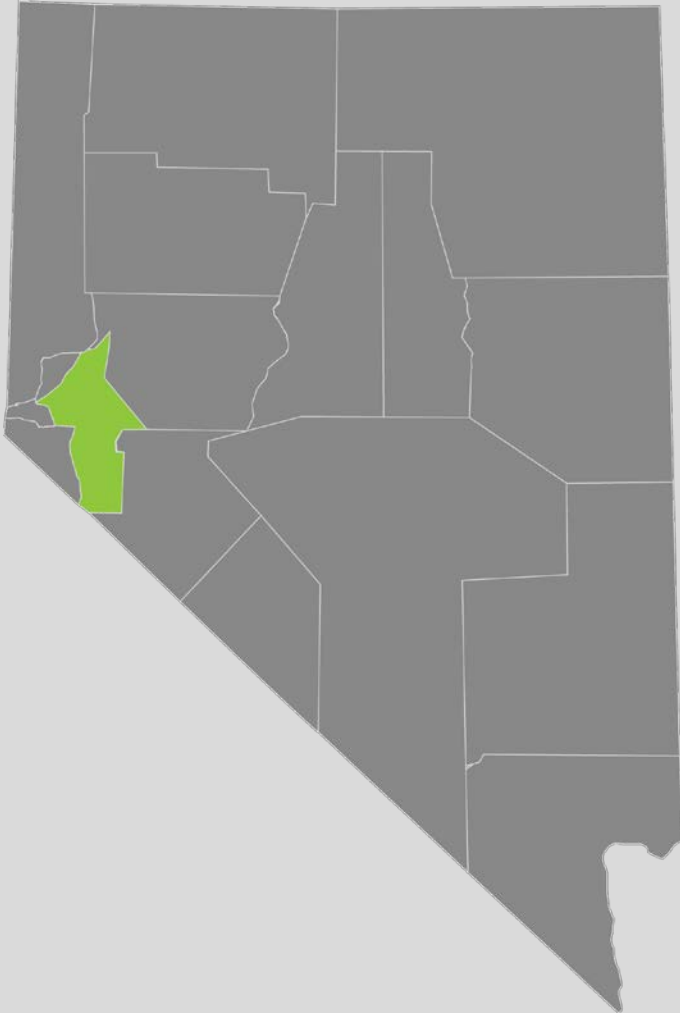
“...any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seem to us to be an obvious truth.”

# CONSTITUTIONAL UNDERPINNINGS OF FOUNDATIONAL STANDARDS

“The right to effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”

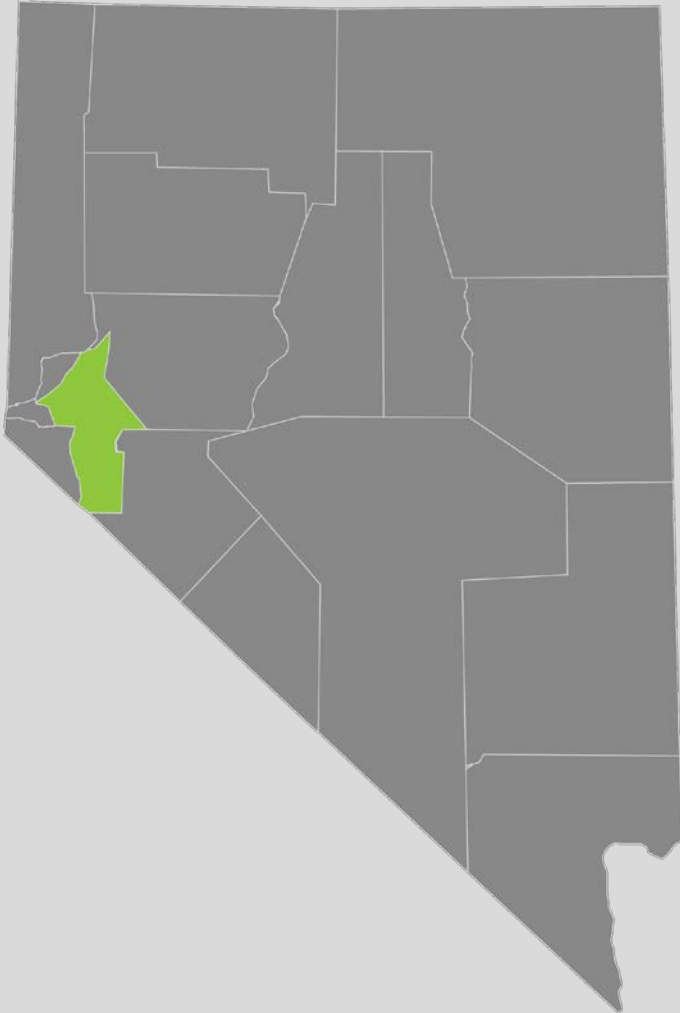
*United States v. Cronin*, 466 U.S. 648 (1984)

# BREAKDOWN IN THE ADVERSARIAL PROCESS



LYON COUNTY

# BREAKDOWN IN THE ADVERSARIAL PROCESS



## LYON COUNTY

**1 Attorney: 600 cases total**  
**(200 felonies)**  
**(10 murders)**

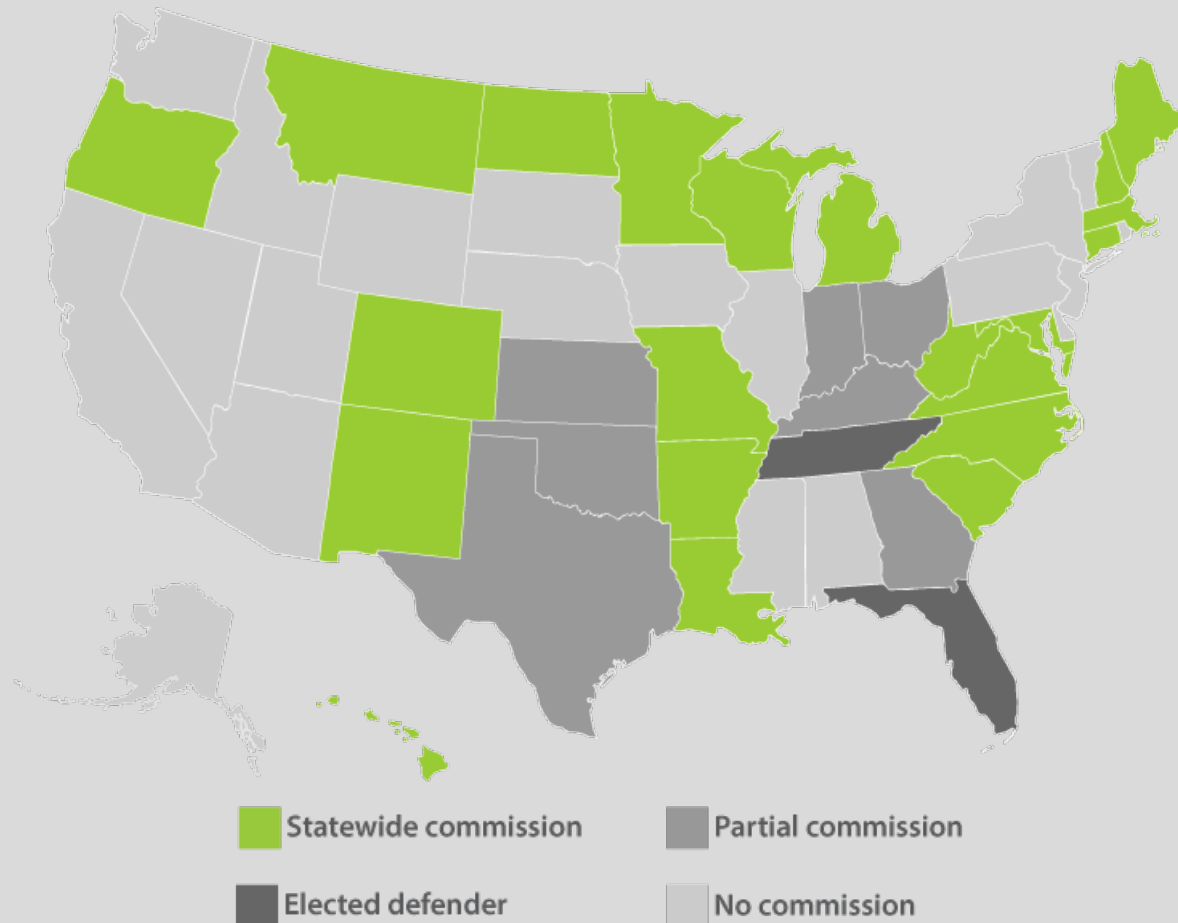


**JANUARY 2008: “ADKT-411”**

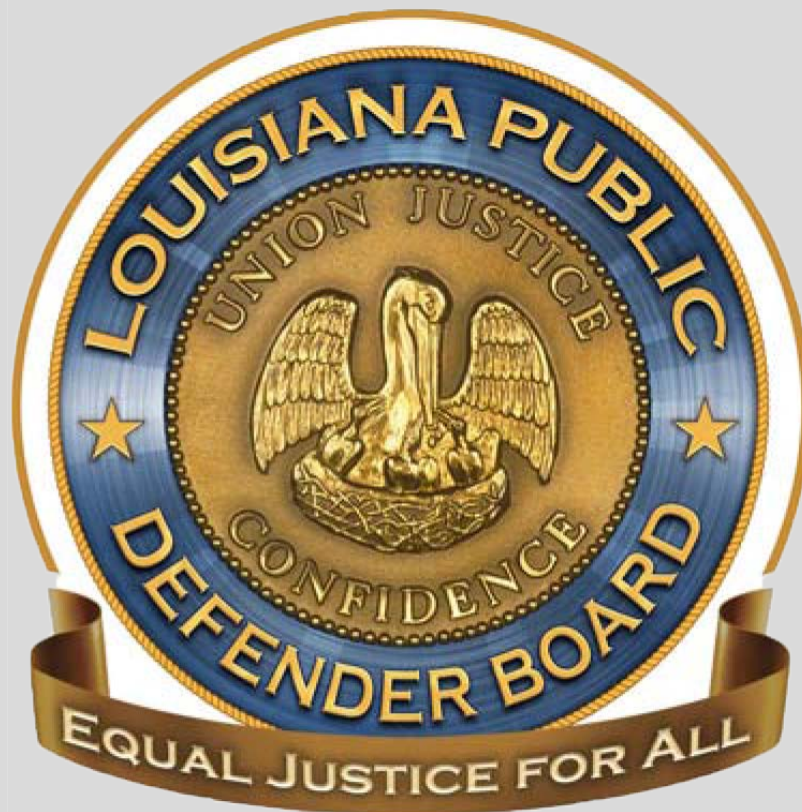


# INDIGENT DEFENSE COMMISSIONS

Independence: states with commissions overseeing right to counsel services

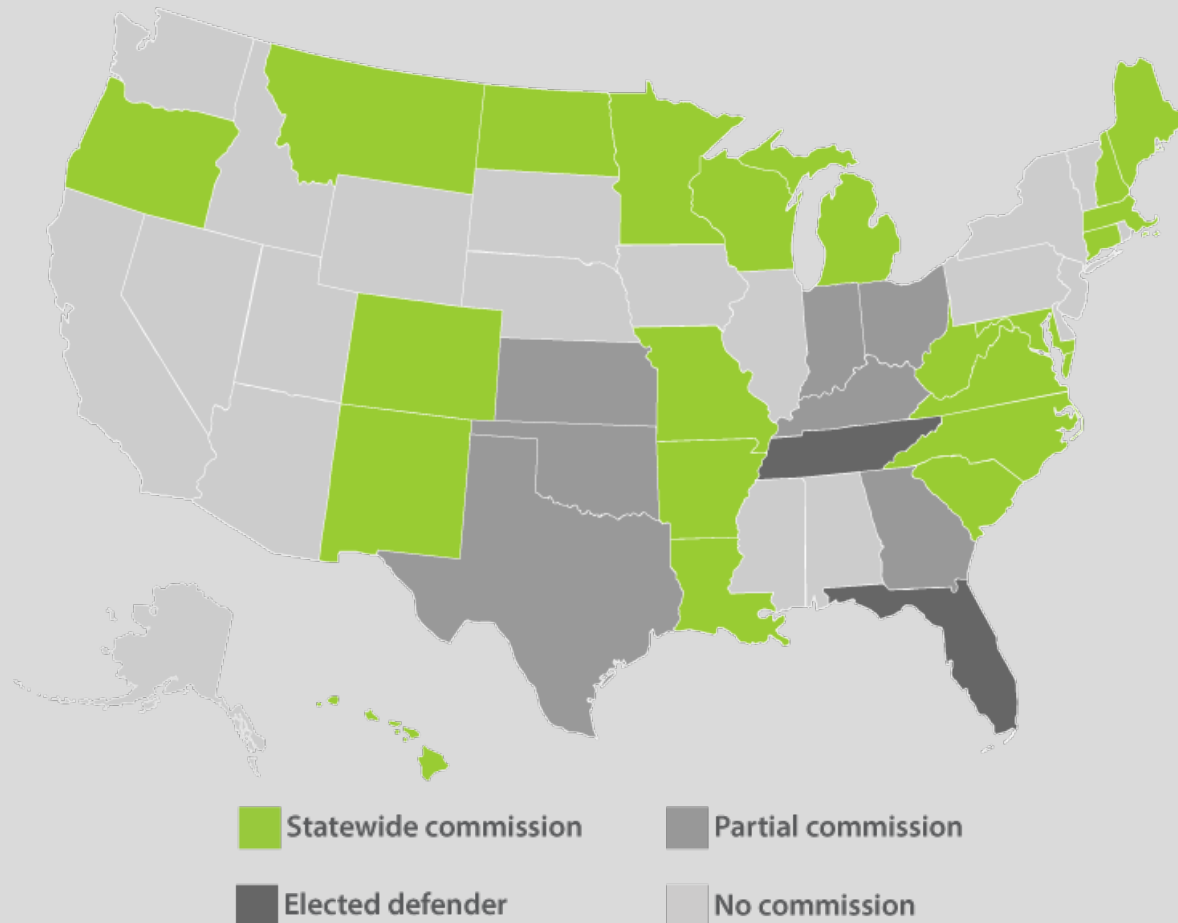


# INDEPENDENCE



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Independence: states with commissions overseeing right to counsel services



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# SYSTEMIC LITIGATION

## **American Civil Liberties Union**

Connecticut  
Pennsylvania  
Montana  
Michigan  
Washington  
New York

## **National Association of Criminal Defense Lawyers**

Louisiana  
Virginia  
Colorado

## **Southern Center for Human Rights**

Georgia

## **Fair Defense Project**

Texas

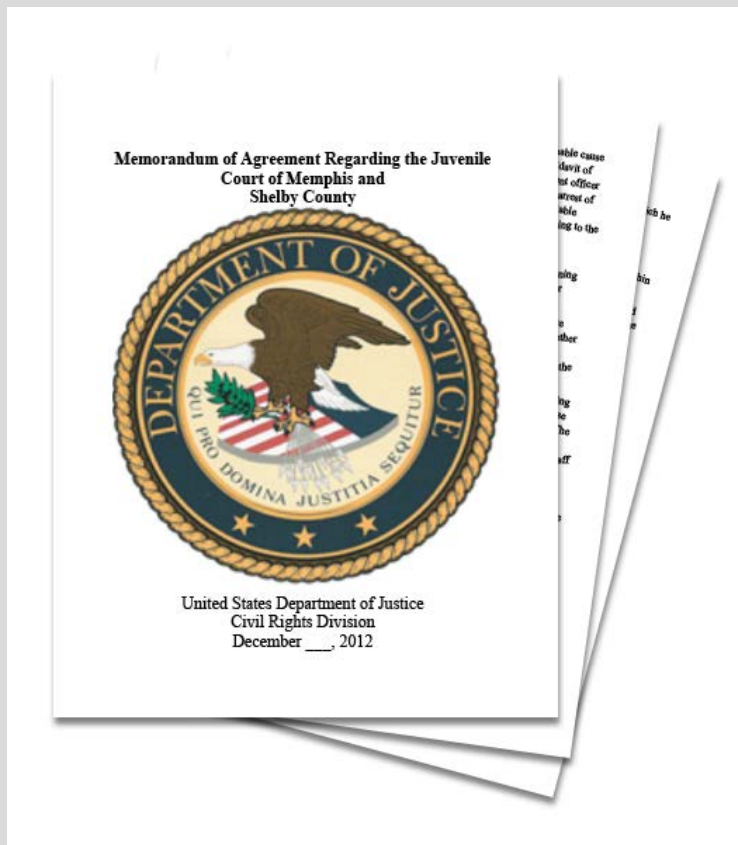
## **NAACP – Legal Defense Fund**

Mississippi

## **Private Law Firms**

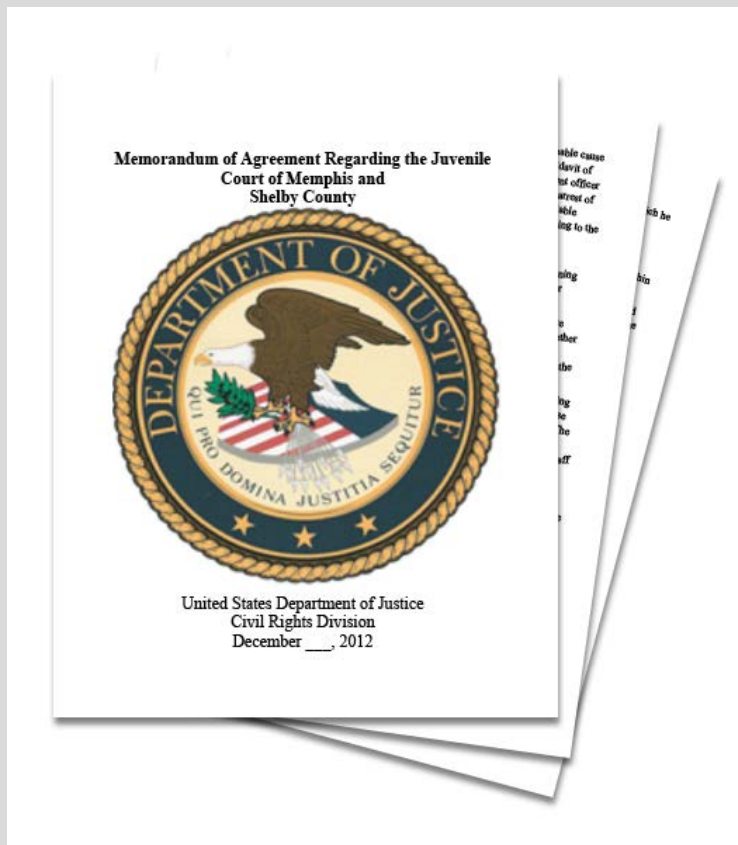
New York  
Florida

# SYSTEMIC LITIGATION



**United States Department of Justice  
has begun to enforce the right to  
counsel**

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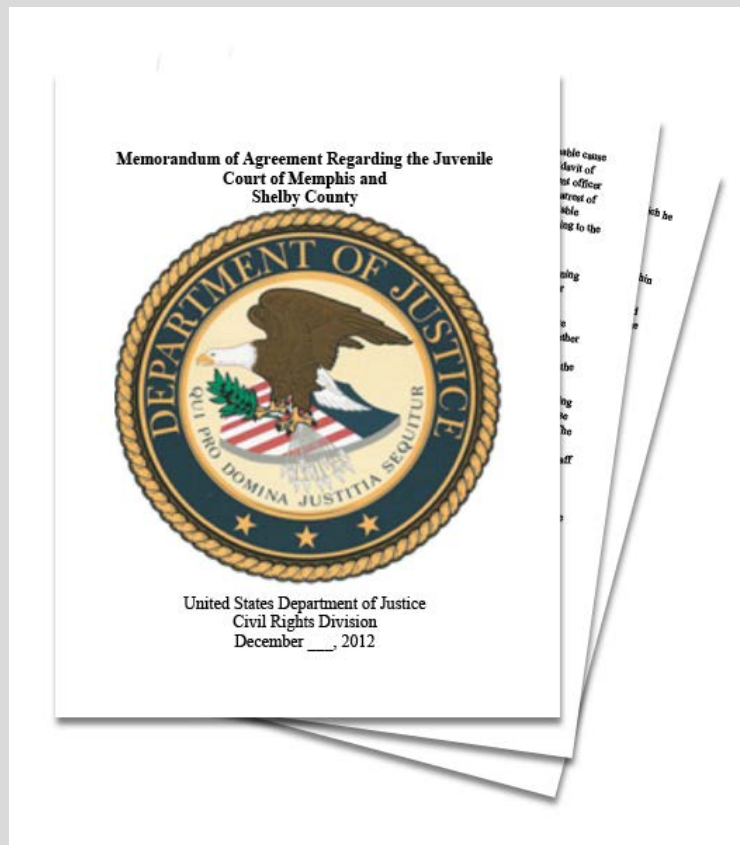


**United States Department of Justice  
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counsel**

**Shelby County, TN (Memphis)**



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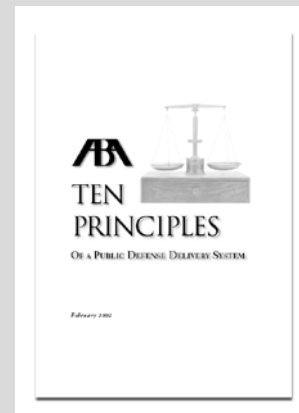
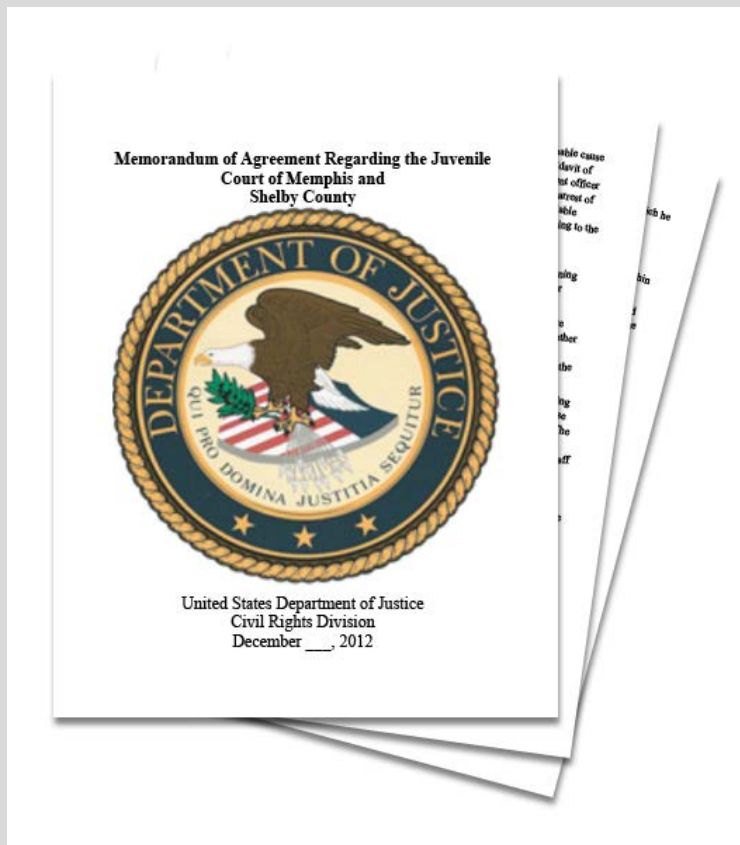


United States Department of Justice  
has begun to enforce the right to  
counsel

Shelby County, TN (Memphis)

- Independence
- Early Appointment
- Workload Controls
- Attorney Qualification
- Training

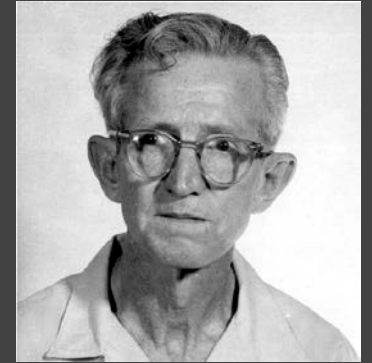
# SYSTEMIC LITIGATION



**“... the building blocks of a well-functioning public defense system.”**

**- February 2010**





**“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”**

*Gideon v. Wainwright*  
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