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OFFICE OF THE DISTRICT ATTORNEY

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March 17, 2008

The Justices of the Nevada Supreme Court
Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701

RE: INDIGENT DEFENSE ORDER ADKT No. 411

Honorable Justices:

Thank you for this opportunity to express this Office's concerns with respect to the Indigent Defense Order entered by this Court on January 4, 2008 and the attached Standards of Performance for indigent defense. Our Office has also reviewed the comments submitted by the Nevada District Attorney's Association and concurs with them. Whenever possible we have tried not to duplicate those comments in this submission.

Our Office understands and agrees that criminal defendants, indigent or not, should have reasonably competent and effective assistance of counsel. We also agree that counsel representing defendants charged with capital offenses have greater responsibilities and therefore, should have greater qualifications, in order to meet their professional obligations to their clients. However, we are concerned that the new standards will supplant the criteria for evaluating post-conviction claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and effectively overrule or otherwise alter existing Nevada or Federal case precedent without the legal analysis and case/controversy requirements normally applicable to such actions. In addition, the standards apply only to indigent defendants, thus creating two different post-conviction standards for reviewing claims of ineffective assistance of counsel.

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There is concern as well that the Order and the Standards create obligations upon State and County Officials that are inconsistent with the Separation of Powers Doctrine and which contain unfunded mandates. Such mandates effect the whole criminal justice and court system, including prosecutorial, law enforcement, courts, custody facilities and pre-trial and post-trial supervisory agencies.

Finally, the Order and Standards ignore the equally compelling needs of the Citizens of Nevada and victims of crimes to have their cases prosecuted by properly staffed and supported prosecutorial offices whose attorneys are as subject to the Nevada Rules of Professional Responsibility as defense counsel. All attorneys owe a duty to clients to be reasonably competent and use reasonable diligence in representing their clients, whether that is an individual or the public at large.

If the Court did not intend to create these types of sweeping consequences, then we respectfully request that those parts of the Order establishing the Standards be vacated and the date for determining the appropriate staffing ratios for public defender and prosecutorial agencies be extended. We also have some questions about the timing and operation of the appointing agency programs and would request implementation be delayed on this as well. This will give time for the Court to consider how best to give counsel in criminal cases suggestions or guidelines to be considered when accepting representation in criminal cases without creating new issues or standards for post-conviction relief or overruling criminal precedent through administrative proceedings. It would also give more time to iron out issues relating to the appropriate staffing of public agencies and the appointment programs.

To aide the Court in understanding our concerns, we have set forth our issues in more detail below:

I. General Issues:

1. If the Court desires to set guidelines which should be considered when representing a criminal defendant, then they should apply to all criminal representation, not just indigent representation.

2. Nevada Rules of Professional Conduct 1.1 and 1.3 state that a lawyer must provide competent representation and this is defined as the knowledge, skill, thoroughness and preparation reasonably necessary for representation. In addition a lawyer must use reasonable diligence and promptness in representing a client. The term "reasonable" as used in the Rules means a reasonably prudent and competent lawyer. NRPC 1.0(h). Thus the Rules mirror the standard set by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

The *Strickland* Court specifically refused to adopt the 1980 ABA Standards for Criminal Justice, or any other checklist, as a test of determining ineffectiveness of counsel claims. *Id.* at 688. The High Court indicated whether counsel's actions were reasonable will depend upon the facts and circumstances of a given case. The Court also noted that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial" *Id.*

The 1993 ABA Standards for Criminal Justice recognized this aspect of *Strickland* by noting in Standard 4-1.1 that the Standards are not to be used for "judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction." The Standards might be relevant depending on the facts and circumstances of the case. We suggest that similar language be included in any guidelines developed by this Court and that the word standard not be used at all.

3. Throughout the Order and the Standards, the Court uses the word "quality" or "high quality" representation and the word "should". This language is inconsistent with *Strickland* as it suggests something more than an ordinarily prudent attorney. Moreover, the use of the word should and the language of the standards, particularly in the capital portion, is taken almost word for word from the 2003 version of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The 1989 version of the Guidelines contained limiting language similar to that found in the 1993 ABA Standards discussed in subsection 2. This language was eliminated from the 2003 version and the commentary to Guideline 1.1 makes it clear that should is mandatory, these are not aspirational goals and they are intended to be used as a checklist for post-conviction evaluation of counsel effectiveness. Indeed this was the intent of the Indigent Defense Commission. To avoid this result, the Standards should be renamed Guidelines, the *Strickland* standard and 1989 language should be included and the term should defined as discretionary. In some instances the word "should" could be eliminated and "may" substituted to insure that this is a suggestion, not a mandate.

4. The Order and Standards were based on the report of the Indigent Defense Commission. The Court should insure that the representations and data contained in the report are accurate and current.

5. If the Court is going to adopt standards with language taken from the ABA or one of its subdivisions, then it should also adopt all of the language that talks about defense counsel's ethical duties. Very little of the language included in the 2003 version of the capital case guidelines and the 1993 version of the Defense Function standards is found in the adopted Performance Standards.

II. Logistical Issues

1. **Implementation Date:** The Court ordered that the performance standards be implemented effective April 1, 2008. Considering the impact of this Order on operations and budgets, the assigned date did not leave sufficient time to meet local and state budgetary deadlines. Budgets for 2008/2009 have already been approved or submitted. Given the fiscal impact of some of the mandates, this is not a realistic date.

2. Placing the Standards into effect before Clark County can perform a competent and comprehensive caseload analysis is premature. The Standards dictate actions regardless of the complexity of the case. If they are mandatory and the Court does not amend the language as suggested above when discussing *Strickland*, this will require a more extensive analysis than can be done in the timeline permitted. Staffing of public officers that encompass a huge percentage of the County's budget should be done in a more prudent manner.

3. In addition, the appointment programs and procedures should be in place before the Standards are implemented since those programs will be required to process complaints about attorney effectiveness. This is also important since the Order directs that attorneys decline to accept appointments. The agency responsible for reviewing the appointment process should be in place to determine if there are legitimate grounds for such action that can be documented and verified.

III. CAPITAL CASE REPRESENTATION

1. **Standard 1**: The language directs that certain professionals be employed in every case (investigator, mitigation specialist and mental health screener) and implies these should be permanent employees (part of the team). This is redundant to the directive that counsel should get the assistance of professional services that are reasonably necessary. If the Court is saying that these services are always reasonably necessary, then it is inconsistent with *Strickland*. The point should be that defense counsel should have sufficient resources to investigate a case and access the mental status of the defendant. What is required in a particular case should be determined according to *Strickland*. We agree that two attorneys is already a requirement of SCR 250 and investigative services are required under federal and state constitutional cases.

Directing that counsel has a right to have services provided by independent professionals and to protect the confidentiality is in conflict with this Court's cases such as *Estes v. State* or the statues relating to the appointment of professionals to determine competency.

2. **Standard 2:** Setting up a process for determining the qualifications of a person to handle a capital case, monitoring expenses and requests for appointment of experts and determining fee schedules is a reasonable approach. However the language of this standard also creates problems with existing cases. Currently whether counsel should be removed from a case is governed by developed law dealing with a variety of issues, including *Strickland* concerns, matters of actual conflicts of interest, the ability of a defendant to waive counsel pursuant to *Faretta* and the need for a defendant to understand that an attorney is designated to make strategic decisions in most instances is determined on a case by case basis. Having a separate agency field complaints from defendants seems inefficient and a waste of resources. We concur with some of the questions asked in the comments submitted by the Nevada District Attorney's Association on this issue.

3. **Standard 6:** Again, whether all of these people will be needed on every capital case should be decided on a case-by-case basis rather than a carte blanche approach.

4. **Standard 7:** The 24 hour requirement is not feasible or reasonable. We suggest as soon as reasonably possible and perhaps a 72 hour requirement to help with evaluating case load requirements.

5. **Standard 9:** In sentence (a) replace the word "thorough" with "reasonable" which is consistent with *Strickland* and would tie investigation to facts of the case. As phrased this creates a higher standard than *Strickland* and poses post-conviction issues.

6. **Standard 10:** Same comment as above, replace thorough with reasonable on (a)2.

7. **Standard 11:**

a. Subsection b requires counsel to explain collateral consequences. This is in direct conflict with case law that says failure to address collateral consequences is not ineffective assistance. The United States Supreme Court and this Court have both rejected the concept for very good reasons, it would be asking criminal practitioners to become versed in areas of law beyond their expertise or detract from the area where they should be developing expertise, criminal law and procedure. In addition, since public defenders can now be sued for malpractice, this will just open the County and State to additional risks of civil suits.

b. Courts in Nevada have very limited ability to make suggestions on housing issues. This might be appropriate in a guilty but mentally ill situation or a negotiation that reduces a capital case, but should not be in guidelines. This same comment applies to other areas where similar language can be found such as subsection 9(G)

8. **Standard 12:** Same comments regarding "other consequences" as were made about collateral consequences above.

9. **Standard 15:** Existing case law has some restrictions on evidence regarding conditions of imprisonment. Subsection f(3) may be inconsistent with those cases. Add language to subsection (l) which reads "while taking into consideration all ethical and legal requirements." As written, this paragraph seems to invite defense misconduct.

10. **Standard 18:** The same language is recommended for subsection (b) as suggested immediately above for the same reason.

11. **Standard 19:** We should not be filing petitions for certiorari to the United States Supreme Court in every case. Whether such action is necessary should be determined on a case-by-case basis consistent with *Strickland*. It is also inconsistent with a lawyer's duty not to file pleadings on a shotgun basis.

IV. APPELLATE AND POST-CONVICTION REPRESENTATION

1. **Standard 1:** Federal and State cases indicate that counsel has no duty to advise a client about a right to appeal in guilty plea situations, and a limited duty after a trial determination. Again Standards should not overrule case precedent and proceeding with, or encouraging, an appeal that counsel feels has no merit is also in contradiction to ethical obligations and rules of court.

2. **Standard 2:** What does the Standard mean by claims not in record? In addition, failure to federalize an issue on appeal is, by case law, not grounds for ineffective assistance of counsel. This is another example of rules abrogating existing cases.

V. FELONY AND MISDEMEANOR TRIAL CASES

1. **Standard 4:** What type and how much pre-court communication is necessary should be determined on a case-by-case basis. This section seems to say that talking to a client in court is per se ineffective or should be prohibited. While a pre-court confidential interview is preferable, it is not always necessary depending on the facts and circumstances of a given case. Suggest use of "whenever possible" language here.

2. **Standard 6:** Paragraph (b)(5) requires a defense attorney to consider the tactics of proceeding with a preliminary hearing without full discovery. As the Court is aware, a preliminary hearing is for a finding of probable cause and is not a trial. Enacting a standard that implies it is ineffective to proceed without full discovery will result in delays (implicating speedy trial issues) because full discovery is rarely available at this stage.

3. **Standard 7:** This section should be reworded to reflect the language in *Strickland* that indicates counsel as a duty to conduct reasonable investigations depending on the facts of the case. *Strickland* specifically notes that certain avenues of investigation may not be warranted depending upon what is discussed with a client. *See Strickland*, 466 U.S. at 690-691.

The seven areas that define the investigation are both time and resource consuming and may not be in a client's best interest. While defense counsel is doing this investigation, so is the prosecution and a beneficial offer may go away as the prosecution discovers more about the defendant or the case. Certainly counsel should discuss all these options with the client and if investigation cannot be completed before an offer will expire, should advise the client accordingly so that the client can make an informed choice about whether to forgo additional challenges and accept an offer.

4. **Standard 9:** Again, should insert "reasonable" investigation to be consistent with *Strickland* and need to review on case-by-case basis. In subsections d and e – potential and other consequences language should be deleted and "direct consequences" inserted.

5. **Standard 17:** Subsection (a) discusses rules of parole eligibility. Because these rules can change and involve collateral issues suggest that this be deleted except for statutory sentencing range.

6. **Standard 20:** Subsection (b) regarding advising of right to appeal is inconsistent with case law and sets grounds for post-conviction relief. To a lesser extent same is true of subsection (g).

VI. JUVENILE DELINQUENCY CASES

1. **Standard 4:** Subsection (5) again talks about collateral consequences. However this may be different in a juvenile context – regardless it should be consistent with case law in the juvenile arena.

2. **Standard 7:** Again, replace thorough with reasonable when speaking of investigation.

3. **Standard 8:** Same comments with regard to "thorough" and "reasonable" as above.

4. **Standard 9:** Same comments regarding use of word reasonable investigation and timing as with adult proceedings above.

As you can see, we do not have objections to much of the language in the Performance Standards and if they are phrased as guidelines and corrections are made so that they do not conflict with *Strickland* and other cases or create unfunded mandates, they would be good general thoughts on what a criminal defense attorney should consider when representing a client. Again, we thank you for this opportunity.

Very truly yours,

DAVID ROGER
District Attorney

DR/kjk