NATIONAL LEGAL AID & DEFENDER ASSOCIATION

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April 29, 2008

Mr. Richard A. Gammick, Washoe County District Attorney
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ADKT 411

Re: Washoe County District Attorney Letter of April 21, 2008 (Attached).

Dear District Attorney Gammick,

I apologize for the delay in responding to your letter of April 21, 2008. I recognize that you requested a response prior to the Nevada Supreme Court Indigent Defense Commission (Commission) meeting of April 23rd. I agree that my response would have been beneficial to the Court and Commission. Unfortunately, the National Legal Aid & Defender Association (NLADA) did not receive the letter until April 25th. I hope my quick and thorough response since its arrival demonstrates the seriousness with which I take the issues raised in your letter.

Please be advised that I greatly value leaving the adversarial process in the court room and having a reasoned discussion on how best to assist victims of crimes and their families while simultaneously protecting the constitutional rights of defendants. As I stated in my April 18th letter to the Nevada Supreme Court, I think all stakeholders share the same goal of a justice system that produces verdicts that are fair, correct, swift and final. Towards that end, I look forward to working with Mr. Helzer from your office on the Commission's new Early Case Resolution Sub-Committee.

I have addressed each of your questions in order as a starting point for further discussion.

Points 1 & 2: In 1999, I had the pleasure and privilege of coming to Washoe County on behalf of a Nevada Supreme Court Commission on the Elimination of Racial, Gender and Economic Bias in the Justice System under a grant from the American Bar Association and the United States Department of Justice while in the employ of The Spangenberg Group (TSG) – an internationally recognized criminal justice consulting firm. During my time in Washoe County a TSG colleague and I conducted a number of court room observations and interviewed a number of criminal justice representatives about the indigent defense system in your jurisdiction, including District Court Judges, Justices of the Peace, the Public Defender, assistant public defenders, and, private defense lawyers. It was my first hand observation of the court room proceedings that first raised questions in my mind regarding the ECR program. As such, I sought and was granted an audience with you. We spoke for about a half hour in your office. So my conclusions on your ECR program were formulated upon direct courtroom observations and interviews with a full array of criminal justice stakeholders.

I cannot tell you the specific names of the District Court Judges or Justices of the Peace my colleague and I interviewed since my site notes are the property of TSG. I am happy to make an inquiry to TSG if necessary, but hope this information alleviates your concern that I reached my conclusions based on selective information. Indeed, though I have heard the reasons for the inability of the Public Defender Office to continue the ECR program in light of the ADKT No. 411 performance standards from Mr. Bosler, the former Public Defender, Michael Specchio, was a proponent of the ECR program at the time of my 1999 visit – so I did not take the opinion of the Public Defender as my own.

Points 3 & 4: The National Legal Aid & Defender Association (NLADA) does not believe that the only answer to an indigent defense crisis is for a state or local jurisdiction to spend its way out of it. A publicly financed lawyer is only required under our Constitution if there is a threat of a loss of the client's liberty upon conviction. In *Alabama v. Shelton* 535 U.S. 654 (2002), Justice Ginsburg opined that the extension of the right to counsel to all misdemeanor cases even when the threat of imprisonment is not immediate[1] shall not cause undue financial strain because jurisdictions can opt for pre-trial probation programs. Pre-trial probation programs typically are structured whereby prosecutors and defendants agree to the participation of pre-trial rehabilitative program which includes conditions typical of post-trial probation. As Justice Ginsburg states, "[a]djudication of guilt and the imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions." The implication being that a significant number of cases can be disposed outside of the formal court setting. NLADA supports these types of early case resolution programs. There are a number of such diversionary programs across the country.

Moreover, if the diversion model is not acceptable to the citizenry of Washoe County or its elected officials, then the only ECR model we can support is the one suggested in my April 18th letter. The Oregon Public Defender Commission guidelines make clear that defense attorneys are required to carefully review charging instruments, police reports, and relevant background and to conduct necessary independent investigation before advising their clients concerning participation in the ECR program. Such conditions must be met before NLADA could endorse any ECR program.

Point 5: I was in fact referring to the eight years that have transpired since the report sponsored by a Nevada Supreme Court Commission under a joint grant from the U.S. Department of Justice and the American Bar Association documented the problems of your early case resolution program. I am not aware of any other public document that has assessed the program.

Having said that, Washoe County's financial difficulties in providing the right to counsel have been documented since 1987, when the National Center for State Courts released its report *Washoe County Indigent Defense Study*. The fact that the County turned to ECR in subsequent

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[1] *Shelton* held that an accused person has a right to counsel at trial even if he is ultimately sentenced to a totally suspended period of incarceration, with the defendant's continued freedom conditioned upon meeting one or more probationary requirement. Should the state accuse the probationer of violating the terms of his probation, the judge cannot punish him by locking him up unless the probationer was afforded the right to be represented by a lawyer when he originally went to trial or pled guilty. Moreover, the Court explained, the failure to initially provide the lawyer cannot be remedied by providing an attorney at the hearing where the judge determines whether to revoke the suspended sentence because at that point, the attorney can only challenge the facts surrounding the probationer's alleged failure to meet the conditions of the suspended sentence – and not the facts of the underlying conviction.

years to help alleviate those documented financial difficulties -- to the detriment of poor people's constitutional rights -- rather then work for state funding and oversight of the indigent defense system in my opinion expands the County's exposure to class action litigation over the failure to provide an adequate right to counsel.

Point 6: The fact that the expansion of the ECR program to include serious felonies was done with the approval of the public defender does not reduce my concerns at all. I have noted on a number of occasions at Commission meetings that the ability of Nevadan Public Defenders to operate in the best interests of their clients is compromised by undue political and judicial interference.

The American Bar Association's *Ten Principles of a Public Defense System,* which in the ABA's own words constitute "the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney," are simply not being met in Nevada. To eliminate any possibility of judicial and governmental interference, ABA *Principle #1* specifically calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.[2]

One of the main functions of such oversight boards is to make hiring and firing decisions regarding the Chief Public Defender. NLADA standards cited in the ABA *Ten Principles #1* prohibit sitting judges, prosecutors or law enforcement from holding seats on the board making such employment decisions. In flagrant violation of this standard, the Washoe County Manager appointed you and a presiding Criminal Court judge to serve as two-thirds of the hiring committee for the Chief Public Defender position in 2005 until national scrutiny led to the judge stepping down and an expansion of the hiring committee. You -- on the other hand -- did not recuse yourself from the hiring committee despite the obvious conflict of interest. It is my understanding from interviewing people involved in the process that the continuation of the ECR program was a particular focus of the interviews.

Therefore, it is not be surprising that a Public Defender who is not insulated from undue political interference should authorize the expansion of the ECR program. The Public Defender knows that his job can be terminated without cause by a County Manager who believes she is realizing substantial cost savings from the ECR program. Similarly, it is not surprising that a Public Defender hired -- at least in part -- for his willingness to continue the ECR program should feel compromised about suggesting the program be scaled back.

Point 7: The facts as you describe them do not change my opinion of the ECR program. Based upon my observations in 1999, the program is constructed in such a manner that the Public Defender's Office meets clients and negotiates cases before any conflict of interest can be

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[2] ABA *Principle 1:* "The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff."

determined. This is a fundamental and systemic weakness of the program. If the program has been modified to alter this practice, please let me know.

You also assert that providing discovery after the negotiation is made, but in time for a second attorney to advise against entering a formal plea, should be considered a constitutionally adequate safeguard. In the opinion of NLADA, if a client is advised by "counsel" to waive a statutory right to a preliminary examination on the basis of incomplete discovery and investigation, the client is not receiving constitutionally adequate counsel. If this same client is being held in custody while awaiting the informed advice of the second counsel -- and will likely remain in custody while awaiting a setting for a remanded hearing -- NLADA suggests that the client's rights are being systematically violated. The description of the program in your letter, and the immediate resolution of misdemeanor cases, does not appear to leave time for the review by a second attorney. Again, I welcome any documentation or information you can provide that these systemic problems have been addressed.

Moreover, what you describe is a system that is also in violation of the ABA *Ten Principles*. ABA *Principle* 7 demands that the same attorney continue to represent the client – whenever possible – throughout the life of the case.[3] Standards on this subject note that the reasons for public defender offices to employ the assembly line model in which one attorney handles the initial negotiation then passes the cases to a different attorney are usually related to saving money and time. But standards uniformly and explicitly reject this approach to representation,[4] for very clear reasons: it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective and is demoralizing to clients as they are re-interviewed by a parade of staff.[5]

Point 8: The national average criminal justice trial rate is 96.9%.[6] When a jurisdiction has a significant deviation from the figure, it begs the question: "Why?" A jurisdiction's trial rate may be impacted by a number of factors. For instance, a jurisdiction that has a District Attorney who overcharges may have a very high trial rate (if the public defender is doing his or her job adequately). Similarly, a Public Defender trying to have her staff gain trial experience can adversely impact trial rates in a jurisdiction. Conversely, a system in which the District Attorney has generous plea offers may have a significantly lower trial rate. So trial rates are just one indicator of a functioning criminal justice system, but one that must be gauge in conjunction with other criteria. Given my concerns over the ECR programs, I came to the conclusion that the Washoe County low trial rate is an indicator of a system that fails to protect clients' right to

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[3] ABA *Principle 7:* "The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal. "Obviously, an exception is made when a conflict of interest arises or the attorney must off load cases due to illness.

[4] *ABA Defense Services*, commentary to Standard 5-6.2, at 83.

[5] See: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976) at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; *Moore v. U.S.* (432 F.2d 730, 736 (3rd Cir. 1970); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

[6] See: "Manner of Disposition for Criminal Cases Filed in 28 Unified and General Jurisdiction Courts, 1999," *Examining the Work of State Courts, 1999 - 2000*, National Center for State Courts.

counsel. But I respect the rights of others to look at the same facts and disagree with that opinion.

I think it is highly honorable of your office to abide by negotiated pleas even when facts that came to light subsequently made you regret those agreements. But from a public safety perspective I think your argument is yet another reason to ensure that all due process is followed in the investigation of the case rather than hastily trying to dispose of it. I often say that when an innocent person sits in jail because a public defender did not have the time to properly defend a client, the real perpetrator of the crime is free to roam the streets putting public safety at risk. But the contrary is just as troubling -- the quick disposition of a case that puts a dangerous person back on the streets earlier than justified presents a similar public safety threat. All parties should invest in a system which conducts proper investigations before moving towards resolution.

Point 9: The opinions expressed in the ABA/DOJ report should make clear that a return to the original ECR criteria would not satisfy the concerns NLADA has regarding the Washoe County ECR program.

Point 10: The information you proffer does not change my opinion. The fact of the matter is that public defenders cannot make a decision on which cases are best suited for ECR because they do not have sufficient time to investigate the facts of the case. As you stated in your letter, the production of discovery may not occur until a second counsel is prepared to look at the file. Under those circumstances, it is difficult to imagine when defense counsel will have a meaningful opportunity to advise a client to take part in the program. If public defenders are recommending cases for ECR it may suggest that they are using the fast pace of the system as a means of zealously seeking the best deal for the client -- as is their ethical duty.

But just because that is the ethical duty of a defender does not mean such actions are necessarily is in the best interest of public safety. Proper investigation will help both sides of the adjudicative process to negotiate a plea in the best interest of justice and not simply to try to dispose of cases for financial savings.

Point 11: It is interesting that you suggest that police are concerned with too many cases going to ECR against the interests of public safety. This seems like further evidence that the ECR program should not be reconstituted. In reviewing my letter, I do agree that I could have been more diplomatic in expressing my thoughts regarding the police. I included law enforcement in my response because I wanted to emphasize the disparity of investigatory resources between the District Attorney and the Public Defender at the point at which public defenders must advise clients regarding ECR plea offers.

Indeed, one of the reasons why the *Gideon* Court determined that defense lawyers were "necessities" rather than "luxuries" to the criminal justice system was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without such resources, the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching.

Washoe County's right to counsel system provides no such parity.[7] My point is that this disparity becomes even more exaggerated when there is a race to dispose of cases under an ECR program.

Point 12: Yes, the jail population figures were obtained from the Public Defender. No, it was not his representation to me that the elimination of the ECR program is responsible for lower jail populations. His observation – one that all stakeholders should consider – is that the previous claim that the elimination of the ECR program would result in a catastrophic increase in jail population and costs deserves closer scrutiny. No doubt there are many influences on the population of the Washoe County jail. But the fact remains that if these previous claims were true the County jail population should have jumped dramatically. It did not.

I raised the issue in my letter to try to get stakeholders to take another look at the principle argument for trying to save the ECR program ("cost savings"). To be clear, I think "cost savings" is an admirable goal of any criminal justice system – and one which the County Manager, among others, owes the tax payers of your county. But whereas the former Washoe County ECR program "may" have a cost savings, the pre-trial diversion form of ECR definitely provides savings because jurisdictions not only reduce jail costs but also save on the cost of providing the right to counsel in the vast majority of appropriately chosen cases.

Point 13: I am not sure I understand your final comment. I have been asked by the Nevada Supreme Court to provide technical assistance in examining and suggesting improvements to the indigent defense delivery systems in your state. As part of that process, I have spoken to the Washoe County Public Defender, Jeremy Bosler, directly. I believe that is part of the charge given to me by the Court.

But it has never been my intent to speak with one stakeholder to the exclusion of all others, as your comment implies. For example, I have spoken with your assistant County Manager, John Berkich, on a number of occasions as well. Over the past few months I have come to greatly value the skills, insights and diplomacy of both Mr. Bosler and Mr. Berkich. Both men clearly agonize over the difficulties in adequately defending the constitutional right to counsel in a state that forces so much of the financial burden for doing so unto its counties. Despite these challenges, they both appear to value a consensus building approach to the indigent defense reform undertaken by the Nevada Supreme Court. The citizenry of Washoe County should be proud to have such people committed to public service.

Until this juncture of the process, it did not seem prudent to extend my direct one-on-one discussions to include you. If you find fault with that decision, I apologize and take

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[7] ABA *Principle 8* requires parity between the resources of the public defender and those of the prosecutor. In 1972, Chief Justice Warren Burger's concurring opinion in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) even went so far as to state that "society's goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution." The Chief Justice's comments reflect the interrelatedness of the various components that make up the criminal justice system. The actions of any one component necessarily impact each of the other interrelated agencies, either positively or negatively. Just as an illness in any one area of the body threatens the overall health of the entire complex human structure, the failure of any individual component of the legal system – be it police, prosecution, courts, public defense, corrections, or probation - threatens the ability of the entire system to dispense justice both uniformly and effectively. U.S. Attorney General Janet Reno stated in 1999 that, "If one leg of the system is weaker than the others, the whole system will ultimately falter."

responsibility for my decisions. However, I think it is wrong to imply that Mr. Bosler – or for that matter Mr. Berkich – bare any responsibility for my decisions.

Please feel free to continue to contact me, if you have any further questions or concerns.

Respectfully submitted,

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cc: The Nevada Supreme Court
Members of the Nevada Supreme Court Indigent Defense Commission
Members of Indigent Defense Committee to Develop a Model Plan for Conflict/Track Attorneys for Judicial Districts
Members of the Supreme Court Commission on Rural Nevada

Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

April 21, 2008

David J. Carroll
Director of Research
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RE: ADKT No. 411 Performance Standards & Early Case Resolution Programs

Dear Mr. Carroll:

This is to advise that I have received and reviewed your letter of April 14, 2008, to the Nevada Supreme Court. I have been involved with the ECR program of Washoe County since its inception, and have continued on a regular basis to monitor the program. There are many representations and comments within your letter that because of my familiarity with the ECR program caused me to write you this letter. I would hope that you would assist in providing answers to the questions I raise in this letter so that our Supreme Court can have the benefit of your comments prior to their meeting on April 23, 2008.

My questions are as follows:

1. I know I have not spoken to you or anyone from your organization; have you spoken to anyone else in the Washoe County District Attorney's Office concerning the ECR program, and if so, who?

2. Many members of the judiciary in Washoe County have been involved with the ECR program. Calendaring accommodations for the ECR Program have taken place at the Justice Court level. The taking of pleas and sentencings pursuant to ECR negotiations have occurred at the District Court level. Who among the Justices of the Peace or the District Court Judges have you spoken to concerning the ECR program, and what concerns have they specifically provided to you?

3. You indicate on page 1 within your letter, "Therefore, I do not reject all early case resolution (ECR) programs out of

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hand." Are there ECR programs or similar programs that you feel you could support, and if so, what are the jurisdictions in which those programs exist?

4. Also at page 1, and following the above-quoted sentence, you proceed by stating, "So long as clients' constitutional rights are adequately protected, NLADA believes the Court may support ECR programs." Are you in fact telling our Supreme Court that an ECR program can be crafted in such a way to alleviate your concerns?

5. The final paragraph at page 1 proceeds as follows: "However, it has long been documented that the particular ECR program in Washoe County fails to adequately protect the rights of the poor." If you are relying on other documents in addition to the 2000 report referred to in the paragraph conducted for the Supreme Court Task Force on Elimination of Racial, Gender and Economic Bias, would you please provide that documentation for my review.

6. As to the 2000 report referred to above for the Supreme Court Task Force, are you aware that the expansion of the ECR program to include additional serious felonies was done subsequent to discussion with the Public Defender's Office and did not remove the ability of the Public Defender's Office to reject any particular case for ECR consideration? Knowing this, is your concern over the expansion of the ECR program reduced at all?

7. As to the Department of Justice/ABA report referred to above, are you aware that additional discovery was often provided in ECR cases when deemed necessary prior to finalizing the negotiations by entry of plea? Additionally, while the first negotiation was done by an ECR deputy for the Public Defender's Office, the subsequent entry of plea was completed by another Public Defender who could, and on occasion did, reject the ECR negotiation previously agreed to. In such cases, there was never any argument concerning the remand of the case to Justice Court to be treated as a non-ECR case. Would these facts change your opinion or concerns expressed within your letter?

8. In the same paragraph referred to above, you cite a section of the DOJ/ABA report that asserts, "One of the most notable effects of the ECR program is that the Washoe County Public Defender Office takes only approximately 30 cases to trial each year." It seems that the inference intended is that the Public Defender's Office should be going to trial more often. It may be that the elimination of ECR will result in more jury trials but not for the

reason you seem to promote. In reality, the Washoe County District Attorney's Office has made negotiations which it later regrets due to a variety of reasons. It has been the practice of this office to honor the negotiations and allow the plea to go through. I can think of no more than four to five cases in which this office has withdrawn a plea negotiation. Other than the fact that this office may have negotiated a case too soon, what is the argument that the ECR program's elimination would result in more trials?

9. Within your letter, your have referred to the expansion of the ECR program. Would a return to the original criteria of the ECR program satisfy your concerns? Are you aware or have personal knowledge of what the original criteria was as compared to the expansion you referred to?

10. On page 2 of your letter, you express concern that the decision as to which cases go to the ECR program are "solely in the hands of the prosecutor," and again that more serious cases continue to be sent to ECR. In addition to my comments concerning the collaborative effort as to the expansion of ECR, would it make a difference to you that while a prosecutor picks the cases out of those submitted everyday to our office, the Public Defender can request the inclusion of a case for consideration and certainly retains the ability to reject any case from discussion?

11. At the third paragraph of page 2, you state "interestingly, the haste by which the system is run leaves open the possibility that certain categories of cases are charged simply because the District Attorney and police realize that the ECR process will result in a quick, negotiated plea." Would it make a difference to you that the only direct police involvement in the ECR program is an occasional request to not include a case for consideration? Law enforcement's concern is that a case may be resolved too much to the benefit of the defendant.

12. Also within the third paragraph of page 2 of your letter, you indicate that the elimination of ECR may have already contributed to a reduction in jail population. Apparently you came to this conclusion after talking to the Washoe County Public Defender. Was it his representation that the elimination of ECR was responsible for a reduction in jail population? The population this morning is 1,118.

13. Noting that you engaged in a discussion with the Washoe County Public Defender's Office concerning the ECR program, was it ever his suggestion to contact myself or a member of

the Washoe County District Attorney's Office to discuss the ECR program?

Again, I would appreciate your effort to answer the above questions. If you are only able to answer some of them, I would still request that you provide that information to me and the members of the Nevada Supreme Court.

If you have any questions, I can be reached at 775-328-3208.

Sincerely,

RICHARD A. GAMMICK
District Attorney

By _____
JOHN W. KELZER
ASSISTANT DISTRICT ATTORNEY

JWH:lj