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June 30, 2008

Chief Justice Mark Gibbons
Justice Michael A. Cherry
Justice Michael Douglas
Justice James W. Hardesty
Justice A. William Maupin
Justice Ron D. Parraguire
Justice Nancy M. Saitta

In Care Of:
John R. McCormick, Rural Courts Coordinator
Administrative Office of the Courts
The Nevada Supreme Court
201 South Carson Street
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Re: ADKT No. 411

I am unfortunately unable to attend the ADKT No. 411 hearing on July 1, 2008. Below is my report on the two agenda items for the meeting. I will make myself available by phone for questions if necessary. Thank you.

1. Parameters of Performance

I have participated in a number of conversations regarding ADKT No. 411's performance standards and whether or not they should be changed to "guidelines" and/or made "aspirational." Most of the arguments put forth for changing the parameters of performance to "guidelines" rely on the following language from *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

In short, advocates for "guidelines" say standardizing the parameters of performance set out in ADKT No. 411 amounts to an undue intrusion by the Court on the independence of counsel to

make individualized decisions on a case-by-case basis. However, ADKT No 411's standards are not the "stringent checklist" prohibited by *Strickland.* The performance standards simply sets out all of the actions a defense attorney *should have the time to consider performing* when making an individualized decision about what is in the best interests of a particular client.[1] That is, an attorney may decide that a full investigation of the facts surrounding a low level felony is not in the best interests of his client – and still fulfill the performance standards -- so long as the attorney took the time to appropriately weigh the consequences before making the decision and is not simply forgoing an investigation for reasons related to lack of funding or too many cases to perform an adequate investigation.

So to the extent that public counsel has the independence, time and training to take into account the parameters of performance on a case-by-case basis I have no opinion as to whether the "standards" or "guidelines" nomenclature gets attached to the order.[2] But, of course, public defenders do not have the independence, time or training to do so in the State of Nevada. Though the Court is to be commended for removing the judiciary entirely from the administration of indigent defense services, public defenders – especially in Clark and Washoe – continue to experience undue *political* interference on a daily basis. ABA *Principle* 1 specifically calls for independent hiring and oversight boards to insulate chief defenders from the direct threat of termination of employment due to actions that are in the best interests of clients but may conflict with county budgetary concerns. Simply put actions such as refusing to participate in an early case resolution program, or refusing new cases because of work overload, increase fiscal costs at the local level. Since most county administrators are not constitutional experts, they may react to such actions by considering the termination of the chief defender's employment. As such, a public defender's desire to remain employed becomes part of the calculus whenever he considers what should be done in the best interests of a particular client.[3]

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[1] The reliance on one small part of the language of *Strickland* is misplaced for another reason as well. A court's determination of whether an attorney in the past provided effective assistance of counsel to a particular defendant under the circumstances of that defendant's case is different than a public defense system's duty to ensure that it enables all of its attorneys to provide constitutionally effective assistance of counsel to all of their clients in the future. The *Strickland* Court was addressing the appropriate use by a court, of the various American Bar Association standards among others, in determining whether a defendant received constitutionally effective assistance of counsel. Nevada, by contrast, is addressing the minimal level of advocacy that must be provided by every attorney to every client in order to ensure that constitutionally effective assistance of counsel if provided. A court may look back and say that, though an attorney did not comply with a particular standard in a particular client's case, even so the representation actually provided luckily enough turned out not to be unreasonable under the circumstances and so was not ineffective. But the State of Nevada does not want to create a system that merely *hopes* an attorney's failure to comply with a standard will turn out alright. The public defense system itself should establish the floor of representation that every attorney should provide.

[2] Perhaps it is important to note here that my use of "standards" and "guidelines" in no way supports the argument of some that ADKT No. 411's parameters of performance should be made "aspirational." Making either the "guidelines" or "standards" aspirational would mean that a public defender may or may not take these performance standards into consideration in their calculus as to what is best for a particular client. This renders the whole notion of parameters of performance meaningless in ensuring an adequate right to counsel in Nevada.

[3] The lack of independence of the defense function in Nevada can be most clearly seen in the hiring practices of Washoe County, and noted in my April 2008 letter to Washoe County District Attorney, Richard Gammick: "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

As such, public defenders only hope of acting in the best interests of their clients -- while simultaneously not jeopardizing their own employment -- is for the Court to make these parameters of performance "standards." That is, to require lawyers in every single case to take the time necessary to consider each parameter of performance as they relate to every individualized case.[4]

Having said this, public defenders should not have to rely on such *de facto* independence. The Court and/or Legislature needs to affirmatively take further steps to ensure the independence of the defense function. In my opinion, the next step is to create the permanent statewide commission already in ADKT No. 411 and charge it with: a) the hiring and firing of chief public defenders in those regions of the state with staffed public defender offices; b) the qualifying of defense counsel to be on assigned counsel panels across the state; and, c) training of defense counsel (including training on the performance standards). This would fulfill the parameters of the ABA's *Criminal Justice Standards*, 5-1.3 on professional independence.[5] As a stop gap

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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.[3]

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."

[4] I should note that this Court will face similar issues around caseload "standards" once the current case weighting study is completed. At an early Commission meeting Judge Stuart Bell extended the argument that since a seasoned defense counsel may be able to handle a significantly higher number of cases than an attorney just out of law school, any imposition of an artificial number, or "hard cap," will impinge on the attorney's decision-making ability on a particular case. For example, a 150 felony cases-per-year cap may be too low for a seasoned attorney and too high for a novice attorney. The seasoned attorney may feel like he needs to take case to trial just to justify only taking 150 felonies per year, or, more likely, a novice attorney may feel like he needs to triage certain aspect of adequate representation in order to accept 150 felonies per year. Likewise, 150 felony caseload cap may be too low for a defender practicing in an urban area and extremely high for a defender practicing in rural jurisdictions requiring excessive travel. Public defenders want caseload "standards" so that they can take actions, like refusing new assignments above what they can ethically handle, without putting their jobs in jeopardy. I believe Judge Bell to be correct about identifying the issues the Court will face around these issues and respectfully suggest that ADKT No. 411 already tells defense attorneys to refuse cases when needed. What is needed, again, is independence to allow public defenders to act in the clients' best interest in relation to case overload.

[5] **Standard 5-1.3 Professional independence:** (a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs. (b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of

measure while the commission is getting established, the Court could simply order that no chief public defender may be terminated without just cause and that acting in accordance with nationally-recognized standards of justice does not constitute "just cause."[6]

2. The Rural Sub-Committee

It is the position of the National Legal Aid & Defender Association (NLADA) that *Gideon* requires states – not counties or local government – to fund indigent defense services. Though some may argue that it is within the law for state government to pass along its constitutional obligations to its counties, it is also the case that the failure of the counties to meet constitutional muster regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision. Therefore, even if this Court agrees that Nevada's current statutes regarding indigent defense are not *prima facie* unconstitutional, there can be little doubt that they are unconstitutional *as applied* since the state has done little if anything to assure that the counties are effectively fulfilling the state's deities under *Gideon* and its progeny.

NLADA is currently partnering with other national advocates to draft a white paper detailing our position to this effect that we hope will be ready for circulation in the near future. In advance of that white paper, it is interesting to note that the Nevada Supreme Court, in *Nevada v. Second Judicial District Court*, 85 Nev 241, 241 (1969), stated while affirming the constitutionality of having counties fund indigent defense: ""No doubt the fixing of such a financial burden upon the several counties has and will cause serious problems in some cases. We are in great sympathy with the plight thus created for those public bodies. ..... No doubt it would be wiser for the state to provide a uniform system for the handling of this type of problem. One serious criminal case could literally bankrupt one of our small, financially insecure counties. But until the legislature provides a different method of affixing financial responsibility than is now upon our statutes, we have no choice but to require the counties to provide and pay for this type of service in accordance with legislative mandate. Should a county be unable to meet an obligation ordered under this rule, a more perplexing constitutional issue would be presented."

The history of the right to counsel in Nevada since that 1969 decision has been that the counties are unable to handle the financial aspects of the state's obligations. For example, we note that the counties burdens have increased significantly since 1969, including but not limited to, the extension of the right to counsel in: a) misdemeanor cases involving possible imprisonment [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; b) critical stages of preliminary hearings [*Coleman v. Alabama*, 399 U.S. 1 (1970)]; c) misdemeanors involving a suspended sentence [*Shelton v. Alabama*, 535 U.S. 654 (2002)]; and, d) appellate cases challenging sentencings for those who plead guilty at the trial-level [*Halbert v. Michigan*, 545 U.S. 602 (2005)]. Within the past two weeks, the US Supreme Court confirmed in *Rothgery* that the right to counsel attaches when a defendant is first brought in front of a magistrate or judge whether or not the prosecution is present for an arraignment or bail hearing. And, this does not take into account the advent of

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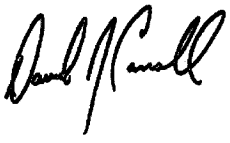
professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction

[6] I suggest that the Counties may object to paying for services while losing control of the hiring process, but that may simply spur the call for state funding of the entire function. But make no mistake, without establishing such independence the ADKT No. 411 performance measures will be rendered meaningless in fixing the prevailing right to counsel crisis.

DNA sciences, the movement for stricter sentencing guidelines, three-strike laws and other legal advancements, that have increase the cost of providing counsel over the past four decades.

NLADA continues to work with the rural sub-committee and the Association of Counties to collect data to support these claims.

Sincerely,



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