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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL AND JUVENILE DELINQUENCY CASES.

ADKT No. 411

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TRACIE K. LINDEMAN
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BY
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COMMENTS AND RECOMMENDATIONS

These comments and recommendations regarding matters referred to the Court by the Indigent Defense Commission ("Commission") are submitted on behalf of the Nevada District Attorneys Association ("NVDAA") and the State of Nevada Advisory Council for Prosecuting Attorneys ("NVPAC").

The Nevada District Attorneys Association is a voluntary, unincorporated association of district attorneys. The NDAA is represented by two members on the Commission pursuant to the Court's Order dated March 21, 2008.

The Advisory Council for Prosecuting Attorneys is an executive branch state agency responsible under NRS 241A.070 for providing leadership and assistance on legal and public policy issues related to the duties of Nevada's prosecutors and the effective administration of justice.

This paper opens with comments on certain overarching issues of importance to the analysis of indigent defense in Nevada; the next section addresses claims that a constitutional crisis exists in the indigent defense system, points out what facts are necessary to support such claims, and reviews these facts in the context of the current system; the next section comments on the current Assessment of the Washoe and Clark County Public Defender Offices by The Spangenberg Group ("Assessment" and "TSG"); and the final section offers specific recommendations for system improvement. The comments are based on information supplied to the Commission, independent research and interviews with judges, court administrators, county managers and private or public criminal defense practitioners.

Government attorneys wear two hats. This is true whether one is talking about the State (Attorney General), a county (District Attorney) or a municipality (City Attorney). They are responsible for the prosecution of criminal cases, but an equally important function is their duty to act as an advisor to the

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Executive/Legislative, and sometimes Judicial, branches of government on legal issues.[1]

In the first capacity, they are an integral part of the criminal justice system, which is primarily composed of the courts, defense and prosecutorial agencies. Ideally, the three components work together to create a justice system that provides balanced, impartial, effective and efficient resolution of criminal matters.[2] This involves determining what level of service will be provided to the ultimate users: victims, defendants, family members of both, jurors, witnesses and attorneys. In certain areas, that level of service may exceed constitutional requirements because the three branches of government, and the three primary components of the criminal court system, agree that providing a greater level of service promotes greater public confidence in the system. But this is a voluntary process and, however worthwhile, must be balanced against other taxpayer and societal needs, such as senior services, indigent medical care, education, fire safety, police, *etc.*

A good example of this type of cooperative effort is the establishment of specialty courts, *i.e.,* drug and mental health courts, etc. Such diversion or alternative sentencing courts are not constitutionally required, but all three components of the system agree they are beneficial and should be supported. The programs work best when prosecutors, defense counsel and the court are present and engaged in maintaining and improving such courts; but, except for when defense counsel are constitutionally required, caseload or budget constraints may require less participation as the Legislative/Executive Branches balance between competing resources.

In the second role, as advisors, government attorneys give opinions to the Executive and Legislative Branches on their constitutional duties to provide indigent defense services as well as speedy and public resolution of cases. In this capacity, government attorneys use opinions issued by the Judicial Branch to indicate the minimum level of service that is constitutionally acceptable so that the Executive/Legislative Branch can make determinations regarding basic budgets

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[1] These duties originate in NRS chapter 228 (Attorney General duties), NRS chapter 252 (District Attorney duties) and NRS 266.470 (City Attorney duties).

[2] The prosecutor's primary responsibility is not to win cases but to see that justice is done. *Berger v. United States*, 295 U.S. 78 (1935). Therefore, prosecutors want nothing less than effective assistance of counsel for all defendants, to ensure the effective administration of justice, and to avoid the time and expense of reversals on appeal or post-conviction habeas relief due to ineffective assistance of counsel.

for the courts, prosecutors and defenders as well as additional levels of service deemed necessary to improve operations or public confidence. Adequate funding to insure a constitutionally sound criminal justice system involves more than defense services. If the courts and prosecutors are not adequately funded, they cannot meet their constitutional duties to provide adequate notice and timely resolutions. The result inures to the benefit of the defendant, so the defense community has no incentive to support such initiatives, but the public safety concerns and impacts are enormous.

These decisions should be based on objective, empirical data and not personal opinions and ideologies. Opinions of people experienced in a field, whether prosecutors, judges or defense counsel, are valuable. But without reliable data, they remain subject to bias and subjective interpretation – a jumble of observations and anecdotal stories. This is not the type of information which should be used to implement major systemic changes with substantial economic impacts.

As noted herein, the national defense community, over the last thirty-five years, has engaged in a campaign not only to insure that the dictate of *Gideon v. Wainright* (372 U.S. 335 (1963)), as interpreted by *Strickland v. Washington* (466 U.S. 668 (1984)) is met, but exceeded. For example, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") recommended in 1973 that counsel be appointed upon arrest or when an investigation focused on a suspect. (NAC Recommendation 13.1). Yet the right to counsel only attaches when adversarial proceedings are initiated under the Sixth Amendment and during custodial interrogations under the Fifth Amendment. *Rothgery v. Gillespie County*, 128 S.Ct. 2578 (2008); *United States v. Gouveia*, 467 U.S. 180 (1984); *Miranda v. Arizona*, 384 U.S. 436 (1966). Similarly, the NAC recommended counsel be available in prisons to assist inmates with post-conviction relief petitions (NAC Recommendation 13.4), despite the fact that the Constitution does not require appointment of counsel on post-conviction proceedings. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991).

These studies are then recited and reused in various defense advocacy reports. The reports are then cited as substantive evidence for system reform. In effect, the defense community is attempting to create new ineffective assistance of counsel criteria through administrative, legislative or class-action proceedings. In such proceedings, the defense promotes adoption of mandatory performance and caseload standards as well as the creation of indigent defense commissions that are completely independent of the Judicial, Executive and Legislative Branches.

To date, no court, legislature or executive agency has agreed with this philosophy. Some states have adopted various elements of these proposals as

This distinction is important because the Executive and Legislative Branches need to know if the requested relief is constitutionally required, or a system improvement within their discretion. For the Judicial Branch to intervene and order the Executive and Legislative Branches to take action or to enjoin actions of those Branches, it needs evidence of a constitutional violation. For that reason, we wish to briefly address the standards that apply to such allegations before addressing why the materials presented to this Court do not demonstrate systemic failure requiring substantive orders of correction.

1. Case Law – Constitutional Systemic Failure

Several courts have addressed allegations that their local or state indigent defense system was failing to meet its obligation to meet the constitutional obligation to provide reasonably effective assistance of counsel at all critical stages of criminal proceedings. They consistently required significant factual evidence (or factual allegations sufficient to survive procedural dismissals) for judicial intervention.

Recently, the Court of Appeals of Michigan affirmed a district court's ruling allowing a class action to proceed in which present and future indigent defendants subject to criminal felony prosecutions in certain counties alleged they "have been, are being, and will be denied their state and federal constitutional rights to counsel and the effective assistance of counsel directly as a result of the court-appointed, defense systems currently being employed by those counties." *Duncan v. State*, --- N.W.2d ----, 2009 WL 1640975 (Mich.App.). The Court essentially noted that, to sustain a claim of systemic failure, evidence must establish 1) widespread and pervasive constitutional violations that are actual or imminent; 2) widespread harm caused by the systemic deficiencies – either affecting the verdict, rights on appeal, or some other relevant right, such as unwarranted pre-trial detention; and 3) the harm can only be redressed through specific changes to the indigent defense system.

In another recent case, indigent criminal defendants commenced a class action against the State of New York seeking a declaration that the State's public defense system was systemically deficient and an injunction requiring defendants to provide a system that is consistent with the constitutional guarantee of effective assistance of counsel. *Hurrell-Harring v. State*, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009). The New York Supreme Court, Appellate Division, dismissed the case, ruling that the claims were not justiciable:

> [W]hile this state has provided indigent legal services in one form or another for more than 40 years, plaintiffs do not allege, nor do they identify, any relevant appellate history that supports their claim that

> indigent criminal defendants have been systemically denied their constitutional right to counsel by the way these services have been delivered. The reality is that when plaintiffs' claim is stripped of its constitutional veneer, it is not about indigent criminal defendants being denied their constitutional right to counsel but, instead, it is simply a general complaint as to the quality of legal services offered to indigent criminal defendants in this state. Reduced to its essential terms, plaintiffs' complaint seeks to establish that "deficiencies" exist in the quality of these legal services but, at the same time, fails to show how these "deficiencies" have resulted in a denial of a defendant's right to counsel in their criminal prosecution and how such "deficiencies" had served to affect the outcome of any particular case. In fact, these "deficiencies" have more to do with how these programs are funded and administered than how individuals have been deprived of the meaningful assistance of counsel in defending against criminal charges pending against them.

883 N.Y.S.2d at 351.

The Minnesota Supreme Court refused to intervene and find systemic failure solely because caseloads exceeded those adopted by the Legislature. *Kennedy v. Carlson*, 544 NW.2d 1 Minn, 1996). The Minnesota Legislature had ordered a weighted caseload study which was performed by The Spangenberg Group. The Legislature adopted, as aspirational goals, some of the recommendations and rejected others. Economic downturns meant the aspirational goals were not being reached. The chief public defender brought suit, claiming that his clients had been exposed to the possibility of substandard legal representation due to excessive caseloads. The Minnesota Supreme Court dismissed the case, noting that, other than the personal opinion of the lead public defender and reference to the caseload standards, no evidence had been presented demonstrating clients routinely received ineffective assistance:

> In those cases where courts have found a constitutional violation due to systemic underfunding, the plaintiffs showed substantial evidence of serious problems throughout the indigent defense system. By comparison, Kennedy has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel. To the contrary, the evidence establishes that Kennedy's office is well-respected by trial judges, it is well-funded when compared to other public defender offices, and its attorneys have faced no claims of professional misconduct or malpractice.

544 NW.2d at 6-7.

Platt v. Indiana, 664 N.E.2d 357 (Ind. Ct. App. 1996), involved a civil suit brought seeking injunctive relief premised on the contention "that the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial." 664 N.E.2d at 362. The plaintiffs alleged that the public defender system violated the fundamental right to effective pretrial assistance of counsel under the Sixth Amendment. The Court of Appeals for Indiana ruled that the claims presented were not reviewable under the Sixth Amendment due to a lack of any particular allegations of deficient performance and harm. *Id.* at 362.

In *Quitman Co. v. Mississippi*, 910 So.2d 1032 (Miss. 2005), the county itself commenced a civil action for declaratory and injunctive relief, alleging that by imposing an obligation on the county to fund the representation of indigent defendants, the state of Mississippi breached its constitutional duties to provide adequate representation for indigent criminal defendants. The Mississippi Supreme Court upheld the trial court's ruling that the county had not demonstrated the failure of the existing system to provide indigent defendants in Quitman County with the tools of an adequate defense:

> The State correctly points out that "[c]ommon sense suggests that if Quitman County claims there is widespread and pervasive ineffectiveness, the most probative evidence to support that claim would be testimony about specific instances when the public defenders' performance fell below 'an objective standard of reasonableness' as measured by the professional norms." . . . The County did not present any evidence on any one of the central factual allegations in its complaint, and the County did not try to show specific examples of when the public defenders' legal representation fell below the objective standard of professional reasonableness.

910 So.2d at 1037.

Cases in which courts have found systemic ineffective assistance of counsel demonstrate how extreme a crisis must exist for judicial intervention.

In Louisiana, the Louisiana Supreme Court found substantial evidence to sustain claims of systemic failure in two notable instances. In *State v. Peart*, 621 So.2d 780 (La.1993), the Court found systemic failure, not upon the caseload numbers per se, but the specific effect the case load had upon the public defender's ability to prepare together with other system problems, including: lack

of a law library, no provision for expert fees, incarcerated clients had no contact with the defender (or anyone from that office) for 30-70 days from the date of appointment, routine lack of investigative support, a trial schedule that left little time for preparation and investigation and lack of a stable funding source. 621 So.2d at 784. The Court relied on the significant trial record demonstrating these facts, together with a report issued by The Spangenberg Group identifying specific problems backed up by factual data, and noted, for example, that no attorney can prepare for one felony trial per day. *Id.* at 789. Subsequently, in *State v. Citizen*, 898 So.2d 325 (La.2005), the Court addressed the issue of adequate funding for appointed counsel under the Louisiana indigent defense system, ruling that unless adequate funds are identified for the compensation of appointed counsel in specific cases, the trial judge may, upon motion of the defendant and a showing of good cause, halt the prosecution of a case until adequate funding becomes available. 898 So.2d at 338-9.

In Florida, the Florida Supreme Court, when presented with extensive data on excessive backlogs of appellate filings in public defender's offices resulting in significant delays, has found systemic ineffective assistance of counsel. In *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla.1990), the Court was presented with an enormous backlog of several hundred criminal appeals in the office of the Public Defender for the Tenth Circuit Court. Cases were routinely delayed by three years awaiting the filing of opening briefs. The evidence clearly demonstrated a systemic problem that would justify habeas corpus relief for indigent defendants unless adequate funding was appropriated to provide the resources remove the backlog. 561 So.2d at 1139. The Court was again confronted with similar evidence of a backlog of appellate cases in the office of the Public Defender for the Thirteenth Judicial Circuit in *Hatten v. State*, 561 So.2d 562 (Fla. 1990). The Court found a systemic problem with a backlog so excessive that there was no possible way the public defender could timely handle the appeals. However, the Florida courts reject any argument that evidence of excessive caseloads alone, without further evidence that individual attorneys provide inadequate representation, constitutes a systemic problem:

> We acknowledge the difficulty in selecting a single "correct" standard and do not believe that a magic number of cases exists where an attorney handling fewer than that number is automatically providing reasonably competent representation while the representation of an attorney handling more than that number is necessarily incompetent.

State v. Public Defender, Eleventh Judicial Circuit. 12 So.3d 798, 801-2 (Fla.App. 3 Dist. 2009) (citing *In re Certification of Conflict in Mots. to Withdraw*

Filed by Pub. Defender of the Tenth Judicial Circuit, 636 So.2d 18, 21-22 (Fla.1994)) .

In Arizona, the Arizona Supreme Court has found extreme facts demonstrating systemic failures affecting right to counsel, but has also rejected systemic failure based on workloads alone. In *State v Smith*, 681 P.2d 1374 (Ariz. 1984), the Arizona Supreme Court considered a claim that contract defense counsel caseloads exceeded the so-called "national" guidelines. The Court noted that while the guidelines were helpful tools, they did not answer the question of whether excessive caseloads were really causing a systemic injury – that the system was routinely resulting in a deprivation of the right to counsel under the Sixth Amendment. 681 P.2d at 1380.

However, the Court did hold that the selection process for awarding public defense contracts was constitutionally flawed. The Court noted that systemic injury was not a necessary component of reviewing the sufficiency of the process, rather than allegations of systemic deprivation of counsel. The Court concluded that the bid system utilized by Mohave County to award public defense contracts to private attorneys was constitutionally deficient, since contracts were awarded on a low bid basis and there was no criteria for the biding process including: lack of work or case load limits, adjustments for complex cases, minimum experience requirements, large geographic area to be covered, limited or lack of resource funding (expert and investigative fees). This, together with the fact that counsel also maintained a private practice, was sufficient to demonstrate a systemic potential inherent implied conflict of interest as an attorney would have to choose between paying and private clients when allocating limited time and resources. The Court then ordered the governmental entities to develop a different system. 681 P.2d at 1381. It rejected the ineffective assistance of counsel claim in the specific case and it did not hold that the contract process created a systemic failure to provide counsel, only the potential for systemic problems. In a similar contract appoint case, *Zarabia v. Bradshaw*, 912 P.2d 5 (Ariz. 1996), the Court held the Yuma County Superior Court's system of appointing private attorneys for indigent defendants unconstitutional, since the system resulted in the appointment of lawyers on a random, rotational basis did not take into account the skill required to effectively handled particular cases, and routinely resulted in the appointment of attorneys with no trial or criminal experience. 912 P.2d at 7.

Suits in federal courts alleging systemic ineffective assistance of counsel in state indigent defense systems have generally been dismissed on abstention grounds. *See, e.g., Luckey v. Miller*, 976 F.2d 673 (11th Cir.1992); *Noe v. County of Lake, Indiana*, 468 F.Supp. 50 (N.D. Ind. 1978). One federal case in which systemic constitutional violations were found is *U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238 (N.D. Ill. 1996), involving a habeas petition by indigent

defendants represented on appeal by the Illinois Office of State Appellate Defender challenging delay in the appellate process. The District Court found substantial evidence of systemic delays in criminal appeals, and concluded that the delays gave rise to constitutional violations in that they were "excessive and inordinate because they exceed every known normative reference point." 917 F.Supp. at 1259.

The courts consistently note that the constitutional issue is whether the system is providing a constitutionally adequate defense, not a superior defense. *See Hurrell-Harring v. State*, 883 N.Y.S.2d at 351-2; *State v. Citizen*, 898 So.2d at 338, n.14; *see also Strickland v. Washington*, 466 U.S. at 687 (proper standard for attorney performance is 'reasonably effective assistance'). As the Mississippi Supreme Court noted in *Quitman Co. v. Mississippi*:

> The question before this Court is not whether the county-based system is the best system of indigent defense. The question is not even whether in isolated cases the public defenders were ineffective. Rather, the question is whether Mississippi's county-based system is a constitutionally adequate system of indigent defense.

910 So.2d at 1047.

Allegations of excessive caseloads, standing alone, are not enough to demonstrate a systemic failure. *See State v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d at 801-2; *Kennedy v. Carlson*, 544 N.W.2d at 6; *State v Smith*, 681 P.2d at 380. Nor will mere allegations of under-funding alone give rise to a cognizable claim of systemic ineffective assistance of counsel. *See Platt v. Indiana*, 664 N.E.2d at 362; *Hurrell-Harring v. State, supra*; *Kennedy v. Carlson, supra*; *Quitman Co. v. Mississippi, supra.*

These cases demonstrate the need for significant evidence of systemic failure and resulting harm before declaring a constitutional "crisis." As can be seen in the next section, this type of analysis has not been done in Nevada, and there is no basis for adopting mandatory caseload standards for Clark and Washoe counties.

2. No Evidence of Constitutional Systemic Failure in Nevada.

a. Ineffective Assistance of Counsel Claims.

While a lack of successful ineffective assistance claims does not eliminate all claims of systemic failures, it is a factor courts can consider in examining an indigent defense system. We also recognize that there are instances where counsel are found to be deficient, but no prejudice resulted. Nevertheless, there is no evidence of routine or systemic deficiency and prejudice.

Washoe County Statistics:

In 2006 there were 123 petitions filed alleging ineffective assistance of counsel. The courts summarily dismissed 30; 27 were dismissed on procedural grounds based on the State's motion; the State prevailed in 28 litigated actions, lost 1 and had 1 granted in part. The balance of actions were carried over to 2007.

In 2007 there were 98 petitions filed. The courts summarily dismissed 40; 31 were dismissed on procedural grounds based on the State's motion; the State prevailed in 46 litigated actions, lost 1 and had 4 granted in part. The balance of actions were carried over to 2008.

In 2008 there were 101 petitions filed. The courts summarily dismissed 33; 28 were dismissed on procedural grounds based on the State's motion; the State prevailed in 36 litigated actions, lost 5 and had 3 granted in part. The remaining were carried over to 2009.

Therefore, the data indicates that there were 6 successful post-conviction ineffective assistance of counsel claims out of 322 cases from 2006-08. An equally small percentage of the 316 petition denials were reversed on appeal on ineffective assistance grounds.[3]

Clark County Statistics:

Clark County does not maintain the above level of annual statistics on post-conviction ineffective assistance of counsel claims. However, for 2008, Clark County processed 273 petitions, of which three were granted. Again, of those appealed, two additional cases were reversed on ineffective assistance grounds.

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[3] Cases are also reversed and remanded for failure to conduct an evidentiary hearing or appoint counsel.

Attorney General's Office Statistics:

The Attorney General's Office defends federal habeas petitions: virtually every petition includes claims of ineffective assistance of counsel. According to Westlaw, out of 114 petitions/cases handled by the Attorney General's Habeas Unit from 2006-09, the federal district court decided 61 ineffective assistance petitions/claims on the merits and entered a final judgment. Of that number, 56 of the petitions were denied and 5 were granted (this excludes cases pending before the Ninth Circuit Court of Appeals).

Rural Statistics:

Statistical data from Nevada's 15 rural counties on the number of successful post-conviction ineffective assistance of counsel claims is also important to this analysis. Data for Elko County indicates that for 2007-08, of 11 post-conviction ineffective assistance of counsel claims, 7 were denied, 3 were withdrawn and 1 was quashed. Comprehensive data was not available at the time of the submission of this paper for the other 14 counties, and NVPAC and NVDAA recommend that further research be conducted to determine whether successful ineffective assistance claims occur with greater frequency in rural jurisdictions.

b. Resource Deficiencies

Various ABA and defense publications, as well as the courts in the above cases, have discussed what types of demonstrated problems may be evidence of systemic failure to provide assistance of counsel. Historically, many arguments began with the identification of problems discussed by the National Advisory Commission in 1973. The NAC identified a number of resource problems with indigent defense systems including: lack of central offices and support staff; no provision for training, no investigative staff or funding, no funding for experts, no funding for travel or incidental expenses, pay and staffing differentials of defense providers versus prosecutors.[4]

[4] The NAC also noted a general belief that private counsel provided better services than appointed counsel. As of 1999, this idea had completely changed. In a Study of Indigent Defense systems, the Bureau of Justice Statistics found that the conviction rates for indigent defense counsel clients were about the same as conviction rates for defendants with private counsel. The same study indicated average sentence lengths were shorter for public-financed attorney clients than private counsel clients.

Looking at Nevada, these issues do not exist in Clark and Washoe County. Despite the significantly greater caseloads in the prosecutorial offices, the indigent defense system budgets and resources are on par with the prosecution and the County governments recognize their responsibility to fund these resources. For example, 2008 salary data for Washoe County indicate the Public Defender received a salary of $153,324.16 while the District Attorney's statutory salary was $149,200.64. In Clark County, the Clark County Public Defender's salary was $189,756.00 while the District Attorney's statutory salary was $179, 982.40.[5] The salary schedules for deputies in these offices are also comparable.

As another example, Clark County's total 2008 fiscal budget for indigent defense, including conflict services and the Special Public Defenders' Office, is $32,516,189.00. Funding for the District Attorney criminal and juvenile functions, including proportionate shares of administrative functions, equaled $32,533,800.00. The FY2010 budget for Washoe County shows the county is investing over $11.5 million in public defense services (including the Public Defender, Alternate Public Defender and conflict counsel), while the District Attorney is budgeted for $12.3 million for the prosecution of all criminal cases across the county. Since indigent defense services handle about 50% of the total criminal caseload, in comparison to the 100% handled by the prosecutors, substantially more money is spent on criminal defense than the prosecution of criminals.

The Washoe County Public Defender's Office handles cases where indigent representation is constitutionally-required and cases where Washoe County believes representation is helpful to the system and funding is discretionary. These include child support, abuse and neglect non-criminal cases and family court matters. Obviously Washoe County does not stop funding simply at a constitutional level. In the Commission meetings and hearings before this Court; Clark County noted that it also provides non-constitutional services through contracts with agencies in Clark County.

Rural Nevada information poses a more difficult case and requires a county-by-county comparison; however, salaries between rural prosecutors and defense counsel again are generally comparable.[6]

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[5] The Public Defender's salary includes longevity, while the District Attorney's does not.

[6] While District Attorney offices are funded on the county level, District Attorney salaries are established by statute: for FY 2008-09, rural District Attorney salaries range from $71,983 (Esmeralda County) to $108,785.00 (Carson City). NRS 245.043(2). Parity among prosecution and defense functions in rural counties can be considered by comparing budgets. Parity can be partly demonstrated in that the State Public Defender salary for the current fiscal year is $118,156, the equivalent of the Chief of the Bureau of

The idea that the local executive/legislative bodies ignore indigent representation is fallacy. The issue is not a lack of any services, as in 1973, but whether the services meet constitutional demands. Yet in every study and defense publication, these thirty-odd year-old views and data are used to support a claim of crisis, without regard to the substantial improvements in the criminal justice system since 1973.

c. Caseload Concerns

Every defense advocacy publication adopts and emphasizes the caseload recommendations of the 1973 National Advisory Commission[8] as a "national standard" for maximum caseloads, even though no jurisdiction has adopted these figures as mandatory maximums for establishing systemic failure to provide counsel or per se ineffective counsel.[9] The ABA Standards regarding workloads are set forth in *ABA Standards for Criminal Justice: Providing Defense Services* Standard 5-5.3 (3d ed. 1992) and *ABA Standards for Criminal Justice Prosecution Function and Defense Function* Standard 4-1.3 (3d ed. 1993), and do not establish numerical workload standards.[10] And, although some national studies have advocated for maximum prosecutor caseload standards, the National District Attorneys' Association have rejected such approaches for the same reasons discussed below.

There is a good reason why courts, legislative and executive bodies have rejected the NAC numbers – they are not based on any empirical data. Rather the numbers derive from the discussions, opinions and surveys of a NAC

Criminal Justice in the Office of the Attorney General; the salary of a supervising state public defender is $106,904, the equivalent of a senior deputy attorney general; the salary of a deputy state public defender is $95,650, the equivalent of a deputy attorney general; and the salaries of investigators in both offices are equivalent at $65,951. SB 433 (2009).

[8] 150 felony cases/attorney/year, etc.

[9] Some states or local jurisdictions have adopted the NAC numbers as aspirational goals for budgetary purposes.

[10] By dint of perseverance, the NAC numbers have crept into a number of ABA publications. The commentary to *Providing Defenses Services* Standard 5-5.3 cites numerical standards adopted by the National Advisory Commission on Criminal Justice Standards and Goals in 1973, and these are often misrepresented as ABA standards although they have never been adopted by the ABA.

subcommittee based on anecdotal and professional experiences of the professionals who were surveyed. As noted above, this information is helpful in establishing a concept – caseloads can lead to systemic failure or inadequate representation, but also as indicated above, they are not a basis for demonstrating actual systemic failures or individual *Strickland* claims.[11] But because the national defense community believes in the NAC numbers and wants them adopted as a per se demonstration of system failure or ineffective representation, they are the underlying basis for every caseload study. This creates a built-in bias in such studies.[12]

The defense community acknowledges that any caseload standard should take into consideration things like case complexity, but only to the extent it would justify a lesser standard than the NAC recommendations. This puts the cart before the horse. Objectively, recommendations should be based on data and aspects of a system. Factors should include the complexity of a case (the number of witnesses, need for experts, etc.), seriousness of the charge, sentencing enhancements, need for sentencing presentations and levels of investigation for pleas or trial effect the number of hours necessary to provide constitutionally adequate representation. Other factors that affect caseload capacity are the experience levels of the attorneys, availability of other professionals (investigators, paralegals, support staff), geographical location of courts, cooperative discovery procedures, pre-trial release programs and technology. If these considerations are combined with hard data about times to process cases, *i.e.,* client interviews prior to preliminary hearings, conduct of preliminary hearings, discovery review, etc., then caseload guidelines have some worth. None of this occurred in the development of the

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[11] As a case in point, consider appellate practices. As of 2006, the Nevada Supreme Court disposed of approximately 90% of its criminal cases in one year and 100% in 18 months. Similar disposition rates were observed in 2007 and 2008. Clearly, though the appellate caseloads in some defense offices exceed the NAC standards, defendants are not routinely waiting years before an opening brief or fast track statement is filed and the quality of the pleadings meets constitutional demands. It is the private bar that represents a greater problem and some appointed contract counsel. Delays are addressed by the court by removing and sanctioning counsel, including bar referrals where appropriate. While the submissions are not always on par with the institutional defenders, they still meet constitutional standards, but NVPAC and NVDAA concur that additional appellate training for contract counsel should be conducted to prevent any constitutional systemic problems.

[12] The term is not being used in a pejorative sense, it simply reflects that the national defense community, and defense consultants like TSG, have beliefs and goals regarding the ideal indigent defense system and these viewpoints affect the objectivity of the reports and publications as they relate to constitutional systemic failure or adequacy of counsel.

NAC guidelines and continued citation to them does not demonstrate constitutional systemic failure or crisis.

NVPAC and NVDAA agree that the entire criminal justice system would benefit from fact, rather than opinion, -based guidelines for courts, prosecutors and indigent defense. They should be, as noted in *Kennedy*, aspirational and designed to avoid potential problems due to excessive caseloads. If the aspirational goals are not met or are too high; courts, prosecutors and defense providers may seek additional funding or a change in operations; demonstrating how the actual caseloads are systemically impacting constitutional obligations and why additional resources are warranted. Such guidelines would also be a helpful management tool for budgeting and determining when a defense agency or attorney should began to develop a fact-based request or motion to decline additional cases.

Mandatory, arbitrary numerical caseload limits should not be imposed because they eliminate the need to demonstrate constitutional systemic harm as discussed in *Kennedy*, *Smith*, *Peart*, *Duncan*, the Florida cases and *Hurrell-Harring*. This would create artificial limits in an area of discretionary funding. Moreover, because excessive caseload issues are rooted in an attorney's ethical obligations under ABA model codes of professional conduct and Nevada Rules of Professional Conduct 1.1 and 1.2, adoption of mandatory standards would apply to all defense counsel, not just indigent defense providers. One cannot say a particular caseload is excessive for indigent practitioners but okay for the private sector. Both are required ethically to decline representation.

With respect to Nevada, as can be seen in Section 3, the Spangenberg Assessment has significant methodology and assumption problems that make its results unreliable even for an aspirational goal.[13] However, it provides considerable data on Washoe and Clark counties which can be used as basis of developing caseload guidelines as well as ideas and concepts that would be helpful in creating similar guidelines for rural areas, courts and prosecutors. Thus it should not be ignored or disregarded.

In addition, NVPAC and NVDAA believe this Court should adopt a uniform definition of a case for defense, prosecutorial and court record-keeping. NVPAC and NVDAA have no problem with the definition of a criminal case developed by the Conference of State Court Administrators and the National Center for State Courts and used in the Assessment: each defendant and all charges involved in a single incident as a single case. We do suggest that all three

[13] NVPAC and NVDAA recognize that TSG did not have the ability to submit a draft for review and input prior to its submission to the Court. Since its submission, there has been little real opportunity to sit down and work on issues related to the Assessment.

components work with the Uniform Records Division of the Administrative Office of the Courts to ensure consistency with that agency and address any areas of concern.

d. Other "Crisis" data

The information presented at the Commission meetings in 2007 and 2008 to justify the allegations of a "crisis" consisted heavily on anecdotal stories and opinions of the various defense community participants, with occasional observations of a judge. The minutes reflect that the "crisis" was obvious because the caseloads represented by the institutional defenders were "obviously" too large. The NAC caseload recommendations were frequently relied upon as were various national defense publications containing conclusory language about excessive caseloads and the NAC recommendations.

As a result, there was no objective inquiry or specific information submitted to the Court to support the caseload commentary. This lack of objectivity, and the belief that the information supplied to it was uncontested, resulted in the Court's Order dated January 4, 2008, adopting caseload standards. Subsequently, when additional information was supplied to the Court, it decided to suspend the order pending the result of a weighted caseload assessment in Clark and Washoe counties. Before turning to the concerns with the Spangenberg Assessment, we would like to comment on additional problems with the information originally supplied to the Court.

First, there was no little or no effort to verify caseload representations. For example, in 2007-2008, the Clark County Public Defender reported caseloads of 320 plus cases per track attorney while the County calculated the number at 260 (including team chiefs) and the District Attorney's data showed 218. Issues such as open versus active cases were not discussed. This does not mean that anyone was right or wrong, just that there was a good reason to question the validity of the data.

Because the numbers all exceeded the NAC recommendations, the immediate conclusion was that a "crisis" existed. While that view is sincerely held, it also stems from a belief system that would fund superior counsel, not adequate counsel as discussed in case law. That is evident from the number of times statements were made such as 'if *Strickland* is the test, then we are meeting *Strickland*, but we should be doing more' or 'an indigent defendant should have the same money spent on his case as a millionaire who hires private counsel.'

As indicated early, NVPAC and NVDAA do not argue that *Strickland* alone is an appropriate test for determining systemic constitutional failure to

provide counsel. However, the case law does indicate the need to demonstrate systemic deficiencies and actual harm caused by the deficiencies. *See Kennedy, Hurrell-Harring, Smith, etc.* As to the second statement, the Constitution does not require that government match the funding available to a private individual. It only requires funding sufficient to insure adequate and competent representation.

Second, there was no effort to determine if the caseloads actually resulted in a systemic failure provide counsel and systemic harm to indigent defendants. As noted in *Kennedy* and *Smith*, a large caseload alone does not translate into systemic failure. Although data isn't always readily available through computer generated reports, it does exist. Determining things like the number of hours spent with a client before recommending a plea offer or what discovery was reviewed prior to the plea is not insurmountable.

For Clark and Washoe counties, the information vacuum lead to the decision to conduct weighted-caseload studies. While the studies have significant problems involving the conversion of the raw data to caseload estimates, they still provide important information that can be used, with other hard data derived from filings, calendar reviews, jail records, etc. from which caseload figures could be developed.

Because of lack of funding, such studies could not be done for rural Nevada, but there are enough management analysts between the State, local and county governments, the administrative offices of the courts and the defense and prosecutorial agencies, that some type of data collection and verification can be developed without hiring consultants. Certainly the information generated through the Rural Subcommittee about how the criminal justice system operates and the reports regarding the State Public Defender's Office warrant this type of effort. If there are areas of constitutional systemic problems, they need to be addressed, but as the case law shows; legislatures, executive agencies and courts need data on how caseloads are actually impacting a system, not just caseload numbers, to determine if a constitutional problem exists and how to address it.

Adopting mandatory caseload limits may be a quick and easy solution for the defense community, but is it appropriate to bind future funding and resource allocation to a number that may bear no relationship to constitutionally adequate representation and the factual realities of a system? This is a fundamental question.

In addition to the caseload discussions and national advocacy publications, the Commission also relied on a 2000 Spangenberg report on indigent services in Nevada and a 2003 National Legal Aid Defender Association report on Clark County. Both suffer from the same generalizations and bias referenced above:

caseloads are excessive under the NAC recommendations; therefore, there is a serious crisis. Again, there is no hard data showing how the caseloads are actually impacting the services provided.

The tendency by the defense community to rely upon generalizations is not new. When the 2000 Spangenberg report was issued, it contained a number of recommendations for gathering additional data and areas that needed further investigation. Yet seven years later, rather than having spent the time gathering hard data to determine if a systemic failure exists, the response by the defense community is continued reliance on NAC recommendations and the general concerns expressed in prior reports. Comments such as "nothing's been done" or "nothing changes" are common. Yet this ignores the significant changes that have occurred.

For example, in 2000 Nevada ranked 43rd in funds spent per capita. Now we rank 25th. The rural counties, recognizing that the Legislature was not adequately funding the State Public Defender's Office, established rural public defender and conflict systems. They did so based on hard data supplied to them by the courts and despite the economic impact upon those counties. Clark and Washoe counties significantly increased their budgets. Other changes have been made in the contract system to address concerns similar to those outlined in *Smith.*

Ignoring these actions demonstrates why generalizations and opinions are not sufficient evidence of "crisis."

3. Washoe and Clark County Assessments

An independent workload assessment requires the acquisition of data and applications of methodologies that are designed to develop information on the actual workload of an entity. It *should not* be vehicle for promoting a particular agenda. The Spangenberg Assessment is such a vehicle.[14]

It began by quoting its own previous 2000 report discussed above, but instead of using the actual conclusions in the report, the Assessment expands the results. For example, the 2000 study indicated that high caseloads may indicate a problem and that additional data should be developed to see what impact the caseloads were having on the provision of indigent services. Yet in the

[14] NVPAC and NVDAA acknowledge that Washoe and Clark counties chose TSG to conduct the Assessment. However, one may still expect impartiality and accuracy in a service provider. Nor should it prevent pointing out concerns when the final product has serious flaws.

Assessment, the statement is made that the 2000 report found the caseloads actually negatively impacted the rights of indigent defendants.

The Assessment states, based on TSG's 2005 databank, that Nevada ranks 25th in expenditures per capita. Perhaps this is just background information, but it has no bearing on a caseload assessment and creates the appearance that TSG is expressing an opinion. (A. 7). Similar commentary statements, unrelated to case load analysis, are found in the specific sections dealing with Washoe and Clark counties. The institutional bias, together with the specific analytical problems discussed below, make the Assessment an inappropriate basis for establishing mandatory caseload numbers.

a. Clark County – General Observations

The Assessment begins by noting that the County's decision to eliminate longevity packages has resulted in a younger, less experienced Public Defender Office and greater turnover. The NVPAC and NVDAA would simply point out that that decision was equally applied to the District Attorney's Office and with the same result.

Looking only at population growth from the 2000 census, the Assessment concluded that, despite a 45.71% increase in attorney staffing since 2000, the Office was not keeping pace. Population growth is not an appropriate figure as there is no direct correlation between population growth and criminal filings. And there is certainly more recent data readily available. This Court's 2008 Fiscal Year Annual Report indicated criminal felony and juvenile filings for the State have been virtually flat-lined or decreasing from 2004 through 2008. (SCAR, Figure 1, p. 22).[15] For the 2007-2008 fiscal year, Clark County criminal district court filings decreased.[16] (SCAR, Table 5, p.27). Clark County District Court disposed of approximately 3,000 more cases than new filings. (SCAR, Tables 5 & 6, pp. 27-28). The Las Vegas Justice Court did see an increase in criminal filings. (SCAR, Tables 11 & 12, pp. 34-35). The Clark County Public Defender does not handle representation on all the cases filed. A significant number of the misdemeanor cases would not require appointment of counsel and many cases are handled by the track/conflict attorneys.

[15] Statistics in Clark County for the past two months do indicate that trend may be changing and filings are now increasing.

[16] A criminal case is defined using a similar definition to that used in the Assessment, by defendant, not case number.

The actual increase in cases was experienced in the 1990's which is why Clark County significantly increased the number of attorneys in the Public Defender Office and expanded the conflict attorney panel from 2000 to 2009 despite decreasing criminal filings.

The Assessment indicates the Public Defender Office's sexual assault team could not handle all the sexual offense-related cases. The same is true of the District Attorney's Office. Cases that require less experience or special knowledge are assigned to the track/team attorneys. There is no indication this creates deficient representation.

The report discusses remarks made by a judge that a low trial rate makes it more difficult for young attorneys to gain trial experience. If the low trial rate is the result of appropriate plea negotiations, how does this result in deficient representation to the client?[17] The Assessment acknowledges this, notes Public Defenders appeared well-prepared for their cases, but expressed concern that caseloads may not give them adequate time to address the cases. (It is also another example of opinion). This is hardly empirical evidence of systemic crisis.

Finally the Assessment discusses areas of system management, such as identifying conflicts at an earlier stage. Certainly the courts, prosecutors and

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[17] NVPAC and NVDAA are aware that some members of the defense community and TSG believe because Clark County has a lower trial rate than other jurisdictions that this is a sign of a problem. This is just another example of a conclusion based on no factual data. It may be a reason to examine the system, but without randomly sampling a broad and statistically viable number of cases and determining whether the recommendation was appropriate under the circumstances, no conclusion can be reached. This is exactly what TSG suggested in its 2000 report, yet the defense community continues to simply rely on the trial rate.

Members of the Clark County District Attorney and Public Defender Offices frequently converse with each other. Many public defenders take umbrage with the suggestion they are ignoring their client's interests and avoiding trials. Other public defenders have indicated they meet their ethical and constitutional obligations to their clients, but the system would benefit if they could spend more time with a client, especially those who might avoid recidivism with more extensive supervision and guidance. And, of course, there are other defense attorneys inside and outside the Office who would disagree. In a like vein, the report mentions other judicial interviews, but it is unclear if TSG interviewed all members of the judiciary or just select members. Yet the Assessment also discusses that the judiciary is pleased with the PD's performance and TSG observations were that the PD's were well-prepared for their cases in court. This type of conflicting commentary simply underlines the need for hard data, not random opinions, when making system changes.

defense community benefit from early identification of conflicts and this is an area to be addressed.[18]

b. Washoe County – General Observations

The Assessment spends considerable time commenting on disputes between the District Attorney and Public Defender. Such disputes are not relevant. For example, unless a continuance to file charges is being requested, the District Attorney does not staff initial appearances. Neither has the Public Defender. If the Public Defender now believes the appearances need to be staffed, the question to be asked is whether failure to staff has actual systemic constitutional implications and harm. If not, then the issue is a valid one to be raised when the Public Defender requests additional staffing.[19]

Although it is unclear how many judges were interviewed, the Assessment indicates that judges were concerned the Public Defenders were not meeting with their clients prior to a preliminary hearing. Again, this does not demonstrate a crisis, only a need for further inquiry. For example, presumably the Washoe County jail has visitor logs. A statistically valid random sampling of cases, going back to a time before the Assessment, could be pulled and compared to jail logs.

The Assessment indicates lack of an open file policy, problems with jail travel time (the Washoe jail is not physically connected to the Courthouse), lack of confidential video arrangements and lack of computerized pleading banks may undermine the efficiency of the Office. However, the District Attorney maintains an open file policy, and the Public Defender routinely uses form files and maintains a brief bank. Nevertheless, even if such problems do not result in constitutional systemic failures, they should still be addressed through cooperative efforts as to see if system improvements would release attorneys for other functions.

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[18] The Assessment also includes general opinions, what might be termed "water-cooler" remarks. For example, the conclusion by some Public Defenders that the District Attorney overcharges because cases are dismissed before reaching district court. The example is a domestic violence case where the victim does appear. The suggestion appears to be we shouldn't file a domestic violence felony case simply because the victim exhibits conduct antagonistic to prosecution, even though such conduct is frequently the result of domestic abuse. These kind of remarks, by any member of the criminal justice community, are not helpful to identifying or resolving potential systemic problems.

[19] This is one of the areas where representations have been made that the Performance Standards require the Public Defenders actions – *i.e.*, 'the Standard says so' – regardless of whether the PD's presence has any benefit to clients and ignoring the Preamble.

It is unknown where TSG received its information that preliminary hearings are routinely continued for 30-60 days. Nor does the Assessment indicate why continuances occur or if this information was verified. Again, if this is an area that needs to be addressed, then it is best addressed by Washoe County courts, prosecutors and defense coming together.

Finally, TSG expresses its concerns and opinions on the early case resolution program, which is *not* the function of a workload assessment.

c. Actual Weighted Caseload Data

TSG begins discussing the NAC recommendations and the methods by which weighted caseloads could be determined. NVPAC and NVDAA agree that any study must be empirically based. The problem is basing a study solely on contemporaneous time records, particularly when the subjects know how the time records will be used. If actual data is available to verify or act as a check and balance, it should be used.[20] In addition, independent verification is important when it becomes apparent that the study results do not seem consistent with actual practice.

The Assessment assumed a forty hour attorney work week and then subtracts time for vacations and sick leave. Time is also subtracted for training, community service or similar activities. The remaining number is the annual hours available to work on cases. However, attorneys are professional staff. It is expected in our profession that time devoted to training or civic activities not be considered part of the 40 hour work week. In fact, most responsible attorneys work about 50 hours per week, because they need to make up for the time lost in training and civic activities. Public sector attorneys should not be treated differently – regardless of whether they work for the Public Defender, the District Attorney, or some other branch of government. The fact that they routinely work overtime should, however, be considered in salary and benefit packages

Another issue is the fact that the studies use disposition numbers, but the type of disposition (plea, trial, dismissal) is unknown (although it may be available in the raw data). This affects caseload issues.

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[20] NVPAC and NVDAA are not suggesting the Public Defenders did not truthfully and honestly complete the time sheets. Rather the issue is how the hours relate to other data such as case calendars, jail logs, etc. For example, knowing how many hours were spent in client interviews is helpful. But it doesn't provide data on what stage of the proceeding – before preliminary hearing or trial or the proximity of an interview to a particular court event. A better picture of hours spent prior to a plea versus a trial makes a difference in case weighting hours.

There appears to be no attempt to reconcile obvious inconsistencies. For example, in Table 10, the study methodology would indicate that each of the non-murder felony deputies are handling or could handle approximately 215 felony dispositions per year and 966 gross-misdemeanor/misdemeanor cases.[21] If you multiply this by the number of attorneys (70) it would mean the Clark County Public Defender's Office handles about 15,050 felony dispositions and 67,620 gm/m dispositions per year. The actual total number of felony dispositions for the 2008 fiscal year, according to the SCAR, is 13,000 and a significant portion of those cases were not handled by the Clark County Public Defender.[22] The 67,620 number is simply ludicrous.[23] Similar problems exist with Washoe County numbers.

In an attempt to validate the number, TSG looked at actual case assignments. But the actual case assignments do not reconcile with the disposition numbers in many categories. The gross-misdemeanor and misdemeanor assignments for Clark County total about 5,350. These are not cases that are expected to be active for more than one year, yet the disposition rate is 67,000 +. Obviously there is a problem. Again Washoe County figures have like problems.

Even if it is assumed that the Clark County Public Defender was responsible for all 13,000 felony dispositions in the 2008 fiscal year, and further assumed that none of those cases were sexual assaults and murders, it would mean that the 62 general track attorneys disposed of 210 felony cases in a year. Since it is evident that the Clark County Public Defender did not handle all the cases, the number is far less than this, more akin to 100 felony cases plus approximately 86

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[21] Murder cases were not included. District Attorney statistics as of November 15, 2007, showed the Clark County District Attorney's Office has 192 active murder cases involving 234 defendants. Three cases were pending international extraditions, three were at Lake's Crossing, fourteen were pending sentencing, fifteen were pending preliminary hearing, seventeen had pending post-conviction proceedings and 140 were set for trial. Of the 234 defendants, 57 were represented by the Public Defender, 37 were represented by the Special Public Defender and 132 had private counsel. The remaining 8 defendants were either representing themselves or awaiting confirmation of counsel.

[22] According to statistical tracking data maintained by Clark County, in 2008, the Clark County Public Defender disposed of 12,475 gross misdemeanor *and* felony cases in a year. Approximately 61% were resolved in Justice Court, thus the total gross misdemeanor and felony case dispositions in District Court would be approximately 4,990 cases. 2007 statistics indicate the Public Defender track attorneys had a combined total of 218 felony/gross-misdemeanor/misdemeanor new assignments per deputy, excluding Class A felonies.

[23] Actual disposition rates for Las Vegas Justice Court, which is the overwhelming majority of gross misdemeanor and misdemeanor cases, was not reported in the SCAR.

gross misdemeanor/misdemeanor cases. Washoe County numbers require adjustment under the same analysis. NVPAC and NVDAA are not advocating these as actual numbers, we are simply pointing out that the studies lack validity and more reliable data or methodology is needed.

Ignoring the inconsistencies, the end result ironically showed Clark County had approximately five more attorneys than needed to maintain the current disposition rates and Washoe County needed one additional attorney. And none of the information resolves the underlying question of whether current caseloads actually cause any systemic failures under the case law.

Rather than address the problems, TSG then falls back on discussing the NAC recommendations and the belief these are appropriate guidelines. TSG then compares the results of the Assessment with jurisdictions that: 1) have voluntarily adopted caseload guidelines and, 2) TSG has determined provide an appropriate level of service. Based upon what amounts to personal opinion, TSG indicates Clark County needs between 30 and 90 additional attorneys and Washoe County needs between 11 to 28 attorneys. No attempt is made to look at the process differences between jurisdictions, adjust for available hours, determine the trial/plea rate for various felonies, etc. The comparison represents an obvious bias and any credibility.

Just one example is sufficient to illustrate the point. In Table 11 the Assessment indicates the 62 track attorneys are assigned about 100 Class A felonies per year. That would be 6,138 Class A felonies. Clark County doesn't have 6,000 Class A felony arrests per year. The total number of annual new Class A felony assignments was 267. The SCAR indicates 3,000 more felonies are disposed of per year than are filed. Granted a Class A felony is a case that is likely to go to trial and go beyond a year, but there is no way to reconcile these numbers. Yet the numbers are still used as a comparison with other jurisdictions. The only category that has any resemblance to actual practice is the Class A sex offenders and Clark County has lower caseloads than the other jurisdictions.

Finally, there is also the question of whether caseloads should be calculated by disposition rates. For example, could the raw data by tasks and categories by used more effectively – separating out those activity hours related to pleas from those related to trial and then attempting to determine the number of hours by category to process a plea versus a trial. These are only a few of the issues with the Assessment. By using additional actual data gathered by all the players, courts, prosecutors and defense, and their joint input, together with the raw data supplied by the TSG studies, NVPAC and NVDAA believe realistic and worthwhile caseload guidelines can be developed for Washoe and Clark counties. But relying solely on the Assessment makes no sense.

B. NVPAC and NVDAA Support Proactive Measures and Dialogue

1. Performance Standards

NVPAC and NVDAA supported the Court's adoption of indigent criminal defense performance standards with the explanatory Preamble (Standard 1: Function of Performance Standards). We did so because using the Performance Standards as a training and evaluation tool for system improvement and as budget guideline makes sense. But, as with caseload figures, the Performance Standards are not a device for avoiding case-by-case analysis and documentation. If a judge asks for an explanation of why an expert is needed, the response 'because the Performance Standards mandate it (or say so)' is not appropriate.[24] The same is true of staffing or budget requests. Yet some members of the defense community are doing just that. Other comments are 'the Performance Standards are mandatory unless there is a strategic reason for departing from them.' The defense community has also represented that, despite the Preamble, the Performance Standards are an ethical dictate. If this were true, they would apply to all criminal defense attorneys, not just indigent defense.

Proactive efforts at improving indigent defense in Nevada should not constitute an indictment that the current system does not pass constitutional muster. Given how the Performance Standards have been treated, NVPAC and NVDAA believe the adoption of caseload numbers by this Court, even if the Court specifies they are aspirational, will be abused and misrepresented. But, as noted below, NVPAC and NVDAA support proactive efforts to develop caseload goals for the criminal justice system at local levels.

2. Effective Caseload Management

The Court should assist the players in each jurisdiction to form operational councils, perhaps similar to the judicial council, to address system issues within that jurisdiction, including developing aspirational caseload goals for the courts, defense system and prosecutors. Caseload management, together with training and systemic cooperation, is a proactive way to avoid constitutional systemic problems and provide better services to the community.

An excellent example of such a cooperative effort occurred recently when prosecutor, court and defense representatives developed a manual, and conducted training of district judges, on post-conviction proceedings. It required personnel

[24] By the same token, if an attorney gives a factual indication of how the expert is necessary to the defense and the fees are those common to such an expert; a judge should not micromanage the case or substitute his or her opinion for counsel.

resources, but the training was inserted into already scheduled and budgeted training programs.

There is no reason similar results cannot be reached on caseload and other issues. For example, the Commission's Rural Issues Subcommittee discussed the possibility of the State Public Defender Office taking over all appeals from rural jurisdictions, but the same issues of appellate expertise apply to prosecutors as well. Neither the State Public Defender nor the Attorney General have the staffing and resources to assume these responsibilities, yet an appellate training program for rural prosecutors and defenders could be developed.

If personalities become a problem, then outside people, who the players trust, can be requested to help mediate until the area is able to develop a better working relationship. But developing a joint systemic plan is essential. For the system to work at its best, each unit has to be supported. Diverting money from unit to unit or engaging in funding wars allows funding agencies to play each unit off another. To build the system, each unit should share in a piece of the limited resource pool, with appropriate checks to insure the system is meeting constitutional requirements and an equitable distribution of discretionary funding.

The approval of initial caseload goals should not be a lengthy process. Goals should be developed in 90 to 120 days. The best available existing agency data, together with the Spangenberg Assessment raw data should be used. (Time-based Method.) No doubt a great deal of data already exists, gathered for budget purposes. Where existing data is unavailable, estimates based on the best information available should be used. For example, rather than do time surveys, a jurisdiction could ask attorneys, courts and defense counsel to give their best estimates of the number of hours spent on particular functions. (Delphi Method) At the same time, the jurisdictions can work to identify what data is missing and how to collect it in the most cost-effective manner. The information gained can also be used in budget preparation and presentations.

Subsequently, in the next 90 to 120 day period, the jurisdictions can work on refining the data and revising the goals as well as beginning the process of addressing any system issues.

RECOMMENDATIONS

The NVPAC and NVDAA respectfully request this Court:

1. Reaffirm that the Performance Standards should be applied in accordance with the Preamble (Standard 1: Function of Performance Standards).

2. Decline to adopt mandatory or aspirational statewide caseload standards.

3. Adopt a universal definition of a case for the criminal justice system based on the standard definition from the National Center for State Courts, with any modifications necessary to conform to the Uniform System of Judicial Records.

4. Create a vehicle for local jurisdictions to develop aspirational caseload management goals for courts, prosecution and defense functions.

5. Provide technical assistance to rural jurisdictions in developing caseload goals.

6. Provide data to Clark and Washoe jurisdictions to supplement existing information and technical advice on taking raw data and converting to appropriate caseload goals.

RESPECTFULLY SUBMITTED this 6th day of October, 2009.

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October 1, 2009

The Honorable James Hardesty
Chief Justice
Nevada Supreme Court
201 South Carson Street
Carson City NV 89701-4702

RE: ADKT No. 411 (Indigent Defense)

Dear Chief Justice Hardesty:

The attached comments and recommendations are submitted on behalf of the Nevada Advisory Council for Prosecuting Attorneys ("NVPAC") and the Nevada District Attorneys Association ("NVDAA") regarding the Nevada Supreme Court's Order filed August 28, 2009, in ADKT No. 411, concerning caseload standards.

While NVPAC and NVDAA support indigent defense performance standards and efforts to improve caseload management, we strongly object to the imposition of artificial numerical caseload standards for the reasons set forth in our comments and recommendations.

Sincerely,

Brett Kandt
Executive Director

Attachment