ACLU
AMERICAN CIVIL LIBERTIES UNION of NEVADA

August 25, 2009

Justice Michael Cherry, Chairman, Indigent Defense Commission
Members of the Indigent Defense Commission

c/o Administrative Office of the Courts
Nevada Supreme Court
201 South Carson Street, Suite 250
Carson City, NV 89701

ADKT 411

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Dear Justice Cherry and Members of the Indigent Defense Commission,

I am writing on behalf of the American Civil Liberties Union of Nevada to formally state our position regarding caseload standards for Nevada's indigent defense community. We believe that ample evidence on the Indigent Defense Commission's record, including the recently-released Spangenberg Report, makes clear that an immediate imposition of interim caseload standards by the Nevada Supreme Court is necessary. These standards should be implemented immediately, and kept in place until Nevada has in place a "permanent statewide commission for the oversight of indigent defense" as contemplated in the Court's ADKT 411 Order of January 4, 2008. Continued delay in creating reasonable standards exacerbates Nevada's constitutional failure to manage caseloads such that public defenders and track attorneys are able to provide consistently adequate indigent representation.

We urge the Commission to recommend to the full Nevada Supreme Court that the state of Nevada immediately adopt the standards set forth by the National Advisory Council on Criminal Justice Standards and Goals [NAC] as an interim set of default standards, which we believe will be substantially higher than the caseloads that are ultimately appropriate for Nevada. While more debate and input is necessary about what the precise standards should be, it is unquestionable that current caseloads are far too high. Indeed, this Court in found in January 2008 that:

> WHEREAS, the National Legal Aid and Defender Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney; and
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> WHEREAS, a majority of the Commission concludes that caseloads in Clark County and Washoe County substantially exceed recommended caseloads and that a caseload standard of no more than 192 felony and gross misdemeanors per attorney should be implemented; and
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> WHEREAS, by any reasonable standard, there is currently a
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> crisis in the size of the caseloads for public defenders in Clark County and
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> Washoe County....

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ADKT 411 Order (January 4, 2008). A year and a half have now gone by since the Supreme Court found the public defenders' offices to be in "crisis." The Court delayed implementing caseload standards until such time as a weighted caseload study could be completed. That study is now completed – save for the Spangenberg Group's warning that such data was collected prior to implementation of the ADKT 411 performance standards, and will therefore upon completion likely require further *lowering* the caseload standards. *See* The Spangenberg Report, at 55. The completion of the case study leaves no more room for delay; caseload standards must be implemented now to prevent the public defense crisis in Nevada from further deepening. Indeed, three dissenters on the Court found that January 2008 would have been the appropriate time for such standards. ADKT 411 Order of January 4, 2008 (Maupin, C.J., and Cherry, Saitta, JJ., dissenting).

Although the standards were developed in 1973, they are unquestionably relevant today, and are cited throughout recent publications such as the ABA's *Ten Principles of a Public Defense Delivery* System (2002) as indicators of excessive caseloads. The NAC standards provide appropriate *interim* numbers. In contrast, the current caseloads constitute a crisis that cannot withstand several more months of delay. Immediate action is required to relieve the systemic stress on our system and on Nevadans' Sixth Amendment rights. The NAC numbers – 150 felony cases, or 200 juvenile cases, or 400 misdemeanor cases per defender per year – are a high ceiling for caseload standards, and there is no plausible argument that the numbers should be any higher. We believe the NAC figures are appropriate interim standards to rely on while the counties decide how to further assess and respond to the Spangenberg Report.

The information that the Spangenberg Report compiled *at the request of the counties* reveals that the current burden in Nevada exceeds any possible appropriate numbers: public defenders each carry an estimated 215 felony cases per defender in Clark County, and 189 felony cases in Washoe per year. The misdemeanor numbers are even further out of the mainstream: 965.8 and 416.8, respectively. Spangenberg Report, Table 22. In contrast, the NAC figures recommend no more than **150 felonies or 400 misdemeanor cases** per defender, per year.

Appropriate caseload standards vary based on local factors. Indeed, the final standards developed may vary for Washoe and Clark counties and are likely to be higher than the conservative interim standards we are proposing. As indicated by the Spangenberg Report, comparable Western jurisdictions studied have instituted caseload standards *below* the national NAC recommendations, particularly with respect to misdemeanor cases. In contrast. Nevada's two largest counties' felony caseload numbers are literally *double* that of King and Pima Counties, determined by the Spangenberg Group to be comparable Western counties. Spangenberg Report, Table 22.

The Spangenberg Report also notes that Nevada's standards are likely to be set well below the comparable jurisdictions mentioned in their Tables:

It is essential to note that the workloads established by this report reflect the practice

of public defense in Clark and Washoe counties *before* the Supreme Court promulgated the performance standards in ADKT-411. What the caseload standards *should* be so that attorneys have sufficient time to represent their clients while meeting ADKT-411 are still to be seen and likely require the additional study that TSG had urged to the counties and the Court. **However, it is inconceivable that ADKT-411 would countenance caseload standards that exceed the range found in jurisdictions comparable to Nevada, especially when the problem is only exacerbated by the lack of essential support staff provided to attorneys.**

Spangenberg Report at 54-55 (bolded emphasis added; italics in original). Thus, as noted above, the NAC standards are a conservative interim ceiling for what caseloads should be and are an appropriate interim measure until a permanent oversight committee is established.

The ACLU of Nevada believes that indigent defense caseloads are at a crisis point: some defender caseloads are at double the standards recommended by the NAC and comparable jurisdictions. There is no evidence before this court that caseload standards should be contemplated *above* the NAC numbers; comparable jurisdictions and the Spangenberg Report clearly support numbers for Nevada that will be dramatically lower if calculated appropriately. As such, immediate imposition of caseload standards will reflect a systemic and necessary recognition that the NAC numbers are merely a ceiling for excessive caseloads; appropriate representation in line with ADKT-411 will likely occur at much lower numbers.

In addition, we believe that the Nevada Supreme Court's authority to set firm caseload standards is inherent in its duty to supervise the ethics of the lawyers who practice in Nevada's courts. The issue of workload is unquestionably one of ethics for overburdened attorneys, as their ability to zealously represent each client lessens with each additional case and its associated responsibilities. At some point, recusal from future cases becomes an ethical mandate. The American Bar Association has noted that "When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer..." ABA Formal Opinion 06-0441, at 8. However, defense attorneys in the state have no mechanism for reducing assigned cases or to control the spigot of criminal prosecution. This means that requesting recusal in front of a judge will be the sole option for overburdened counsel.

Supreme Court intervention is not only allowed, it is necessary. Without further assistance from the Court, recusal is an impractical and imprudent decision to leave to unprotected public defenders. A motion for recusal – after appointment of defense counsel – depends on each individual judge's willingness to accept that recusal is ethically required. At the last meeting of the Indigent Defense Commission, State Public Defender Diane Crow offered compelling testimony that after being subjected to mandatory furlough time as a state employee, she moved for recusal on a case she believed she could not handle zealously or ethically, especially given her newly-reduced work hours. The judge's response was to deny her motion, and note that she should simply *find* the time to make it happen. That solution is not

workable given the *systemically* excessive caseloads set forth in the Spangenberg Report.

The danger of leaving such critical Sixth Amendment decisions to be made by judges in a vacuum based on one "simple" case is exacerbated by Nevada's lack of independence in the selection or retention of public defenders. Indeed, the comments to the ABA's *Eight Guidelines of Public Defense Related to Excessive Workloads* all center around the critical idea of independence to create an environment where it is politically and practically feasible for indigent counsel to actually recuse themselves. *See* Comments to Principle #2; Principle #3 ("This is especially important because there is an understandable reluctance of public defense lawyers to report to those in charge that they either are not, or may not, be providing services consistent with their ethical duties and performance standards.")

Nevada has no such environment of independence; and as Ms. Crow's story indicates, the practice of self-recusal has very real limitations. Thus, we believe it is incumbent upon the Court to provide some basic guidance about what those limits are, and we believe that the modest and reasonable caseload standards we propose above will serve that purpose without placing artificially low limits on public defenders. We believe that it is well within the Court's purview to set caseload standards for the attorneys who practice in their courts; and we believe it is imperative to do so before the state incurs the broad liability made nearly certain by the excessive caseloads set forth in the Spangenberg Report. These caseload standards should be a stopgap put in place until such time as the permanent oversight commission ordered by ADKT 411 comes into existence; that body should be charged with further honing the standards based on implementation of both the Spangenberg Report and full implementation of the performance standards.

Thank you for including this letter as a part of the Indigent Defense Commission's written testimony.

Sincerely,

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