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April 18, 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:
The Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701
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Re: ADKT No. 411 Performance Standards & Early Case Resolution Programs

During the March 18th ADKT No. 411 hearing I cited the following quotation from the Scottsboro Boys' case [*Powell v. Alabama*, 287 U.S. 45 (1932)] in cautioning the Court against placing too much emphasis on celerity of case processing over due process: "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant … must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of a mob."

Given the content of conversations I have had with various Nevadan interests since that hearing, it is necessary to clarify my position on early case resolution programs in light of that quotation. As with the U.S. Supreme Court in *Powell*, the National Legal Aid & Defender Association (NLADA) concurs the prompt disposition of criminal cases is an admirable goal of any justice system. Indeed, it has been our experience that few people, if any, reject the notion that criminal justice systems should produce verdicts that are fair, correct, swift and final. Therefore, I do not reject all early case resolution (ECR) programs out of hand. So long as clients' constitutional rights are adequately protected, NLADA believes the Court may support ECR programs.

However, it has long been documented that the particular ECR program in Washoe County fails to adequately protect the rights of the poor. The 2000 report conducted for the Supreme Court Task Force on the Elimination of Racial, Gender and Economic Bias under a grant of the United States Department of Justice and the American Bar Association (DOJ/ABA report) acknowledged that the Washoe County ECR program -- though originally intended to be a way to eliminate many non-serious cases from the court dockets -- had been expanded to include serious felonies over time. The DOJ/ABA report noted that the most troubling aspect of ECR's operation is that the discovery rules "are such that public defenders do not always have the

state's discovery in the client's file before discussing the plea with him or her, and sometimes … only have a statement of probable cause." The DOJ/ABA report raised the serious concern that deals not favorable to the defendant were being accepted "without a full review of the facts." The report questioned whether defendants felt coerced to accept pleas whether or not they are guilty of the crime as charged simply because their public defenders – lacking the time, tools and training to look beyond the sparse information at their disposal – were advising them to do so. The section of the 2000 report related to the Washoe County ECR program concluded that "one of the most notable effects of the ECR program is that the Washoe County Public Defender Office takes only approximately 30 cases to trial each year." That is, thirty cases out of 6,391 in 1999, or a trial rate of less than half of one percent (0.47%).[1]

Without the Court responding to the criticisms documented in the DOJ/ABA report, the failures of the Washoe County ECR program have become institutionalized and expanded over the past eight years. The truncated period for accepting pleas still does not allow public defenders to get follow-up discovery beyond the probable cause and supplemental reports – including video or audiotapes. The district attorney and law enforcement personnel often do no further investigation and discovery once a case is set for ECR, so mitigating/exculpatory evidence may not be found. And, with discretion for which cases go to ECR solely in the hands of the prosecutor, more and more serious cases continue to be sent to ECR.

Interestingly, the haste by which the system is run leaves open the possibility that certain categories of cases are charged simply because the district attorney and police realize that the ECR process will result in a quick, negotiated plea. Contrary to popular opinion that the Washoe County ECR program saves the county taxpayers money, this dynamic may actually increase jail population – and subsequent costs – because of the number of people accepting pleas for jail time that they otherwise would not have received if the case had been thoroughly investigated. The Washoe County Public Defender notes that the current jail population in that county is lower today[2] without the ECR program than it was when program was handling 200 cases a month.

Where Do we Go From Here?

Based upon testimony from the March 18th hearing, I presume that there will be a push at the April 23rd meeting of the Indigent Defense Committee to have the ADKT No. 411 performance standards changed to allow the Washoe County ECR program to continue unfettered. Such actions would be short-sighted in my opinion because it would result in basing public policy for the whole state on a single jurisdiction. Poor clients in Carson City or Nye County should not be denied, for example, thorough investigations by public defenders simply because of Washoe County's economic difficulties. The more appropriate course of action is to change the Washoe County ECR program to meet the performance requirements for defenders set out in ADKT No. 411.

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[1] By comparison, a United States Department of Justice, Bureau of Justice Statistics special report, *Defense Counsel in Criminal Cases (November 2000)* states that the average trial rate in the nation's 75 largest counties is 5.6%.

[2] The Washoe County ECR program was terminated well in advance of ADKT No. 411's performance standards implementation date due to the inability of public defenders in the ECR program to meet the parameters of those performance measures. In March 2007, with the ECR program in place – the jail population was 1,200. In March 2008 after the program was terminated the jail population was 987.

I, therefore, respectfully recommend the following:

1. Given the fact that ADKT No. 411's performance standards were unanimously recommended to the Court by the Indigent Defense Commission, including the Assistant County Managers of Washoe and Clark Counties, and were unanimously adopted by the full Supreme Court, the Court should inform the Commission on or before April 23rd that that ADKT no. 411's performance standards are presumptively the appropriate indigent defense standards for the State of Nevada. This places a higher burden of proof by advocates who would seek their change. I agree with the Court that some changes are needed for consistency sake between the various standards (death penalty, adult trial-level, juvenile, and appellate), but other substantive changes should require detailed explanations of why poor people in Nevada should be denied basic and nationally recognized components of adequate representation.

2. The Court should adopt uniform standards for the operation of ECR programs in the state of Nevada. This would meet the two-pronged objectives of promoting both swift and fair justice uniformly throughout the state. Such standards could include: prohibitions against certain classifications of cases ever going through an ECR program; a demand for full discovery to be turned over for the defense, including a cover letter or simple pleading that will be filed with the trial court wherein the prosecutor states that all discovery pursuant to the rules of court and that all exculpatory information in the possession of the state has been turned over to the defense; an expanded time period for public defenders to properly investigate the facts before the plea offer is rescinded; and, a demand that the attorneys have confidential space and time to advise clients so that they can make a knowing and voluntary decision to resolve the case through an ECR program.

There is precedence for such actions. For example, The Oregon Public Defender Services Commission (OPDSC) was legislatively created to provide independent oversight of all indigent defense services in the state. The commission has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency and accountability of defense services consistent with Oregon and national standards, including adopting rules regulating: financial eligibility of persons entitled to be represented by appointed counsel at state expense; professional qualification standards for appointed counsel; and procedures for the contracting of public defense services.[3] In line with their mission, OPDSC has adopted a series of guidelines for public defenders participating in early disposition programs (EDP).[4] These guidelines include, among others:

[3] The State of Oregon provides 100% of indigent defense funding through a series of contracts with private attorneys, consortia of private attorneys, or private non-profit defender agencies. OPDSC hires a Chief Executive to run a central office charged with day-to-day management of the statewide system. The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to "maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations." If a defender agency cannot meet this requirement, the contract will not be renewed. OPDSC contracts with ten non-profit organizations to provide primary indigent defense services in 11 of the state's 36 counties. Twenty-four counties are served through either consortium contractors or individual law firm/private attorney contracts. In one county, indigent defense services are provided through an assigned counsel plan. In this county, and for conflict representation in other counties, attorneys are paid an hourly rate by OPDSC. All individual private attorneys must apply to the OPDS and receive certification in order to receive appointments. The OPDSC model may be apt for Nevada in the future.

[4] OPDSC early disposition guidelines are attached as Appendix A.

1. An EDP should insure that the programs operation and rules permit the establishment and maintenance of attorney/client relationships.

2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions.

3. An EDP should provide for adequate physical space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.

4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.

5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.

6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict of interest for the client's original attorney.

7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

One of the more controversial aspects of the Oregon standards is found in Guideline 2, which states: "Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial." Such an acknowledgement shows just how precariously close any ECR program comes to breeching clients' constitutional right to counsel. Indeed, the United States District Court, Eastern District for Michigan has held that early case resolution programs that dispose of cases prior to preliminary examination hearings violate clients' right to counsel in *United States v. Morris*, 470 F. 3d 596 (6th Cir. 2006), aff'd, 377 F. Supp. 2d 630 (E.D. Mich. 2005).

The Oregon guidelines suggest to me that for a client to accept ineffective assistance of counsel itself through an ECR program may require a second appointment of counsel to advise the client so such acceptance is truly voluntary and knowing and not simply the by-product of the ECR programs' rush to judgment. This guideline, in essence, acknowledges the tension that is created by the ECR procedures on the one hand and a client's right to effective assistance of counsel and an attorney's ethical obligations on the other. With or without such a guideline, an ECR program inevitably results in a compromise of traditional attorney performance standards. Whether, and to what extent, Nevada will proceed down this road is at the heart of the issues now facing the Court.

Thank you.

Respectfully submitted,

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