IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

WASHOE COUNTY PUBLIC DEFENDER'S OFFICE; AND JEREMY BOSLER, WASHOE COUNTY PUBLIC DEFENDER,

Petitioners,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE DAVID A. HARDY; THE HONORABLE JEROME POLAHA; THE HONORABLE BRENT T. ADAMS; AND THE HONORABLE SCOTT N. FREEMAN,

Respondents,

and

RICHARD A. GAMMICK, WASHOE COUNTY DISTRICT ATTORNEY; AND PAUL ELCANO, JR., EXECUTIVE DIRECTOR OF WASHOE LEGAL SERVICES,

Real Parties in Interest,

_____/

No. 61173

ANSWER TO ORIGINAL PETITION FOR WRIT OF MANDAMUS

Comes now, Real Party in Interest Richard A. Gammick, District Attorney of Washoe County, and, in accordance with the Order of the Panel dated June 29, 2012, answers the petition for writ of mandamus.

Docket 61173 Document 2012-22451

The Real Party in Interest generally admits that Respondent Chief Judge Hardy has entered the order appended to the petition at pages 89-92. Beyond that, the petition mainly makes mixed assertions of law and fact. Specifically, the Real Party in Interest denies the allegations of fact and/or law that the only time the County Public Defender is "unable" to represent an indigent person is when the County Public Defender identifies an actual conflict of interest. Instead, the Real Party in Interest asserts that when the County Public Defender refuses to meet with a client, and refuses to extend a plea bargain offer in a timely manner, due to internal procedures such as searching for conflicts or for any other reason, then the Public Defender is temporarily "unable" to represent an indigent accused person. As indicated in the affidavit of Richard Gammick, and in the Response by Washoe Legal Services, the County Public Defender has repeatedly refused to have his staff available to meet with clients and discuss the case in less than a week after they are arrested. That is a week of incarceration that costs the taxpayers of this county money and, more importantly, costs the clients of the Public Defender a week of their lives. The delay may also serve to delay the beginning of any investigation in such cases where investigation is necessary.

In opposition to the petition, the Real Party in Interest first contends that the writ will not issue to control a discretionary decision. Instead, the writ is available to "compel the performance of an act which the law especially enjoins as a duty resulting from an office. . ." NRS 34.160. This Court has expanded that somewhat and has also reviewed decisions for a gross abuse of discretion, but has still refused to use the writ as a mere error correcting device. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). So, the issue would seem to be whether it is ever allowable for the court to set up a system by which a lawyer paid with public funds, but who does not bear the title of "Public Defender," is appointed in the initial phases of a criminal prosecution. That being said, the Real Party in Interest is NOT seeking a ruling that a writ is inappropriate. The parties want and need a ruling on the merits of the question of whether the Order establishing the pilot program for the Early Case Resolution program is prohibited by some rule of constitutional law or some statute or other authority.

This Court has directed an answer addressing the contentions that the pilot program is prohibited by certain specific statutes; prohibited by a certain plan submitted by the prior Chief Judge of this judicial district or;

whether the program by its nature precludes the effective assistance of counsel.

The various statutes include NRS 7.115. As noted in the Order at issue, that allows appointment of some lawyer other than the Public Defender if the Public Defender is disqualified. The purpose of that statute appears to be to safeguard the public treasury and avoid waste of taxpayer money. The statute does not define the concept of a Public Defender in any way, and certainly not in a way that requires use of the term "Public Defender." As the purpose of the statute would seem to be to safeguard public funds, the Court may note that the findings in the Order at issue, and the affidavits of Richard Gammick and Michael Specchio, demonstrate that the prior incarnations of the program saved the taxpayers some 1.2 million dollars per year, measured just in subpoena fees and jail-bed-days, without regard to the myriad other costs saved by the program. Thus, the Real Party in Interest contends that the statute does not prohibit use of an agency, funded by the county, and approved by the county, that provides representation for indigent persons even though the name of the agency does not include the words "Public Defender." If the title were necessary, then in response to an order from this Court the Real Party in Interest will recommend changing the name of the agency to the "Public Defender

Division of Washoe Legal Services." For the moment, the Real Party in Interest contends that Washoe Legal Services proposes to be a Public Defender agency and NRS 7.115 does not prohibit the County Commissioners or the district court from authorizing payment to that agency.[1]

Other statutes make it clear that the court has the authority to deviate from the norm. NRS 260.060, provides the court with express authority (even without funding by the County Commission) to appoint and compensate an attorney other than, or in addition to, the Public Defender, at any stage of the proceedings, "for cause." The Real Party in Interest suggests that plea bargaining is a stage of the proceedings and that the refusal of Petitioner Bosler to devote his resources to making the effort to present offers to clients within a week of being appointed is sufficient "cause." Indeed, that finding can be fairly implied by the Order signed by Chief Judge Hardy. The Order by the Chief Judge also includes several findings to the effect that the pilot program advances the goals of ADTK 411. The same cannot be said of the current procedure of leaving minor offenders languishing in jail waiting for Petitioner Bosler to show up.

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[1]The Court may note that the County is not a party to this action, for reasons best known to the Petitioner. Whether the use of public funds to mount this attack on the decisions of the County Commission is a proper use of public funds can be determined by the County Commissioners.

NRS 260.030, mentioned by Petitioner, states the qualifications of the Public Defender and charges that, when designated, the Public Defender shall represent each indigent person who is held for a public offense. It certainly does not provide that no other lawyer may represent indigent persons. If it did, then the existing three tiers of indigent defense representation currently used in Washoe County would also be prohibited and the Public Defender would be required to represent even when disqualified. The creation of a duty does not mean that there can be no one else with the same duties. Indeed, as noted above, Nevada's Public Defender statutes clearly contemplate that other attorneys may represent indigent defendants. NRS 260.060.

NRS 171.188(3)(b) expressly provides that if the State or County Public Defender "is unable to represent the defendant or other good cause appears," then the court may appoint another lawyer for the accused person. Courts must read each sentence, phrase, and word of a statute and render it meaningful within the context of the purpose of the legislation. *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). The phrase "or other good cause appears" in NRS 171.188(3)(b) has no meaning if the inability of the County Public Defender to represent an accused is the only reason another attorney can be

appointed. The Real Party in Interest suggests that the inability of the current Public Defender to allow his clients to decide if they want to resolve the case quickly is sufficient cause to allow the County Commissioners to fund Washoe Legal Services to provide that service. The affidavits of Specchio and Bennett demonstrate that there is ample good cause for a return to the prior efforts to find those defendants who desire a speedy resolution to their criminal charges. NRS 171.188(3)(b) and NRS 260.060 provide the legal authority.

The petition concedes that the Public Defender will be "unavailable" when the Public Defender determines that it has too many cases and cannot take on any more. *See* Petition at 5. The distinction between that unavailability and being unavailable due to spending a week or more seeking out conflicts is unclear. Likewise, if the delay is caused by Petitioner's misplaced belief that ADTK 411 provides hard and fast standards of performance, instead of simply general guidelines, the delay still renders the Petitioner unavailable. In either case, the accused person needs a lawyer, a lawyer who will work on getting the person out of jail immediately, not in a week or so. The incarcerated defendant needs a lawyer that will discuss the case, that will advise the client of recorded telephone calls and the existence of informants, and who will inquire into

connections in the community for bail purposes, and who will explore the need for immediate investigations. Unfortunately, the County Public Defender has announced that he is unavailable for that duty. Thus, by application of the rule of law espoused by the Petitioner, the district court has the authority to appoint a publicly funded legal organization that does not bear the title of "Public Defender."[2]

Part of the argument in the petition is that the prior Chief Judge, Judge Steinheimer, submitted a plan to the Court, in accordance with ADTK 411, that details the procedures for the appointment of counsel. The Real Party in Interest first notes that the plan submitted by Judge Steinheimer does not have the force of permanent and unchangeable rule of law superior to all other rules of law. Next, to the extent that the Petitioner is complaining that the court is again getting into the patronage business of selecting appointed counsel, that is no more true than when the court appoints the Public Defender and the Public Defender then deploys his assets. There is nothing in the plan that forbids the court from appointing an agency and then allowing the agency to decide how to meet its obligations. The Order at issue allows the court to appoint the agency – Washoe Legal Services, but the decision of who to employ is made by that

[2]The court may be aware of other publicly funded agencies such as the "Special Public Defender" of Clark County and the "Legal Defenders" operating in various cities.

agency, not by the court and most certainly not by the District Attorney. The independence and competence of the employees of Washoe Legal Services is spelled out in greater detail in the response by Washoe Legal Services and the District Attorney would not presume to comment further on the subject but would simply refer the Court to the response of those who can speak to the matter.

To the suggestion that the plan submitted by Judge Steinheimer would prohibit appointment of anyone other than the Public Defender (if it had the force of law and was unchangeable), the Real Party in Interest would point out that the plan has no provision that would judicially prohibit the County Commissioners from creating a third Public Defender agency. More importantly, there is no reason to believe that the plan amounts to such an immutable law that there can be no experimentation. That construction would give the Indigent Defense Commission permanent authority, superior to every other authority in this state, including perhaps the state constitution.

The plan submitted by the former Chief Judge should be seen as just what it appears to be: a plan. As the poet once said, the best laid plans of mice and men oft go astray.[3] The purpose of the plan was to get the court

[3]Burns wrote "gang aft a-gley" but the text is a reasonable approximation.

out of the patronage business and that purpose is still met by the current order. The purpose of the plan was not to bind the County Commissioners for all time and prohibit getting more process than is due. The judges of the Second Judicial District Court, through the administrative order of the chief judge, have endorsed the ECR Pilot Program and as the affidavit of Judge Brent Adams establishes it was carefully evaluated and supported by the court.

The Court also requested a response to the contention that the pilot program may result in some unidentified person eventually being deprived of the effective assistance of counsel. The Real Party in Interest will first point out that the current program, of appointing Petitioner Bosler, sometimes results in defendants being deprived of the effective assistance of counsel. That fact alone, that prediction that human beings will have foibles, is not grounds to disband the current Public Defender's office and it is not grounds to prevent the pilot program from going forward. As noted elsewhere, the purpose of this program is to get the Public Defender's clients out of jail. Those who wish to are afforded the opportunity to participate and those that do not wish to may await the eventual arrival of the delegation from the County Public Defender.

The Real Party in Interest agrees with the general proposition that counsel must make a reasonable investigation before advising a client on whether to accept a plea bargain. What is equally clear is that sometimes the reasonable investigation consists of simply asking the client about the case. Indeed, in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066 (1984), the Court noted that the scope of an investigation will usually depend on what the client tells the lawyer. "For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." *Id.*

Petitioners worry that is inconsistent with the 6th Amendment for the ECR Pilot Program to produce a plea agreement without the benefit of additional discovery or investigation by the defense. But the standard used in judging the effectiveness of defense counsel in brokering a plea bargain is "reasonable competence in representing the accused" and is deferential to the judgment and perspective of the defense attorney. *Premo v. Moore*, ___U.S. ___, 131 S.Ct. 733, 742 (2011). In *Premo* the Supreme Court did not reject as unconstitutionally impermissible the calculated risks both the prosecution and defense take in making an early plea deal. "In the case of

an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived." *Id.*

The order at issue simply recognizes that there are times where the need to investigate is considerably diminished or eliminated altogether. That decision will not be made by the court, or by the District Attorney, but by the appointed lawyer and the client. The fact that Petitioner Bosler contends that the decision must be made now, and hypothetically, for all persons who may be arrested in the future, says much about the practices of Bosler but nothing about the law. In cases where the initial consultation reveals that there is no need for investigation and that the client wishes to move the case along expeditiously, that option should be available. The client has the exclusive authority to decide how to plead and a blanket refusal to even relay a plea bargain offer cannot be justified by the notion that some cases may require some additional investigation or that some cases may require additional discovery.

We should not discount the fact that some defendants may desperately want to avoid additional investigation and may wish to enter a plea to a charge as quickly as possible, before the prosecutor discovers that

the proper charge is a more severe charge. One would be hard pressed to justify that a client is well served by a delay that allows the prosecutor to discover that the person charged with DUI actually has two prior convictions.

For much of the history of this nation, and in many of the courts in this nation, including federal courts, lawyers have been able to talk to clients even without having access to the prosecutor's file, complete with all investigative notes. The notion that all those convicted in such courts have necessarily been deprived of the effective assistance of counsel is ludicrous. The right to effective assistance of counsel is protected primarily by the individual lawyers who conscientiously discharge their duties, and secondarily by the post-conviction review allowed by chapter 34 of the Revised Code. The suggestion by Petitioner that the right can only be protected by prophylactic and universal rules, by a checklist of some sort, is unwarranted. Indeed, *Strickland, supra*, cautions against any sort of universal performance standards. The lawyer who communicates the initial offer will be in the best position to decide whether to advise the client to accept the offer, or to explore other options. To make that decision now, for all people who may be arrested in the future, is unwarranted. To deprive all people arrested in the future of the possibility of moving quickly

out of the jail and into a diversion program, is unwarranted. The cost to society, and the cost to the individual defendants of unnecessary delay, should be avoided.

There can be no doubt that the ECR Pilot Program has the potential to offer tremendous benefits to accused persons and to the taxpayers. *See,* the affidavit of David Bennett. As the affidavit of Judge Brent Adams confirms, ECR programs compliment the Second Judicial District Court's Drug Court Program by getting addictive defendants out of jail, into supervised addiction treatment and back to the their homes and jobs. The contention that this Court must deprive those defendants and those taxpayers of those benefits is based on the notion that some statute gives the appointed Public Defender not only the responsibility, but the exclusive right to represent indigent persons at all stages of the proceedings, and to do so as he sees fit. This Court ought to reject that argument and rule that no statute creates any right in the Public Defender, and no statute prohibits the County Commissioners from funding an alternate source of lawyers, and no statute prohibits the district court from appointing that alternative source of lawyers where the County Public Defender finds himself unable to get to the county jail and relay plea bargain offers in a timely fashion. Thus, the Court should deny the petition and allow the parties to continue the

efforts to use the ECR Pilot Program and bring "the same justice sooner" to the people of Washoe County.

DATED: July 16, 2012.

By: _____
RICHARD A. GAMMICK
Washoe County District Attorney

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 16, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

JOHN REESE PETTY
Chief Appellate Deputy
Washoe County Public Defender's Office

Shelly Muckel
Washoe County District Attorney's Office

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on July 16, 2012, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Paul D. Elcano, Jr.
Executive Director of Washoe Legal Services
299 Arlington Avenue
Reno, NV 89501

Shelly Muckel
Washoe County District Attorney's Office