

IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY PUBLIC DEFENDER'S
OFFICE; AND JEREMY T. BOSLER,
WASHOE COUNTY PUBLIC DEFENDER,
Petitioners,

vs.

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

Respondents,

and

RICHARD A. GAMMICK, WASHOE COUNTY
DISTRICT ATTORNEY; AND PAUL D. ELCANO,
JR., EXECUTIVE DIRECTOR OF WASHOE
LEGAL SERVICES,
Real Parties In Interest.

No. 61173

FILED

JUL 09 2012

TRACIE K. LINDEM. A.
CLERK OF SUPREME COURT
BY *T. Wilcap*
DEPUTY CLERK

ANSWER TO PETITION FOR WRIT OF MANDAMUS

**PAUL D. ELCANO, JR.
EXECUTIVE DIRECTOR OF
WASHOE LEGAL SERVICES
In Proper Person as
Real Party In Interest
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STATEMENT OF FACTS

I. HISTORY

An Early Case Resolution program (hereinafter ECR) functioned in the Second Judicial District between approximately 1993 and 2005. The program resulted in the efficient and speedy disposition of thousands of low level felony and misdemeanor cases resulting in costs savings to the Washoe County Jail, the District Attorney's office, the Public Defender's office and the Courts. More importantly, criminal defendants were able to see and talk to an attorney at the jail within a few days of their arrest. Often, this early contact resulted in plea bargains that took effect much more quickly, thereby resulting in earlier release from custody, the maintenance of housing, employment and family and earlier entry into treatment programs. During this time, only one challenge to the constitutionality and appropriateness of the program was made. This action was summarily dismissed. Respondents are not aware of any post-conviction or ineffective assistance of counsel claims being made based on this ECR program. ECR was terminated suddenly in 2005 when the newly appointed Public Defender withdrew from participation.

In an effort to reinstitute ECR, the District Attorney attempted to redesign the program to meet some of the objections raised by the Public Defender by making complete discovery available more quickly. The Public Defender remained unwilling to participate in the revised program. Based on this unwillingness and the demonstrated effectiveness of the former ECR program, the Washoe County Commission's staff in 2008 approached Washoe Legal Services (hereinafter WLS) inquiring whether it could perform as counsel for the indigent defendants in ECR cases. WLS designed and proposed an ECR program that was very similar to its predecessor, but with WLS serving as co-appointed supplemental defense counsel along with the public defender. At this juncture, the Order of Appointment was to be procedurally signed by a Justice of the Peace. WLS' role as supplemental counsel was limited to its participation in the ECR program. In addition, the WLS ECR program varied from its predecessor in that the defendant's participation was voluntary, and WLS' counsel saw the defendant within 24 to 48 hours. Over the course of two years, this proposal was discussed, vetted and explained in numerous meetings with all involved parties, including the then current Justices of the Peace in Washoe County. At this juncture the Reno Justice Court was entirely supportive of the ECR program. During the course of these meetings the Washoe County Public Defender repeatedly refused to operate

the proposed ECR program.

As a result, in August of 2011, the Washoe County Board of Commissioners authorized and funded the implementation of an ECR program with WLS functioning as defense counsel. In September, the program began to function. (See Statistics for 2011 ECR program, below). Unfortunately, in the interim, two new Justices of the Peace were elected in Washoe County. The newly elected Justices of the Peace did not wish to participate in the ECR program. Since ECR at that time relied upon an appointment of WLS by the Justice Court, the program was discontinued because the newly elected Justices of the Peace refused to sign orders appointing WLS. The termination of the program occurred two weeks after its inception.

The refusal to appoint WLS coincided with the launch of the Washoe County Justice Court's Mandatory Settlement Conference (hereinafter MSC) program. The ostensible reason voiced by the Justice Court for this termination was that the ECR program violated NRS 7.115, and NRS 171.188.

The Second Judicial District Court became involved after ECR was killed by the Reno Justice Court. The program model was altered to handle those ECR cases that would normally be resolved in District Court (i.e., pleas to felony or gross misdemeanor charges) and to directly file these cases in District Court on a

significantly accelerated timeline. By directly filing ECR cases in the District Court, an Order of Appointment was no longer required by a Justice of the Peace. In June of 2012, Chief Judge Hardy reduced the program to Administrative Order 2012-07 and on June 26, 2012, the Washoe County Commissioners again re-authorized the program, and a contract to administer the program was signed by the county with Washoe Legal Services. See Appendix at Page 6. The application for a Writ of Mandamus followed on June 29, 2012.

II. PROGRAM DESIGN

ECR was designed in large part to deal with crimes related to drug and alcohol abuse. Substance abusers in the criminal system can be classified broadly as one of two types: Sociological abusers and sociopathological abusers. Those who are sociological are usually amenable to treatment and probationary options. Sociopathological abusers, generally speaking require incarceration subsequent to conviction. ECR was designed to attempt to winnow out persons who are amenable to treatment and probationary options.

As currently proposed, the District Attorney will identify cases submitted to its office that meet the criterion for inclusion in the ECR program. These will be mostly limited to low level drug cases or other felony or gross misdemeanor crimes that involve no physical injury or restitution to victims. Those cases

selected for the ECR program will be submitted to the District Court, who will review and accept those cases it determines are appropriate. The Court will then issue an Order appointing WLS as co-counsel with the Public Defender, who will have been appointed by Justice's Court within 24 hours of arrest. The ECR procedure will in no way interfere or affect the Justice Court appointment of the Public Defender, or the Public Defender's right to contact the defendant.

The plea bargain offer will be communicated to WLS within 48 hours of arrest. Along with the offer, all discovery will be electronically communicated to WLS. WLS will meet all incarcerated defendants face to face within 24 hours of the offer being tendered, unless a weekend intervenes. At this meeting WLS will: provide access to all discovery materials; communicate the offer; discuss its ramifications; discuss the details of the offense; discuss the suitability of the proposed resolution; discuss the defendant's personal situation as to living circumstances, family life and employment; review collateral consequences; and explain potential legal ramifications of the offer. In addition, ECR counsel will thoroughly discuss that the defendant's participation in ECR is voluntary, and will evaluate the defendant for competency.

If the offer is accepted, the Defendant will sign a waiver of his appearance in Justice Court and proceed by Information directly to District Court, where the

initial arraignment will be held, usually within three judicial days. In most cases, Diversion or Adult Drug Court will be available as a preferred disposition. Aside from the plea bargain, the defendant's custody status will be considered and, if appropriate, referral to the appropriate Specialty Court made, thereby significantly shortening the time between arrest and treatment with Court supervision.

If the offer is rejected or the Defendant declines to participate in the ECR program, an Order will be signed by the District Court removing the case from ECR and removing WLS as co-counsel. This Order will be communicated to the Justice Court and the Public Defender. Because this rejection will normally come within 72 hours of arrest, there will be no interruption in the Justice Court's normal case flow and the case will proceed in Justice Court in the normal course and without any delay. Under Reno Justice Court's Mandatory Settlement Conference program, no court settings occur for at least one week after arrest. If the ECR offer is accepted the Justice Court and Public Defender will be notified that their involvement has ended. If it is rejected, both will be notified that the case will proceed in the normal course, and therefore qualify for MSC. The ECR offer will remain the offer in the case even if it is originally rejected by the defendant; that is, there will be no penalty to the defendant for rejecting the ECR offer initially. Obviously, the prosecution and the defense are free to alter their

settlement stance if and when new facts are discovered. The Public Defender will be notified of the ECR offer, and will be informed that no penalty should attach to the Defendant's initial refusal.

III. TIMELINE ANALYSIS

The current system for processing felony or Gross Misdemeanor cases is as follows:

Day 1: Arrest

Day 14: Preliminary hearing and plea bargain negotiation

Day 28: District Court arraignment and plea. Possible release.

The Reno Justice Court Mandatory Settlement Conference program currently shortens this time frame by only one week:

Day 1: Arrest

Day 7: Mandatory Settlement Conference and plea bargain negotiation

Day 21: District Court arraignment and plea. Possible release.

The above analysis is based on the assumption that the Public Defender has done his conflict check and that none exists. If one does exist the transfer of the case to the Alternate Public Defender often requires a continuance of either the Mandatory Settlement conference or even of the Preliminary Hearing. If the alternate Public Defender conflicts out, the case is referred to the County Conflict

List (the Bell Group). When this occurs, delays in the seven day timeline in the MSC program are routine. In fiscal year 2009/2010 the Bell Group was referred 834 cases which comprised 11% of the cases initially referred to the Public Defender. Thus, at a bare minimum, 834 defendants cannot have an MSC within seven days of arrest. See Appendix at Page 2, Alternate Public Defender output measures.

While the Justice Court "appoints" the Public Defender within 24 hours of arrest, the Public Defender does nothing to represent the client until his conflict check suggests that he can. This can and has caused delays which, in effect, deny a criminal defendant his right to counsel in a timely manner. The defendant remains in custody without representation until the conflict check is complete.

The ECR timeline is as follows:

Day 1: Arrest

Day 2-3: Offer and discovery to WLS

Day 2-4: Offer and consultation between WLS and Defendant with offer accepted or rejected. If accepted,

Day 7-10: District Court arraignment and plea. Probable release.

The ECR program therefore improves on the disposition of cases by 15-18 days over the normal procedure and approximately 14 days over the Justice

Court's MSC program. It is projected that ECR will ultimately process approximately 1,000 cases annually. The Washoe County Sheriff estimates jail day costs at \$120 per day and transport costs at \$50 per inmate trip. The savings here are obvious. With 1,000 ECR cases saving 14 jail days per case annual cost savings are \$1,680,000; similarly 1,000 Justice Court appearances will be eliminated at \$50 per inmate for transportation, thereby saving \$50,000 per year.

IV. WASHOE LEGAL SERVICES PERSONNEL

Since the Petition for Writ of Mandamus alleges potential ineffective assistance of counsel claims, a brief description of the persons at WLS who will implement this program is essential.

Paul D. Elcano, Jr. was licensed to practice law in the State of Nevada in the fall of 1978. Mr. Elcano is currently the Executive Director of Washoe Legal Services and has held that position since the fall of 2003. He was a practicing trial lawyer in Washoe County for some 16 years. He was a criminal law defense specialist and tried jury cases involving murder, rape, robbery, larceny, federal firearms violations, and federal wildlife violations. Mr. Elcano was court appointed on seven murder cases as solo counsel, and two additional murder cases as co-counsel. He was appointed as penalty counsel in a death penalty case. In his trial career, Mr. Elcano obtained not guilty jury verdicts on charges including

murder, robbery, federal firearms violations, and federal wildlife violations. He successfully argued for life imprisonment in his death penalty case.

Mr. Elcano is a past president of the Washoe County Criminal Defense Lawyers Association. Pursuant to court and county requests he organized and administered the first conflict list in Washoe County. This list grew into what is now known as the Bell Group. Mr. Elcano was appointed as a special prosecutor to investigate and report to the Grand Jury regarding alleged criminal misconduct by UNR athletes.

David D. Spitzer has been hired by Washoe Legal Services to represent criminal defendants in the ECR program. Mr. Spitzer will therefore function as the Washoe Legal Services employee charged with receiving the offers and discovery from the District Attorney, communicating them to the defendant, accepting, rejecting or modifying the offer and representing the Defendant when the offer is accepted.

Mr. Spitzer became an attorney in Nevada in 1984 and went to work in the Washoe County District Attorney's office in 1985. After five years as a criminal prosecutor, he left the office for private practice in 1990 until he joined the Washoe County Public Defender's office in 1993. As a Deputy Public Defender under Mike Specchio, he participated in the formation of the Adult Drug Court

and served as defense counsel for its participants. He left the Public Defender's office in 1997, and in 1998 became the attorney for Adult Drug Court defendants as a private contractor with Washoe County. In 2000, he helped design and implement the Diversion and Mental Health Courts. He served as the attorney for these clients in the Second Judicial District until 2007, when the newly created Alternative Public Defender's office took over that function. During his career, he has represented criminal defendants in serious felony cases and gone to jury trial in felony DUI, sexual assault and murder cases.

V. RELEVANT STATISTICS

The ECR program functioned briefly from September 5 to September 21, 2011. 21 cases were received; 12 of the defendants were out of custody. All 21 cases involved felony arrests. Six of the out of custody defendants failed to respond to attempts to contact; six were contacted but none resolved due to the Justice Court's closing of the program. Statistics for the nine in custody defendants are as follows:

1. Statistics for September 5, 2011 to September 21, 2011.

In custody: 9

- Ø All 9 contacted within 24 hours of ECR offer being made
- Ø Initial interview lasted about 45 minutes

Ø 3 were rejected

Cases Settled: 6

Ø 4 were resolved as misdemeanors

Ø 2 were resolved as felony pleas and transferred to Adult Drug Court (i.e., no felony conviction if successful)

Cases Closed by Rejection, : 3

Ø 2 rejected the ECR offer

Ø 1 rejected due to competency issues

Reasons for Acceptance of ECR offer:

Ø 3 listed access to treatment as the primary reason for ECR acceptance

Ø 2 listed continued employment as the primary reason for ECR acceptance

Ø 1 listed concern over a higher jail sentence as his primary reason for acceptance

In all cases resolved by acceptance of the ECR offer, WLS' counsel had reviewed, and had available for the defendant: a probable cause affidavit; the arresting officer's report; supplemental reports from other officers, where applicable; Drug Recognition Exam reports where applicable; Preliminary

Drug test results, where applicable; laboratory analysis, where applicable and a criminal history of the defendant.

**VI. WASHOE COUNTY PUBLIC DEFENDER'S
PLEA BARGAIN AND CONFLICT RATE**

The following data comes from the Washoe County Public Defender's Annual report to the Board of County Commissioners for fiscal year 2010/11. See Appendix at Page 1. The percentages given reflect the number of felony and gross misdemeanor cases that went to trial followed by the corresponding number of cases settled by plea bargain.

	F/Y 08-09	F/Y 09-10	F/Y 10-11
Trial rate:	.08%	.02%	.07%
Plea Bargain rate:	99.2%	99.8%	99.3%

The Public Defender's Budget report acknowledges a 3-5% national trial rate. In *Missouri v. Frye*, slip opinion October 2011 term, 566 US ____ (2012), the Supreme Court quoted Department of Justice, Bureau of Justice Statistics data that sets the federal rate of cases decided by guilty pleas at 97% and the national state rate at 94%.

The rate at which the Washoe County Public Defender conflicts out of cases is discernable from his annual submissions to the Board of County

Commissioners. These submissions include the total number of cases received, and the number of cases conflicted to the Alternate Public Defender's office, and the Bell Group. An analysis of both these reports for fiscal year 2009/2010 reveals that approximately 21% of the cases submitted are referred to the Alternate Public Defender's office because of conflicts. The APD rate of conflict is approximately 51%. As a result 11% of the total number of indigent cases are ultimately assigned to the Bell Group. This data appears in the Annual Reports to the Washoe County Commissioners for fiscal year 2009/2010. See Appendix Pages 1 and 2.

POINTS & AUTHORITIES

I. CONSTITUTIONAL UNDERPINNINGS

Pursuant to the Nevada Constitution there are three branches of state government. See Nevada Constitution, Article 3, Section 1. This constitutional section specifically precludes the exercise of a power properly belonging to one branch by another. See also *Galloway vs. Truesdell* 83 Nev 13 (1967) at page 19 (imposition of nonjudicial functions by statute on the judiciary). The three branches of government include the legislative power vested in the senate and assembly, Nevada Constitution Article 4 Section 1; the executive branch, Nevada Constitution, Article 5, Section 1; and the judicial branch, Nevada Constitution,

Article 6, Sect 1. The three branches of Nevada government are specifically formed for the benefit for the people of the State of Nevada. See Nevada Constitution Preamble. Pursuant to the Nevada Constitution Article 1, Section 1, the people of the State of Nevada are granted various inalienable rights.

Constitutionally, no branch of government can of its own volition restrict or abridge its duties pursuant to the Nevada constitution, as the duties of each branch of government inure to the benefit of the people of this state. No branch can exercise any function belonging to another, Nevada Constitution Article 3, Section 1; and no branch can unfairly restrict or fail to exercise its own function pursuant to Article 1. See *Galloway* at page 20. See also *Whitehead vs. Commission on Judicial Discipline* 110 Nev. 874 (1994) at page 879. For example, the Supreme Court of the State of Nevada cannot refuse to hear appellate cases, nor can the legislature refuse to meet on a constitutionally required basis.

Inherent in the judicial branch of government is the Court's ability to appoint counsel. Courts have historically exercised the judicial power to appoint counsel. Prior to *Gideon vs. Wainwright* 372 US 335, 83 S.Ct. 792 (1963) courts in state and federal systems routinely appointed defense counsel for indigent defendants in serious cases; this court can judicially note per NRS 47.130, that in the State of Nevada district courts appointed criminal defense lawyers for indigent

defendants prior to the formation of the office of Public Defender. Historically, this provided one of the initial prongs that gave rise to the pro bono programs provided by legal service organizations today.

An example of this inherent power to appoint is contained specifically in the case of *Gideon vs. Wainwright*, supra. Mr. Gideon specifically requested the United States Supreme Court appoint counsel for him in the certiorari proceedings before them. The United States Supreme Court specifically stated in *Gideon* at 272 US 335 as follows:

“Since *Gideon* was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following...”

“Judicial power is the capability or potential capacity to exercise a judicial function...a mere naked power is useless and meaningless. The power must be exercised and it must function to be meaningful.” See *Galloway vs. Truesdell*, supra at page 20. Like any judicial power, the inherent power to appoint has limitation. Obviously, some nexus or cause is required in each individual case, and the power to appoint cannot result in an abuse of discretion. The power to appoint cannot unduly conflict with the other branches of government. As a corollary, the power to appoint as a judicial power cannot be reduced by legislative or administrative act. Thus, the power to appoint as a judicial power

inherent in each individual court cannot be restricted by mere administrative court plan, nor can it be delegated to any other branch of government.

Conflict between the judicial exercise of the power to appoint, and other branches of government was negligible in a historical context until payment of appointed counsel reared its ugly head. As long as appointed counsel worked pro bono, or was properly paid out of judicial branch funds, no conflict between the branches of government existed. In 1963, the United States Supreme Court in *Gideon vs. Wainwright*, supra. issued a landmark decision requiring states to provide criminal counsel to indigents charged with felonies. Their holding was based on the 6th Amendment right to counsel and its application to the states by via the 14th Amendment. The Nevada Constitution contains its own due process clause. See Article 1, Section 8 (5) (5).

The landmark holding in *Gideon* not only required the provision of counsel, but required states to pay for it. As a result, the court's inherent power to appoint counsel became joined with the legislative and executive branches to the extent that states were now constitutionally required to pay for indigent defense in felony prosecutions. United States constitutional guidelines are standards below which state and local governments cannot fall. It is well recognized that state and local governments may set higher standards on their own. See *Oregon vs. Haas*, 420

US 714, 719 (1975); *Lego vs. Twoney*, 404 US 477, 489 (1972). The ECR program in Washoe County adds a supplemental lawyer to the *Gideon* framework, and is a local government's enhancement of basic constitutional requirements.

Thus the breakthrough in *Gideon* dealt not with the Court's power to appoint, but rather the requirement that individual states fund indigent defense appointments in felony cases. Pursuant to *Gideon*, the legislature in the State of Nevada enacted a statutory framework to implement the decision. The relevant portions include NRS Chapter 260, NRS 7.115, and NRS 171.188. The judiciary could still appoint, but as a constitutional baseline could not force the other branches of government to pay for the appointed legal services outside of independent court funding or legislative enactment.

II. NEVADA STATUTORY ANALYSIS

The office of the county Public Defender originated with NRS Chapter 260. The relevant statute regarding appointment in this chapter, which unfortunately was omitted from the Petition for Mandamus by the Public Defender, is NRS 260.060 which reads as follows:

“Magistrate or district court may appoint and compensate other defense counsel. For cause, the magistrate or district court may, on its own motion or upon motion of the public defender or the indigent person, appoint and compensate out of the county funds an attorney other than, or in addition to, the public defender to represent such

indigent person at any stage of the proceedings or on appeal in accordance with the laws of this state pertaining to the appointment of counsel to represent indigent criminal defendants.” Emphasis added.

NRS Chapter 260 is the statutory framework which creates the Public Defender’s office. In his Petition for Mandamus, the Public Defender specifically cites NRS 260.030. His failure to discuss NRS 260.060 is glaring, as this statute is a legislative recognition of the Court’s inherent power to appoint for cause.

Any statutory analysis must begin with the constitutional caveat that the legislature cannot abridge the judicial power to appoint pursuant to the Nevada Constitution. It can only regulate legislative branch payment for the exercise of that function.

The petition filed by the Public Defender completely ignores NRS 260.060. NRS 260.060 allows for the appointment of co-counsel or the replacement of the Public Defender. Pursuant to this statute the district court is free to appoint, and compensate out of county funds, an attorney other than the Public Defender or in addition to the Public Defender upon a finding of mere “cause.” Since this statute is contained in NRS Chapter 260 which creates the office of the Public Defender it must be considered as part of the overall legislative scheme setting up the Public Defender system.

It should be noted that a specific finding of cause in this case has been made

in the district court's administrative order. Judge Hardy specifically states in page 2 of his order as follows:

"Early Case Resolution is an effective tool to manage criminal case processing; and Early Case Resolution enhances public safety by providing prompt treatment of addictive persons, assists in jail management, reduces jail transportation costs, and results in substantial savings of public funds;"

It is estimated that Early Case Resolution will process up to 1,000 cases per year. ECR reduces jail time over the current settlement conference procedure by some 14 days per case. When fully operative and handling 1,000 cases per year the savings in jail days at \$120 per day will be \$1,680,000 per year in jail costs alone. Since the program uses direct filing in district court, 1000 appearances in Justice Court will be eliminated on a yearly basis. Because the Justice Court appearances are eliminated defendants will not be transported to Justice Court and therefore transportation costs for 1,000 appearances will be eliminated. Jail transportation costs are estimated at \$50 per prisoner per trip. Therefore, an additional \$50,000 in yearly jail transportation costs will be saved as a result of ECR.

Because the ECR program is designed primarily to handle drug court cases, defendants will be able to participate in rehabilitation programs 14 days sooner. This will allow them to maintain their jobs and domestic relationships. By treating

these drug abusers promptly and allowing them to maintain employment, adjunct county services regarding welfare, eviction proceedings, foster care assessment, etc. will be greatly reduced. Obviously these critical facts amount to “cause” pursuant to NRS 260.060.

In addition to the district court’s ECR order a specific order of appointment will be entered in each case. This specific order of appointment will contain a finding of cause pursuant to Nevada statutory scheme. If the Court enters an order without sufficient cause it must be attacked on a case by case basis. Therefore, the requirements of NRS 260.060 are satisfied.

In pertinent part NRS 171.188 reads as follows:

“Procedure for appointment of attorney for indigent defendant.

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent the defendant.
2. The request must be accompanied by the defendant’s affidavit, which must state:...
3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and shall make such further inquiry as he or she considers necessary. If the district judge, justice of the peace, municipal judge or master:
 - (a) Finds that the defendant is without means of employing an attorney; and
 - (b) Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the state public defender as appropriate to represent the defendant. If the appropriate public defender is unable to represent

the defendant, or good cause appears,
another attorney must be appointed. Emphasis added.

Under the ECR program, Washoe Legal Services is appointed as co-counsel along with the Public Defender. Therefore, the statute is inapplicable since the Public Defender is appointed as co-counsel representing the defendant. The ECR services provided are entirely **supplemental**. The defendant's participation is entirely voluntary. ECR counsel meets with the defendant within 48 hours (if no intervening weekend) and discusses the program and the settlement offer with him. If the offer is refused ECR counsel immediately withdraws and the Public Defender takes the case to the Mandatory Settlement Conference in Justice Court. A client's refusal, and subsequent ECR withdrawal, will almost always occur prior to the date set for the Mandatory Settlement Conference in Justice Court. This seamless procedure keeps the client continuously represented.

Even assuming arguendo that NRS 171.188 somehow applies, its dictates are satisfied. Pursuant to NRS 171.188 (3) (b) the court is free to appoint counsel if "the Public Defender is unable to represent the defendant, or other good cause appears." Since the Public Defender has refused to participate in this ECR pilot program he is unable to represent the defendant in that capacity. In addition, in most cases ECR counsel meets with the defendant while the Public Defender is

still completing a conflict check. While the Public Defender is conducting his conflict check he is unable to represent the defendant. The alternate prong of this statute allows appointment if other good cause appears, and good cause does appear per se if the Public Defender is unable to represent the defendant. Once again however, this statute contemplates the Public Defender being replaced by a second lawyer; ECR contemplates a co-counsel situation so by its very terms it is inapplicable.

NRS 7.115 reads as follows:

“Appointment of attorney other than public defender prohibited unless public defender disqualified. A magistrate, master or district court shall not appoint an attorney other than a public defender to represent a person charged with any offense or delinquent act by petition, indictment or information unless the magistrate, master or district court makes a finding, entered into the record of the case, that the public defender is disqualified from furnishing the representation and sets forth the reason or reason for the disqualification. Emphasis added.

...

NRS 7.115 is a disqualification statute. Since ECR counsel is supplementary, and appointed along with the Public Defender, there is no replacement or disqualification. The ECR lawyer is simply handling the settlement aspect of the criminal case. Therefore, the appointment of ECR counsel as a supplemental lawyer satisfies the requirements of NRS 7.115.

Since ECR counsel does not replace the Public Defender, and because the order does not disqualify the Public Defender, ECR counsel is not an attorney "other than a Public Defender". The ECR lawyer is counsel working in conjunction with the Public Defender. Since the ECR program specifically appoints the Public Defender to these cases no disqualification occurs, and therefore the requirements of NRS 7.115 are inapplicable.

In summary, NRS 7.115 is inapplicable because under ECR the Public Defender is appointed and the ECR lawyer is not replacing him. NRS 171.188 is inapplicable because the Public Defender is appointed. NRS 260.060 is clearly the relevant and defining statute since it is contained in the chapter which creates the Public Defender's office and specifically allows the appointment and compensation of another attorney for cause or in addition to the Public Defender.

III. ECR HAS RECEIVED EXECUTIVE/LEGISLATIVE BRANCH FUNDING APPROVAL

Pursuant to public hearing, the ECR program received approval by the Washoe County Commission. The executed contract providing for payment to Washoe Legal Services as the administrator of this program is attached hereto in the Appendix at Page 6. Therefore this exercise of the judicial

power to appoint has been sanctioned for funding by the appropriate branch of government.

IV. THE PUBLIC DEFENDER IS NOT THE GATEKEEPER OF CRIMINAL APPOINTMENTS

Under petitioner's analysis each and every indigent criminal appointment must be subject to his direction. He argues that pursuant to ADKT 411, the so called model court plan, and the statutory framework, that no criminal defendant can obtain appointed counsel until the criminal conflict system has been fully administered. Thus petitioner argues that only the Public Defender can be appointed initially in criminal cases. The Public Defender conflicts 21% of his cases to the Alternate Public Defender. The Alternate Public Defender then conducts her conflict check and rejects 51% of the 21% transferred to her. This is an additional 11% of the cases. This 11% is then referred to the conflict list to be administered by Mr. Bell. Mr. Bell then assigns the case to a conflict lawyer and that lawyer does his own conflict check, etc.

Pursuant to petitioner's analysis the district court is powerless to appoint independent indigent defense counsel until this process is completed. This reasoning is flawed in three particulars: It violates the separation of

powers of the various branches of state government; is an unlawful delegation of judicial function to a non-elected appointed public officer; and leaves the defendant without counsel during the conflict check in violation of *Gideon*.

The legislature cannot abridge the court's power to appoint through creation of the office of the Public Defender. The Public Defender is appointed by the county commission. See NRS 260.010 (5). He cannot be a judicial officer, as all judges are elected in the State of Nevada. See Nevada Constitution Article 6, Sections 1, 3, 5, 8, and 9. As a non judicial officer the legislature cannot delegate judicial duties to him. See *Truesdell*, supra at 83 Nevada page 19.

Secondly the courts cannot shirk or otherwise delegate to the Public Defender, via model court plan or administrative act, their responsibility to appoint under the Nevada Constitution. This would be an unconstitutional delegation of judicial power to a non-elected public officer. See *Truesdell*, supra at Page 20.

In Washoe County we have a Public Defender's office that may have the highest plea bargain rate in the United States. In the last three years for which data is available they have plea bargained 99.8%, 99.2%, and 99.3%

of their cases. Talk about zealous advocacy in this system is mere illusion.

Nationally 94 % of state convictions are the result of guilty pleas. See Department of Justice, Bureau of Justice statistics, Source Book of Criminal Justice Statistics Table 5.22.2009 as quoted in *Missouri vs. Frye*, supra.

The Public Defender, under his gatekeeper analysis claims the court is powerless to appoint counsel while the defendant languishes in jail and the Public Defender goes through his conflict check. This court must examine realities. The appointment of the Public Defender is not the same as providing the defendant counsel. The dictates of *Gideon* are clear. The defendant is supposed to get a lawyer. What he gets in Washoe County, according to the Public Defender, is a gatekeeper. While the defendant sits in jail, the Public Defender begins his conflict odyssey. After an initial conflict check 21% of his cases are kicked to the alternate Public Defender. After another conflict check, 51% of the Alternate Public Defender's cases are kicked to the conflict list. After they go the Bell Group, individual lawyers may again find conflict and kick them again.

The reality is that during this process the defendant is without counsel. The requirements of *Gideon* are simple: the defendant is entitled to a lawyer. He needs somebody immediately, not somebody eventually. ECR fills this

gap.

The Public Defender's position would have you believe that the court is powerless under a statutory analysis to appoint other counsel while he is conducting his conflict check. This ignores the defendant's need for counsel during this time frame. Exigent circumstances may arise. Settlement offers may be proffered. Emergency motions may be needed. Critical testimony or other evidence may be subject to disappearance. Counsel should be appointed and available to evaluate the defendant's case during this hiatus.

Under petitioner's analysis, if a defendant was in jail with a viable search and seizure issue, and a key witness in that proceeding was about to die, the court would be powerless to appoint an independent lawyer to investigate pending the conflict check. Similarly if a defendant wished to see his dying mother and needed a bail hearing the court would be powerless to appoint a lawyer during the Public Defender's conflict check.

Settlement offers are no different. The Supreme Court of the US in *Missouri vs. Frye*, 566 US ____ (2012) 132 S.Ct. 139 stated the general rule as follows:

“...defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused.”

During his conflict odyssey petitioner is unable to do this. ECR counsel is.

What petitioner fails to acknowledge is that the first few days after arrest are a critical juncture in many cases. During the first few days of incarceration many defendants still have gainful employment, and viable but tenuous domestic situations. Getting a settlement offer to them immediately is critical.

The decision to plead guilty is the defendant's alone. See NRPC 1.2 (a). It is not a legal decision, but a life decision. Defendants cannot be deprived of this opportunity at this critical early juncture in their case, simply because the Public Defender is checking for a conflict. In short, the petitioner's analysis is simply an attempt to usurp the judicial function and place it in a bureaucratic maze of conflict checks and conflict lists.

V. ADKT 411 AND MODEL COURT PLANS DISTINGUISHED

As discussed previously the courts under the Nevada Constitution cannot abridge their constitutional responsibilities. The district courts cannot abandon their power to appoint counsel. See *Galloway vs. Truesdell* at page 20. The power must be exercisable. ADKT 411 and any Model Plans must be viewed within this constitutional context.

ADKT 411 by its terms is intended only to serve as "a guide." See

ADKT 411 Standard 1(b). ADKT 411 specifically states its standards “are intended to facilitate the efficient and effective operation of indigent and other criminal defense programs.” See Standard 1(d). Pursuant to ADKT Standard 4-4 (b) the initial client interview should be as soon as possible. An attempt should be made to accomplish this within 48 hours.

ECR complies with all of these critical guidelines provided for in ADKT 411. The settlement offer is explained fully and completely based on all available discovery at that juncture in the case. In addition, the lawyer has the defendant’s understanding of the case, and along with complete discovery from the prosecution, is working at a factual advantage at this juncture. Since acceptance of settlement is the defendant’s sole prerogative, the program is in compliance with the guidelines offered by ADKT 411.

Similarly the district court’s model plan is easily distinguishable. The model plan is by its very terms applicable only to trial and appellate counsel. See Model Plan objective 1B. Since the ECR lawyer is a settlement lawyer and not responsible for trial, the model plan is inapplicable. To the extent the model plan is not consistent with the ECR program it cannot be used to abridge the court’s power to appoint, and can easily be modified or read together with the district court’s administrative order. It should be noted that

the model plan is only signed by the administrative judge, and nowhere does it appear that this was adopted by district court vote. Therefore it carries no more weight than the administrative order signed by Judge Hardy and the two must be read together.

VI. INDEPENDENCE OF ECR COUNSEL

The decision to offer a plea bargain is the prosecutor's alone. The contents and timing of the offer are subject to prosecutorial discretion and are singularly within the prosecutorial domain. Acceptance of the plea negotiation is the defendant's alone. See NRPC 1.2 (a). The defendant and his lawyer may limit the scope of the lawyer's representation if it is reasonable under the circumstances. NRPC 1.2 in pertinent part reads as follows:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

...

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Emphasis added.

Since ECR is entirely voluntary, complies with *Frye*, and timely, it is reasonable pursuant to NRPC 1.2 (c). Thus the ECR program is specifically authorized by the Rules of Professional Responsibility.

ECR counsel, Mr. Spitzer, is an employee of WLS. He is included in the medical insurance plan at WLS. His paycheck comes from WLS. WLS does his income tax withholding. His office is in WLS's office building.

When ECR was about to be approved the first time, WLS set about hiring an ECR lawyer. WLS had several initial requirements. These included in order of importance: 1. The highest standards of honesty and integrity; 2. Extensive experience as defense counsel; 3. Extensive jury trial experience including jury trial acquittals; 4. Experience in drug court; and 5. Experience as a prosecutor if possible.

WLS investigated and searched with the private bar and Mr. Spitzer's name kept surfacing. He was interviewed and hired.

ECR counsel is independent. The district attorney's office had nothing relevant to do with his selection. The district attorney's office has nothing to do with the ECR attorney-client relationship other than the

tendering of the plea bargain offer.

VII. COMPETENCE OF ECR PERSONNEL

The ECR program is being administered by Paul D. Elcano, Jr., the Executive Director of Washoe Legal Services. David Spitzer, Esq. has been hired as the ECR attorney. Mr. Elcano was a trial lawyer in Washoe County for an excess of 15 years. He was formerly a criminal law specialist. Mr. Elcano was appointed sole counsel on seven murder cases in his career. He was appointed as co-counsel on two additional murder cases, including one death penalty case. He was appointed as a special prosecutor to investigate and report to the district court. He has obtained not guilty jury verdicts on charges including murder, robbery, federal firearms violations, and federal wildlife violations. He is a former president of the Washoe County Criminal Defense Lawyers Association. Pursuant to county directive and contract he organized and administered the first formal court appointed conflict list in Washoe County. Mr. Spitzer is a former Washoe County Assistant District Attorney and Public Defender. He has extensive trial experience. He represented criminal defendants on behalf of the county as a Public Defender and pursuant to county contract, for over ten years in the drug court. ECR personnel is competent.

The claim that ECR on its face includes ineffective assistance of counsel is completely unsupported. Petitioner has not alleged that any particular defendant has been harmed. Without factual support or specific claim, these bald allegations must be disregarded.

VIII. CONCLUSION


For the reasons stated herein, ECR is funded, constitutional, statutorily acceptable, and judicially adopted. It is an appropriate exercise of the judicial obligation to fairly and constitutionally administer the court system. The Public Defender is no gatekeeper for indigent defendants' rights. He is merely an appointed public officer pursuant to NRS Chapter 260. The judicial branch is charged with the enforcement of the indigent defendant's constitutional rights. For a public officer to come before this court and claim that the court system is powerless to follow the constitutional requirements of *Gideon* and *Frye* is inappropriate. The claim that the defendant is not entitled to counsel while a case runs through the conflict procedure in Washoe County ignores the defendant's constitutional needs. For the reasons stated herein the Petition for Writ of Mandamus should be denied.

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Respectfully submitted this 9 day of July, 2012.

By:



PAUL D. ELCANO, JR.
Executive Director of
Washoe Legal Services
In Proper Person as
Real Party in Interest

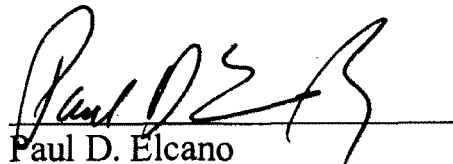
AFFIDAVIT OF PAUL D. ELCANO

STATE OF NEVADA)
 :
COUNTY OF WASHOE)

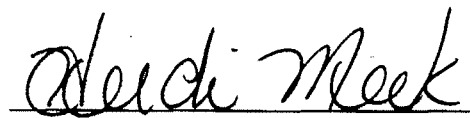
I, Paul D. Elcano, being first duly sworn, do hereby swear under penalty of perjury that the following assertions of this Affidavit are true:

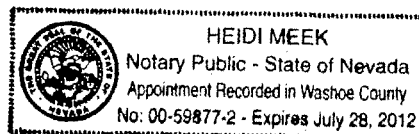
1. That I am currently Executive Director of Washoe Legal Services, a 501(c)(3) non-profit organization; I am a member of the Nevada and California Bar Associations; and, my current status in inactive in each;
2. That I have read the attached Answer to the Petition for Writ of Mandamus, including the Statement of Facts and Points and Authorities; and,
3. That based on personal knowledge or on reliable information and belief, I believe the facts in the Answer to the Petition for Writ of Mandamus are true and correct.

Further your Affiant sayeth naught.


Paul D. Elcano

Subscribed and sworn before me by Paul D. Elcano,
this 6 day of July, 2012.


Notary Public



AFFIDAVIT OF DAVID D. SPITZER

STATE OF NEVADA)


:

COUNTY OF WASHOE)

I, David D. Spitzer, being first duly sworn, do hereby swear under penalty of perjury that the following assertions of this Affidavit are true:

1. That I am an attorney duly licensed to practice law in the State of Nevada;
2. That I have read the attached Answer to the Petition for Writ of Mandamus, including the Statement of Facts and Points and Authorities; and,
3. That based on personal knowledge or on reliable information and belief, I believe the facts in the Answer to the Petition for Writ of Mandamus are true and correct.

Further your Affiant sayeth naught.


David D. Spitzer

Subscribed and sworn before me by this 4th day of July, 2012.

David D. Spitzer


Notary Public



CERTIFICATE OF COMPLIANCE

1. I here by certify that I am submitting this answer in Proper Person as a Real Party In Interest pursuant to Supreme Court Order. To the best of my knowledge, information and belief I hereby certify as follows.

2. I hereby certify that this answer complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because this answer has been prepared in a proportionally spaced typeface using WordPerfect 12 and in font size 14 and Times New Roman.

3. I further certify that this answer complies with the page – or type-volume limitations of NRAP 32 (a)(7) because, excluding the parts of the answer exempted by NRAP (a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,944 words.

4. Finally, I hereby certify that I have read this answer and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28 (e)(1), which requires every assertion in the answer regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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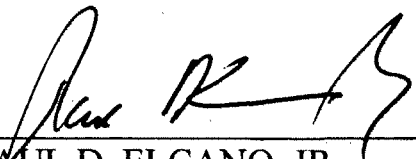
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Dated this 6 day of July, 2012.



PAUL D. ELCANO, JR.
EXECUTIVE DIRECTOR OF
WASHOE LEGAL SERVICES
In Proper Person as
Real Party In Interest
Nevada State Bar No. 1690 Inactive
299 Arlington Avenue
Reno, NV 89501
(775) 329-2727

CERTIFICATE OF SERVICE

STATE OF NEVADA)
COUNTY OF WASHOE)

I certify that I am an employee of Washoe County Legal Services and that on the 9
day of July, 2012, I hand delivered a true and correct copy of the attached Answer to
Petition for Writ of Mandamus and Respondent's Appendix to:

The Honorable David A. Hardy
Second Judicial Dist. Court Dept. 15
75 Court St.
Reno, NV 89501

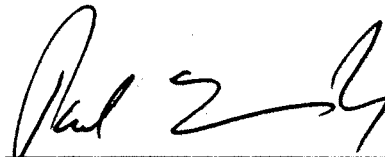
The Honorable Scott N. Freeman
Second Judicial Dist. Court Dept. 9
75 Court St.
Reno, NV 89501

The Honorable Jerome Polaha
Second Judicial Dist. Court Dept. 3
75 Court St.
Reno, NV 89501

Richard A. Gammick
Washoe County District Attorney
1 South Sierra Street, 4th Floor
Reno, NV 89501

The Honorable Brent T. Adams
Second Judicial Dist. Court Dept. 6
75 Court St.
Reno, NV 89501

Washoe County Public Defender
350 South Center Street, 5th Floor
Reno, NV 89501



Paul Elcano, Jr.

IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY PUBLIC DEFENDER'S
OFFICE; AND JEREMY T. BOSLER,
WASHOE COUNTY PUBLIC DEFENDER,
Petitioners,

vs.

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

Respondents,

and

RICHARD A. GAMMICK, WASHOE COUNTY
DISTRICT ATTORNEY; AND PAUL D. ELCANO,
JR., EXECUTIVE DIRECTOR OF WASHOE
LEGAL SERVICES,
Real Parties In Interest.

No. 61173

FILED

JUL 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

REAL PARTY IN INTEREST PAUL D. ELCANO, JR.'S APPENDIX

PAUL D. ELCANO, JR.
EXECUTIVE DIRECTOR OF
WASHOE LEGAL SERVICES
In Proper Person as
Real Party In Interest
Nevada State Bar No. 1690 Inactive
299 Arlington Avenue
Reno, NV 89501
(775) 329-2727
pelcano@washoelegalservices.org

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Outcome	Goal	Measure	Target
2.2 Combine resources to provide better service to clients	2.2.1 A case management system that fully addresses the needs of clients and staff	New system in place and operating efficiently	Updated system that tracks necessary data
	2.2.2 Providing CLE in conjunction with other county agencies	Increase in number of combined training within county	Five joint training sessions

Output Measures

Department Objective	Measure	FY 08-09 Actual	FY 09-10 Actual	FY 10-11 Estimate	FY 11-12 Projected
Provide professional legal representation to indigent clients.	Cases received by APD Office:	New Measures developed in FY2010	2,464	2,200	2,175
	Criminal		1,522	1,440	1,500
	Class A Felonies		87	75	80
	Juvenile		414	470	475
	Family		216	180	200
	Specialty Court		301	100	0
	Cases sent by APD to Appointed Counsel Administrator:		834	850	825
	Criminal		533	600	575
	Class A Felonies		41	30	30
	Juvenile		180	200	200
	Family		121	50	50
	Specialty Court		0	0	
	Appellate		4	10	
Provide professional legal representation to indigent clients.	Cases Retained by APD Office:	New Measures developed in FY2010	1,659	1,370	1,400
	Criminal		1,028	1,000	1,000
	Cases per Lawyer		257	250	200
	Cases per Lawyer as a % of Recommended case load *		171%	167%	133%
	Class A Felonies		46	50	50
	Cases per Lawyer		12	12	12
	Family		97	120	125
	Cases per Lawyer		48	60	63
	Open Cases per lawyer as of June 2010		89	100	100
	Cases per Lawyer as a % of Recommended case load *		111%	125%	125%
	Juvenile				
	Cases per Lawyer		232	250	275
	Open cases per Lawyer		232	250	275
	Cases per Lawyer as a % of Recommended case load*				137%
	Specialty Court				
	Cases Rcvd		302	42	0
	Open Specialty Court Cases per Lawyer		749	0	0
	Appeals:				
	Appeals filed		10	15	20

Output Measures


Department Objective	Measure	FY 08-09 Actual	FY 09-10 Actual	FY 10-11 Estimate	FY 11-12 Projected
<p>Provide professional legal representation to indigent clients.</p> <p>Note: Recommended caseloads have been adopted by the American Bar Association (ABA) and the National Association of Criminal Defense Lawyers (NACDL) on the recommendation of the National Advisory Commission (NAC). The commission is made up of elected officials, law enforcement officers, corrections officials, community leaders, prosecutors, judges, and defense attorneys.</p>	# of cases received	10,708	9,721	9,600	9,600
	Felony/Gross Misdemeanor Cases:				
	# of felony cases	4,693	4,386	4,250	4,250
	# of gross misdemeanor cases	725	689	660	660
	# of companion misdemeanors*	44	44	44	44
	# of cases per attorney	199	189		
	Recommended caseload per atty	150	150		
	(*not included in cases per atty)				
	# of homicide cases	13	12	15	15
	# of capital cases	1	0	0	0
	Trial rate	.08%	.02%		
	National trial rate is 3-5%				
	Jury trial success rate	17%	33%		
	Misdemeanor cases:				
	# of misdemeanor cases	2,211	2,535	2,670	2,670
	# of cases per attorney	360	351		
	Recommended caseload per atty	400	400		
	Juvenile Court cases:				
	# of juvenile court cases	1,458	1,191	1,140	1,140
	# of cases per attorney	312	259		
	Recommended caseload per atty	200	200		
	Family Court cases:				
	# of family court cases	414	417	400	400
	# of cases per attorney	77	78	77	
	Recommended caseload per atty	80	80		
	Appeals:				
	# of appeals	42	43	43	43
	# of capital appeals	0	0	1	0
	# of cases per attorney	21	22		
	Recommended caseload per atty	25	25		
	Civil Commitment cases:				
	# of civil commitments	560	495	500	500
	# of cases per attorney	560	495		
	Recommended caseload per atty	200	200		



WASHOE COUNTY

"Dedicated To Excellence in Public Service"

www.washoecounty.us

CM/ACM 
Finance

DA _____

Risk Mgt. _____

HR _____

Other _____

STAFF REPORT 26
BOARD MEETING DATE: June 12, 2012

DATE: July 28, 2011
TO: Board of County Commissioners
FROM: John Berkich, Assistant County Manager
Richard Gammick, District Attorney
THROUGH: Katy Simon, County Manager
SUBJECT: Approve Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed \$60,000] for a six-month pilot period effective July 1, 2012, with the option to renew for an additional term. (All Commission Districts)

SUMMARY

On August 9, 2011 the Board approved a six month Early Case Resolution (ECR) pilot program through a contract with Washoe Legal Services (WLS) which began September 1st and was to end on December 31, 2012. The program was launched and soon thereafter encountered various issues concerning its operational procedures with the Reno Justice Court and the program was eventually suspended. In an Order dated June 8, 2012, Chief Judge David Hardy announced that the Court would, in three of its departments, participate in a pilot ECR program to begin July 1st and end December 31, 2012. This program would differ from the original in that the direct filing of pleas would occur in the District as opposed to the Justice Court. To support the Court's proposed pilot, staff now seeks the Board's approval of a new contract with WLS whereby both parties agree to provide the same resources with the County again providing funding in an amount not to exceed \$60,000.

PREVIOUS ACTION

August 9, 2011 – the Board approved a contract with WLS for a six-month pilot program
June 28, 2011 – the Board received and update on the program and received direction to develop a contract with WLS for a pilot program

BACKGROUND

On June 28, 2011 staff and the DA presented an update on the program to the Board and received direction to develop a contract with WLS to implement a pilot program. Then on August 9, 2011, the Board approved an agreement effective September 1, 2011 with WLS to design and implement a six-month pilot program ending December 31, 2011. Under the agreement, WLS was to provide all the resources for the startup and operation of the program and the County was to provide an amount not to exceed \$80,000 to underwrite the cost of the program.

AGENDA ITEM # 7³ (4)

The program was launched and soon thereafter encountered various issues concerning its operational procedures with the Reno Justice Court. Specifically, the Court found that the program violated statute as it was predicated on WLS being appointed defense counsel rather than the public defender.

After numerous meetings and discussions, the program was suspended pending some other alternate resolution from the Justice Court or a higher court. WLS was paid \$40,000 for its services which was half of the amount approved (\$80,000) for the contract.

In a letter dated May 9, 2012, Chief Judge David Hardy announced that the Court would, in three of its departments, participate in a pilot ECR program to begin July 1st and end December 31, 2012. This program would differ from the original in that the direct filing of pleas would occur in the District as opposed to the Justice Court.

On June 8, 2012, the Court entered an administrative order (attached) which set forth the implementation by the Court of a ECR Pilot Program which is to commence on July 1, 2012 and end December 31, 2012 unless extended by order. The order included a short workflow schematic, provisions for discovery, and other guidelines. This program will differ from the original in that the direct filing of pleas would occur in the District as opposed to the Justice Court. Pursuant to the Order, Washoe Legal Services will operate the program and will be appointed co-counsel with the Public Defender. It further describes that funding will continue to be provided to WLS pursuant to the Board's approval of June 28, 2011. This first agreement ended as of December 31, 2011 for the reasons described above.

Accordingly, to support the Court's proposed pilot, staff now seeks the Board's approval of a new contract with WLS to become effective July 1, 2012 and end December 31, 2012. As with the first agreement parties agree to provide the same resources with the County again providing funding in an amount for this new contract, not to exceed \$60,000 (original contract was set at \$80,000).

As proposed, once developed and fully-operational, this program, like the first, may process up to approximately 2000 cases each year and provide for numerous benefits to both defendants and the County as discussed with the Board. Additionally this proposed program will provide additional time in processing cases and will the transportation costs of moving inmates to court (see Gammick email attached).

In summary, staff and the DA request Board approval of this contract with WLS to develop a six-month pilot program in the District Court for the proposed ECR program and return prior to the expiration of the contract with a performance report and a recommendation to renew or terminate the contract.

FISCAL IMPACT

Costs would be posted to the Conflict Counsel FY 12-13 budget C101010, GL 710839 Court Appointed Attorneys. Funding not to exceed \$60,000 for a six-month pilot program and will require a transfer from Contingency if savings are not sufficient to cover the pilot program costs.

RECOMMENDATION

Approve Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed \$60,000] for a six-month pilot period effective July 1, 2012, with the option to renew for an additional term.

POSSIBLE MOTION

Motion to approve an Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed \$60,000] for a six-month pilot period effective July 1, 2012, with the option to renew for an additional term. (All Commission Districts.)

AGREEMENT FOR PROVISION OF LEGAL SERVICES
TO INDIGENT DEFENDANTS

This Agreement, is made and entered into this 26th day of June, 2012, by and between WASHOE COUNTY, a political subdivision of the State of Nevada (hereinafter "County"), and WASHOE LEGAL SERVICES, a Nevada non-profit corporation (hereinafter "WLS").

WHEREAS, the Sixth Amendment to the United States Constitution requires states to provide competent legal defense to indigent persons; and.

WHEREAS, the State of Nevada has delegated its responsibility to provide indigent defense to the counties; and

WHEREAS, in 1997 Washoe County created the first Early Case Resolution (ECR) program which provided expedited due process to thousands of defendants over a period of eleven years during which no successful challenge was ever made against the program; and

WHEREAS, the ECR program was suspended by the Washoe County Public Defender in February 2008, subsequent to the Supreme Court order in ADKT No. 411 and the County and District Attorney now seek to reintroduce the program to minimize the overall indigent caseload; and

WHEREAS, in an Order dated June 8, 2012 the District Court ordered the implementation of an ECR Pilot Program to commence on July 1, 2012 and end on December 31, 2012 and appointed WLS as co-counsel with the Public Defender;

NOW, THEREFORE, the parties agree as follows:

1. WLS agrees to provide the necessary counsel and support services and all equipment and administrative costs for a period of six months to provide for a pilot program to provide indigent legal services contemplated by the ECR program.
2. Amount of Compensation to be Paid: In consideration of the indigent legal defense and ECR services provided by WLS, County agrees to pay WLS \$60,000.00 for the provision of said services for a six-month pilot period. The payments shall be made to WLS on a monthly basis at the address set forth below in six equal payments during the term.
3. Term of Agreement: This Agreement shall be effective on July 1, 2012 and shall remain in effect for a period of six (6) months. The Agreement may be renewed for additional term upon written agreement of both parties entered into before the expiration date of December 31, 2012. This Agreement may be terminated immediately if WLS fails to perform its obligation hereunder, upon thirty days written notice by the County

given in accordance with paragraph eight below and a subsequent failure to cure by WLS within a reasonable period of time.

4. Relationships Created: The parties understand and agree that no attorney-client relationship is created under this Agreement between WLS and the County. It is the intention of the parties only that WLS shall provide the services and assistance outlined in this Agreement, and that the only attorney client relationship that arises from the services provided hereunder shall be between the attorney employed by WLS and the individual represented.

5. Procedure for Provision of Services: The obligation of WLS to provide legal counsel services hereunder shall accrue upon appointment to a case by the Justice Court and a subsequent identification of the case as appropriate for inclusion in the ECR program and shall continue until an order is entered by the Court relieving WLS of its obligation or the case is dismissed.

6. Indemnification and Insurance Requirements: Contractor shall save, hold harmless, and indemnify County, its officers, agents and employees, from and against all claims, causes of action, liabilities, expenses and costs, including reasonable attorneys' fees, for injury or death of any person or damage to property arising out of, or connected with, work performed under this Agreement which is the result of any acts or omissions, whether negligent or otherwise, of Contractor, its officers, agents, subcontractors or employees.

County shall not provide any insurance coverage of any kind for Contractor or Contractor's employees or contract personnel. Contractor shall procure and maintain Professional Liability insurance in the amount of \$1,000,000.00 to cover Contractor's activities with respect to services provided pursuant to this Agreement. This insurance coverage shall remain in force for the duration of this contract.

7. Notices: Any notice to be provided to a party under this Agreement shall be made by ordinary mail (effective three days after deposit in an approved U.S. Mail facility), or by hand delivery as follows:

To the County: Washoe County Manager
P.O. Box 30083
Reno, Nevada 89520

To Washoe Legal Services: Executive Director
650 Tahoe Street
Reno, Nevada 89509

8. Condition of Funding For Enforcement of Agreement: As required by N.R.S. 244.320 and N.R.S. 354.626, the parties acknowledge that the participation of the County in this Agreement is contingent upon the appropriation of public funds to support the activities described herein and that the Agreement will terminate if the appropriation of funds does

not occur. In this event, immediate written notice of termination will be given in accordance with paragraph eight above.

9. Sole Agreement: This Agreement contains all the commitments and agreements of the parties related to indigent legal defense and ECR services, and oral or written commitments not contained herein shall have no force or effect to alter any term or condition of this Agreement, unless modified in accordance with paragraph eleven below.

10. Amendment: This Agreement may be amended or modified only by the mutual written agreement of the parties which has been ratified in accordance with law.

11. Severability: In case any one or more of the terms, sentences, paragraphs or provisions contained herein shall for any reason be held to be invalid, illegal, or non-enforceable, in any respect, such invalidity, illegality, or non-enforceability shall not affect any other terms, sentences, paragraphs, or provisions and this Agreement shall be construed as if such invalid, illegal, or non-enforceable provision had never been contained herein.

12. Waiver: A waiver of any breach of any provision of this Agreement by any party shall not be construed to be a waiver of any preceding or succeeding breach.

13. Governing Law; Venue: This Agreement shall be governed, interpreted and construed in accordance with the laws of the State of Nevada and venue for any action based upon its terms and the parties' performance thereunder shall be in the Second Judicial District Court of Washoe County.

IN WITNESS WHEREOF, the parties have set their hands with the intent to be bound.

WASHOE LEGAL SERVICES

By: Paul E. A.

Executive Director

WASHOE COUNTY

By: Robert M. Larkin

Robert M. Larkin, Chairman,

Washoe County Board of Commissioners

ATTEST:

Lancy L. P. J. Chief Deputy
County Clerk