

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.

Docket No. Electronically Filed
Jun 28 2012 11:54 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

ORIGINAL PETITION FOR WRIT OF MANDAMUS

JEREMY T. BOLSER
Washoe County Public Defender
Nevada State Bar Number 4925
JOHN REESE PETTY
Chief Deputy
Nevada State Bar Number 0010
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PETITION

TO: THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE
NEVADA SUPREME COURT:

Petitioners, Washoe County Public Defender's Office and Jeremy T. Bosler, in his capacity as the Washoe County Public Defender, by and through John Reese Petty, Chief Deputy Washoe County Public Defender, hereby petitions this Court for a writ of mandamus directing David A. Hardy, the Chief Judge of the Second Judicial District Court, to rescind and/or vacate his Administrative Order 2012-07 filed on June 8, 2012, which purports to implement an "early case resolution pilot project." See PA at 89-92 (Administrative Order 2012-07).¹

Petitioners seek this Court's intervention because, as set forth more fully below, Administrative Order 2012-07 (1) violates controlling provisions of the Nevada Revised Statutes; (2) does not conform to the Second Judicial District Court's administrative plan submitted to this Court on May 5, 2008, pursuant to ADKT 411; and (3) fails to provide effective criminal representation under the Sixth Amendment to the Constitution of the United States.

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¹ "PA" stands for Petitioners' Appendix which is being filed with the Petition pursuant to NRAP 21(a)(4).

Parties

1. Petitioner, Washoe County Public Defender's Office, is an institutional public defender office that was created in 1969 to provide constitutionally required legal representation to all indigent persons accused of crimes in Washoe County. See NRS 260.010 (authorizing counties to create the office of public defender).

2. Petitioner, Jeremy T. Bosler, is the Washoe County Public Defender and has held this position since his appointment on June 21, 2005, by the Washoe County Board of County Commissioners.

3. Respondent, Second Judicial District Court, is a constitutionally created court of general jurisdiction. See Nev. Const. Art. VI, sec. 1 and sec. 5. Washoe County constitutes the Second Judicial District. See NRS 3.010.

4. Respondent, David A. Hardy, is the duly elected Judge in Department 15 of the Second Judicial District Court, and is currently the Chief Judge of the District Court.

5. Respondents, Jerome M. Polaha and Brent Adams, are the duly elected Judges for Departments 3 and 6, respectively, of the Second Judicial District Court, and Respondent, Scott N. Freeman, is the Judge in Department 9 of the Second Judicial District Court, by appointment of the Governor.

6. Real Party In Interest, Richard A. Gammick, is the duly elected District Attorney for Washoe County.

7. Real Party In Interest, Paul D. Elcano, Jr., is the Executive Director of Washoe Legal Services, a Nevada non-profit corporation.

Facts:

8. All indigent persons in Washoe County who are “under arrest and held for a public offense” and are otherwise eligible, are entitled to legal representation by the Washoe County Public Defender’s Office. (Hereinafter “Public Defender”.) See NRS 7.115; NRS 260.030(2); NRS 171.188(3). However, in a case where the Public Defender is “unable to represent the defendant, or other good cause appears,” an attorney other than the Public Defender “may be appointed” to represent the accused. NRS 171.188(3). Generally, the Public Defender is “unable to represent [a] defendant” where a conflict of interest in that representation exists, e.g., when a case (1) involves multiple defendants; or (2) involves a victim who has been or is currently being represented by the Public Defender; or (3) involves a witness who the State has deemed a necessary witness who has been or is currently being represented by the Public Defender. In a case where the Public Defender has been appointed, “other good cause” may require that the Public Defender be, in specific cases, relieved of that duty of representation, e.g. *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998) (Washoe County Public Defender removed as counsel by the district court upon motion by the State); and *cf.* *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004) (a significant breakdown in the relationship

between the defendant and court-appointed counsel may constitute adequate cause for the substitution of counsel at public expense). Finally, “good cause” for the appointment of counsel other than the Public Defender would exist where the Public Defender has declared unavailability to accept further appointments due to caseload constraints.²

9. On January 4, 2008, this Court ordered each judicial district in Nevada to submit to the Court an administrative plan for, among other things, the selection of attorneys “other than public defenders and special public defenders” that “excludes the trial judge or justices of the peace hearing the case” in the “appointment of trial counsel.” PA at 3-4 (ADKT 411) (In the Matter of the Review of Issues Concerning Representation of indigent Defendants in Criminal and Juvenile Delinquency Cases). The Second Judicial District responded on May 5, 2008. PA at 74-88 (The Second Judicial District Court – Indigent Defense Report). (Hereinafter the “Model Plan.”) The Model Plan is comprehensive in scope setting forth objectives, definitions, mandatory versus discretionary appointment of counsel, timing of the appointment of counsel, eligibility for appointed representation and related matters. *Ibid.* Under the Model Plan the Public Defender receives the initial appointment, *Id* at 79, and must “as soon as practicable”

² While the Public Defender’s Office does conduct conflict screenings of all cases to which it has been appointed in order to avoid conflicts of interest, to date it has never declared itself unavailable to take criminal cases.

conduct “a conflict check to determine whether any conflict of interest exists which would prevent representation of the client.” *Id.* at 80. If a conflict is determined by the Public Defender to exist, the case is transferred to Washoe County’s Alternate Public Defender, who must also conduct a conflict inquiry. *Id.* Finally, the Model Plan provides for the appointment of private counsel at public expense in those specific cases where either the Washoe County Public Defender or the Alternate Public Defender cannot provide representation. *Id.* at 80-81. Consistent with this Court’s January 4, 2008 Order, appointment of private counsel under the Model Plan is done not by a district judge or a justice of the peace, but by the “Appointed Counsel Administrator” – a position created by the Model Plan. *Id.* at 81 and 86.

10. Notwithstanding the above, on June 8, 2012, Chief Judge David A. Hardy issued and filed Administrative Order 2012-07. PA at 89-92.

Judge Hardy’s Administrative Order commands the Second Judicial District Court to implement an Early Case Resolution Pilot Program, which is set to commence on July 1, 2012 and end on December 31, 2012, “unless extended by further administrative order.” PA at 90. The Administrative Order provides:

[t]he presiding judge, on a case-by-case basis, shall determine whether [Washoe Legal Services] counsel will represent an indigent defendant as co-counsel with the Washoe County Public Defender. In the event WLS counsel is appointed as co-counsel, the Washoe County Public Defender shall have no further responsibilities

until such time, if ever, the case is removed from the ECR Pilot Program. If at any time before entering a plea, the presiding judge determines the case should be withdrawn from the ECR Pilot Program, the judge will relieve WLS counsel and direct the Washoe County Public Defender to represent the indigent defendant in all further proceedings.

PA at 90. Next, it designates Departments 3, 6 and 9 as participants in the ECR Pilot Program, with Judge Adams designated as the Chair of a committee consisting of himself, Judge Polaha and Judge Freeman commissioned to “meet and implement program details, such as counsel appointments, forms, and calendaring, [as] proposed by the Washoe County District Attorney with the cooperation of Washoe Legal Services.” PA at 91.

The Administrative Order further details the ECR Pilot Program as follows:

- a. The Washoe County District Attorney shall determine criminal cases appropriate for assignment into the ECR Pilot Program. The final assignment decision shall be made by the District Attorney pursuant to his prosecutorial discretion. Categories of cases qualifying for ECR case processing shall be periodically reviewed by the Washoe County District Attorney in consultation with Washoe Legal Services.
- b. The initiation of an ECR criminal case shall be made by direct filing of the information in the Second Judicial District Court.
- c. If at any time prior to entering a plea the defendant elects not to enter a plea consistent with plea negotiations, or if the defendant chooses to withdraw from the ECR Pilot Program, or if the presiding judge declines to accept the plea after canvassing the

defendant, the matter shall be remanded³] to the Justice Court for further proceedings.

PA at 91.

Claims in Support of Mandamus:

11. Administrative Order 2012-07 violates numerous statutory mandates including NRS 7.115, NRS 260.030(2) and NRS 171. 188(3) because it authorizes the appointment of private Washoe Legal Services (hereinafter “WLS”) counsel to represent indigent persons in the place of the Public Defender without first establishing either (1) that the Public Defender is “unable to represent the defendant”; or (2) the requisite “other good cause” necessary for the appointment of “another attorney.” Instead, the Administrative Order preempts the Public Defender’s obligation to determine whether it is unable to represent the defendant, and simply deems its ECR Pilot Program to constitute “good cause” – *sui generis*. PA at 90. Additionally, it unsuccessfully attempts to comply with the controlling statutes by requiring the appointment of the Public Defender as “co-counsel” with the WLS attorney. This artifice is laid bear by the contemporaneous declaration that the Public Defender “shall have no further responsibilities” to the defendant

³ A “remand” in either of these scenarios is not possible. If the case is before the district court through the direct filing of the information, there would be no pre-existing justice court case to which a remand could be made.

unless “the case is removed from the ECR Pilot Program.” *Ibid.* The appointment of the Public Defender in this context is an imposture.

12. Administrative Order 2012-07 does not conform to the Second Judicial District Court’s Model Plan because it vests in district court judges the power to determine “whether WLS counsel will be appointed to represent an indigent defendant”, PA at 90, and requires these judges to “implement program details [including] counsel appointments ... [as] proposed by the Washoe County District Attorney.” PA at 91. Furthermore, it assigns specific Departments of the Second Judicial District Court to “participate in the ECR Pilot Program[.]” *Id.*

While the Model Plan conforms to this Court’s demand for the independence of the Court-Appointed Defense System from the Judiciary -- see e.g. PA at 3 (Order of January 4, 2008, noting in part: “WHEREAS, participation by the trial judge in the appointment of counsel, other than public defender and special public defenders, ... creates an appearance of impropriety; and WHEREAS, the appointment of counsel, ... should be performed by an independent board ... or by judges not directly involved in the case.”) -- the ECR Pilot Program does not. It is patently worse, as under the Administrative Order district court judges appoint private WLS counsel to represent the indigent defendant only in cases the Washoe County District Attorney has determined alternate counsel to be “appropriate.” See PA at 90-91.

13. The Sixth Amendment to the Constitution of the United States provides in part: “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.” The Sixth Amendment demands the effective assistance of counsel, and extends that demand into the plea-bargaining process. See *Lafler v. Cooper*, 566 U.S. ____, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 566 U.S. ____, 132 S. Ct. 1399 (2012). The district court direct filing component -- a program that openly disavows the need for additional discovery or investigation before recommending a guilty plea – outlined by the ECR Pilot Program is inconsistent with the basic guarantee of effective assistance of counsel. Moreover, it runs afoul of this Court’s Indigent Defense Standards of Performance for felony and misdemeanor cases. See PA at 35-43 (Standards 4 through 9).

14. Although Chief Judge Hardy has the discretion, by virtue of his office, to issue administrative orders, see Washoe District Court Rule 2, that discretion is cabined by law. An exercise of discretion that is outside the law constitutes a manifest abuse of discretion, or an arbitrary or capricious exercise of discretion. A writ of mandamus is appropriate to control a court’s abuse of discretion.

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RELIEF SOUGHT

Petitioners seek a writ of mandamus directing David A. Hardy, the Chief Judge of the Second Judicial District Court, to rescind and/or vacate Administrative Order 2012-07 filed on June 8, 2012.

Under the terms of the Administrative Order, the Early Case Resolution Pilot Program as envisioned therein is set to commence on July 1, 2012. Petitioners are additionally seeking an emergency stay of the implementation of the Pilot Program while this Court considers the issues set out in this Petition.

Respectfully submitted, this 28th day of June, 2012.

JEREMY T. BOSLER
Washoe County Public Defender

By: 
JOHN REESE PETTY (Bar # 0010)
Chief Deputy

AFFIDAVIT OF JEREMY T. BOSLER

STATE OF NEVADA)
 :
COUNTY OF WASHOE)

I, Jeremy T. Bosler, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. I am an attorney, duly licensed to practice law in the State of Nevada, and that I am the Washoe County Public Defender, having been appointed to this position on June 21, 2005, by the Washoe County Commissioners pursuant to NRS 260.010 and Washoe County Code 5.439.

2. That by virtue of my position I am obligated to direct, organize, plan, coordinate, and manage the delivery of constitutionally mandated services through the Washoe County Public Defender's Office.

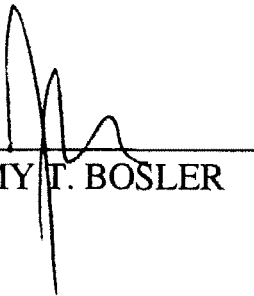
3. The Washoe County Public Defender's Office is an institutional provider of constitutionally mandated legal representation to those qualifying indigent persons arrested and charged with crimes; and further, the Washoe County Public Defender's Office is the primary indigent defense delivery system in Washoe County.

4. The Washoe County Public Defender's Office accepts appointments in all adult felony cases, gross misdemeanor cases, and misdemeanor cases occurring in Washoe County that are not within the incorporated cities of Reno and Sparks.

5. The Washoe County Public Defender's Office, other than in cases that present legal conflicts of interest, has never declared unavailability to accept an appointment in a criminal case.


6. That Petitioners have no other plain, speedy and adequate remedy at law.

7. That this Petition is brought in good faith and not for delay or any other improper purpose.



JEREMY T. BOSLER

Subscribed and sworn to before me by Jeremy T. Bosler
this 28th day of June, 2012.



Notary Public.



MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

Standards for Writ Relief

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from the office, trust or station; or to control a manifest abuse of discretion or which has been exercised in an arbitrary or capricious manner. *Stromberg v. Dist. Ct.*, 125 Nev. ____, ____, 200 P.3d 509, 511 (2009) (“This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.”) (internal quotation marks and citations omitted); *Sonia F. v. Dist. Ct.*, 125 Nev. ____, 215 P.3d 705, 707 (2009) (same); *Cote H. v. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906 (2008) (same); *Walker v. Dist. Ct.*, 120 Nev. 815, 819, 101 P.3d 787 (2004) (same).

The writ “will issue where the petitioner has no plain, speedy and adequate remedy in the ordinary course of the law.” *Stromberg v. Dist. Ct.*, 200 P.3d at 511 (internal quotation marks and citations omitted).⁴ And this Court can entertain a mandamus petition when (1) “judicial economy and sound judicial administration militate” for the writ; or (2) “where an important issue of law requires

⁴ At issue is an administrative order issued by Chief Judge Hardy from which no appeal lies.

clarification.” *Ibid.* (internal quotation marks and citations omitted). For the reasons to follow, this Court should entertain this mandamus petition as it presents a legal issue that needs clarification. Additionally, judicial economy and the sound administration of justice militate in favor of the writ.

The Washoe County Public Defender’s Office is the primary provider of indigent defense services in Washoe County and the courts must comply with governing statutes

The Washoe County Public Defender’s Office was created in response to the United States Supreme Court’s historic decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Pursuant to NRS 260.030(2) the office must, “when designated pursuant to NRS 171.188, represent, without charge, each indigent person who is under arrest and held for a public offense.” (Emphasis added.) Under controlling provisions of NRS 171.188(3)(a) and (b), in Washoe County if a district judge or a justice of the peace finds that a defendant “is without means of employing an attorney,” and determines that “[legal] representation is required,” then he must appoint “the public defender ... to represent the defendant.” Furthermore, the district judge or justice of the peace may not appoint “another attorney” in the place of the public defender unless (1) the public defender “is unable to represent the defendant”; or (2) “other good cause appears.” What does this mean?

Criminal defendants are entitled to conflict-free legal representation.

Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978); *Wood v. Georgia*, 450 U.S.

261, 271 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374 (1992); *Coleman v. State*, 109 Nev. 1, 846 P.2d 276 (1993). Thus, where representation by the public defender would create a conflict of interest, the public defender is “unable to represent the defendant.” Similarly, the public defender is unable to represent a defendant where the court removes him from the case. See *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998) (Washoe County Public Defender removed as counsel by the district court upon motion by the State); and cf. *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004) (a significant breakdown in the relationship between the defendant and court-appointed counsel may constitute adequate cause for the substitution of counsel at public expense). An example of “other good cause” for the appointment of counsel other than the public defender would be where the Public Defender must declare unavailability to accept further appointments due to caseload constraints.

In sum, under NRS 171.188, the ability of a court to appoint another attorney to represent a defendant in the place of the public defender is dependant on the ability of the public defender to represent the defendant. If the public defender is able to represent a defendant, a court is without the authority to preclude that representation. See also NRS 7.115 (providing that “[a] magistrate, master or a 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 [judicial officer] 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 reasons for the disqualification.”) (italics added); and *Cf. Mathews v. State*, 91 Nev. 682, 684, 541 P.2d 906 (1975) (holding that under NRS chapter 260 for purposes of a direct criminal appeal in a county with a public defender system, “the appeal must be handled by the county public defender; except ... in those cases where the public defender *cannot act or is otherwise disqualified*; ... in such cases, private counsel should be appointed, pursuant to NRS 171.188”) (italics added).

The joint appointment of the public defender as co-counsel from Washoe Legal Services (WLS) as provided for in the administrative order is an imposture

Administrative Order 2012-07 does not purport to deem the Public Defender “unable” to represent any criminal defendant.⁵ Indeed, by its very terms it preempts the Public Defender’s ability to make that determination because it calls for the joint appointment of the WLS attorney as “co-counsel” but then commands that “the Washoe County Public Defender shall no further responsibilities until such time, if ever, the case is removed from the ECR Pilot Program.” The

⁵ Nor does it establish “other good cause.” The administrative order’s declaration of “good cause” is simply the fact of the program it implements. PA at 90 (“The ECR Pilot Program ... constitutes good cause”)

“appointment” of the Public Defender in this context is only a thinly veiled attempt to comply with NRS 171.188, and is an imposture.

This ECR program does not conform to the Model Plan

The Model Plan in place in the Second Judicial District Court derives from this Court’s ADKT 411 Order filed on January 4, 2008. Therefore, it is instructive to look to that Order in reaching an understanding of the purpose of the Model Plan. On page 3 of the Order, under the heading, “Independence of the Court-Appointed Public Defense System from the Judiciary,” this Court proclaims in pertinent part: that “participation by the trial judge in the appointment of counsel, other than public defenders and special public defenders, ... creates an appearance of impropriety” such that “the appointment of counsel, ... should be performed by an independent board, agency, or committee, or by judges not directly involved in the case.” PA at 3.

Consistent with the Court’s Order, the Model Plan ensures that the Public Defender receives the initial appointment in all criminal cases. Under the Model Plan the Public Defender must “as soon as practicable” conduct a conflict check to determine whether any conflict of interest exists which would prevent representation. If a conflict is determined by the Public Defender to exist, the case is transferred to Washoe County’s Alternate Public Defender, who must also conduct a conflict inquiry. Finally, the Model Plan provides for the appointment of

private counsel at public expense in those specific cases where either the Washoe County Public Defender or the Alternate Public Defender cannot provide representation. Under the Model Plan the appointment of private counsel is done not by a district judge or a justice of the peace, but by the “Appointed Counsel Administrator” – a position created by the Model Plan.

In contrast, under the Administrative Order “[t]he presiding judge, on a case-by-case basis ... determine[s] whether WLS counsel will represent an indigent defendant[.]”⁶ Similarly, although the Administrative Order creates a “ECR Court Committee” to implement program details (including appointment of counsel) as proposed by the Washoe County District Attorney, that committee is comprised of the very same judges – Judge Polaha, Judge Adams and Judge Freeman – who are also designated to “participate in the ECR Pilot Program[.]” PA at 90-91. This is hardly the “Independence of the Court-Appointed Public Defense System from the Judiciary” envisioned in this Court’s January 4, 2008 ADKT 411 Order.

This ECR program is inconsistent with the Sixth Amendment right of effective assistance of counsel

Under Administrative Order 2012-07 the ECR program is as proposed by the Washoe County District Attorney “with the cooperation of” and “in consultation

⁶ Notably, the presiding judge’s case-by-case determination to appoint private WLS counsel does not conform to NRS 7.115. It does not make a finding that the public defender is “disqualified from furnishing representation” and actually keeps the public defender on the case.

with” Washoe Legal Services.⁷ Only the District Attorney determines the criminal cases appropriate for assignment into the ECR Program. PA at 91. And, the initiation of the ECR criminal case is made by direct filing of the information into the Second Judicial District Court – by-passing the criminal complaint process in the Justice Court. *Ibid.*

The Sixth Amendment to the Constitution of the United States provides in part: “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.” The Sixth Amendment demands the effective assistance of counsel, and extends that demand into the plea-bargaining process. See *Lafler v. Cooper*, 566 U.S. ____, 132 S. Ct. 1376, 1384 (2012); *Missouri v. Frye*, 566 U.S. ____, 132 S. Ct. 1399 (2012).⁸ The district court direct filing component -- a program that openly disavows the need for additional discovery or investigation before recommending a guilty plea – outlined by the ECR Pilot Program is inconsistent with the basic guarantee of effective assistance of counsel. Moreover, it runs afoul of this Court’s Indigent Defense Standards of Performance for felony and misdemeanor cases. See PA at 35-43 (Standards 4 through 9). *Cf. State v.*

⁷ Although it is curious under this system why Washoe Legal Services is even involved. The “WLS” attorney is not a staff attorney, but rather is a contract attorney with criminal case experience.

⁸ Aside from the Sixth Amendment concern is whether the attorney operating under the ECR Pilot Program can do so in conformity with this Court’s guidelines; particularly Standard 9: Plea Negotiations. PA at 61-64.

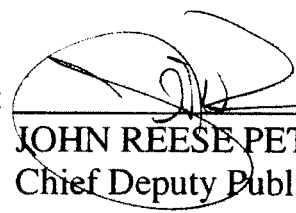
Huebler, 128 Nev. ___, ___, 275 P.3d 91, 98 (2012) (commenting that “[i]t is not every day that an innocent person accused of a crime pleads guilty, but a right to exculpatory information before entering a guilty plea diminishes the possibility that innocent persons accused of crimes will plead guilty.”) (citation omitted).⁹

CONCLUSION

For the reasons stated in the foregoing petition, this Court should issue a writ of mandamus directing Chief Judge Hardy to rescind and/or vacate his Administrative Order 2012-07. Petitioners respectfully ask this Court entertain this Petition and issue the requested writ.

Respectfully submitted this 28th day of June, 2012.

JEREMY T. BOSLER
Washoe County Public Defender

By: 
JOHN REESE PETTY (Bar # 0010)
Chief Deputy Public Defender

⁹ The Reno Justice Court has developed an early case resolution program that is more compatible with the Sixth Amendment command for effective assistance of counsel. See PA at 93 (Letter from Judge Pearson detailing the program in place in his court). This program also complies with NRS 7.115, NRS 260.030 and NRS 171.188, as well as with ADKT 411 and the Model Plan. *Id.* at 94 and 103-105.