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April 30, 2012

The Honorable Justice Charles W. Johnson
Washington Supreme Court
Temple of Justice
P.O. Box 929
Olympia, WA 98504

Re: Additional Comment on Proposed Indigent Defense Standards to Implement CrR 3.1, CrRLJ 3.1, and JuCR 9.2

Dear Justice Johnson:

The Washington State Office of Public Defense (OPD) appreciates the opportunity to submit further comments on the standards that have been proposed to implement Court Rules CrR 3.1, CrRLJ 3.1 and JuCR 9.2, which require attorneys to certify that they meet certain standards when appointed as counsel for indigent defendants.

As it was last fall, the OPD Advisory Committee again is in support of the proposed standards, including numerical caseload limits, as appropriate and necessary to fulfill the Court Rules' intended purpose.

Recent activity in various courts emphasizes the critical importance of the responsibilities of public defenders. Just last month, the U.S. Supreme Court issued two opinions expounding upon effective assistance of counsel requirements with respect to guilty pleas, providing further reasons why public defense attorneys must have sufficient time for adequate representation of each client. In *Missouri v. Frye*, 132 S.Ct. 1339 (2012), the Court vacated the defendant's conviction due to his attorney's failure to communicate an offer to him, explaining that "...ninety-four percent of state convictions are the result of guilty pleas...[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id.* at 1407 (internal citations omitted). In *Lafler v. Cooper*, 132 S.Ct. 1376, the parties conceded that the defense attorney's articulation of faulty advice to the defendant constituted ineffective assistance of counsel, and reversed his conviction.

Other recent cases also establish expanded duties owed by public defense attorneys to their individual clients. In *Padilla v. Kentucky*, 130 U.S. 1473 (2010), the Court held for the first time that counsel must inform a client whether his plea imposes a risk of deportation. *See State v. Sandoval*, 171 Wn. 2d 163 (2011). In *Rothgery v. Gillespie*, 554 U.S. 191 (2008), the Court held that a criminal defendant's initial appearance before a magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

The fact that the responsibilities owed to their clients by public defense attorneys are becoming more complex and time-consuming underscores the need for reasonable per-attorney workloads. At present, the

caseloads of public defenders in various Washington courts widely vary, and many exceed the Washington State Bar Association caseload standards. In *Wilbur v. City of Mount Vernon, et al*, No. C11-1100RSL, (W.D. Wash., filed June 2011), the judge recently entered an order denying the defendants' summary judgment motion, stating that:

Defendants take issue with plaintiffs' assertions that the public defenders...are assigned to handle approximately 1000 misdemeanor cases per year, that counsel spends on average less than 35 minutes on each case, and that the public defenders took only two cases to trial in 2010...(but) there is evidence supporting plaintiffs' overarching argument that counsels' workload is unmanageable.

Order Denying Defendants' Motions for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction (February 23, 2012).

Damages caused by ineffective assistance of counsel due at least in part by the public defender's high caseload and failure to spend a sufficient amount of time are being litigated in another recently filed lawsuit, *Jones v. State of Washington and Grant County et al.*, No. 12-2-00250-3 (Chelan Cnty. Sup. Ct., filed March 5, 2012). In this case, a juvenile and his parents are seeking compensation for the damages they suffered over several years arising from his unwarranted conviction of a sex offense when he was 12 years old, as decided by the Washington Supreme Court in *State v. A.N.J.*, 168 Wn.2d 91 (2010).

With respect to the proposed standards, OPD further recommends the following actions in order to facilitate a smooth, consistent statewide implementation by courts, attorneys and their clients:

- Delay the effective date of the numeric caseload standards until one year after the effective date of certification to the other standards. (For example, if the Court proceeds with a June 2012 effective date for the first set of standards, the numeric standards could become effective one year later, June 2013.) In addition to allowing courts and attorneys adequate time to become fully accustomed to a certification process, a one-year delay would ensure the opportunity to secure training and technical assistance in implementing the numeric standards, including developing local case-weighting protocols. During the interim period, OPD plans to offer extensive technical assistance to local courts, public defense administrators and courts statewide.
- Include in the Court's Order adopting the standards a directive that local courts/clerks must identify in the state's Judicial Information System (JIS) when a matter is assigned to a public defense attorney. Currently, the lack of such basic data makes it difficult to identify the number of public defense cases pending in a particular court or assigned to an individual attorney -- information that is critical to successful implementation of the proposed standards on a statewide basis. If that data is not made available in a consistent format via JIS, each court or public defense administrator will be required to develop its own system.

On behalf of OPD and the OPD Advisory Committee, I urge the Court to adopt the Standards proposed for implementation of CrR 3.1, CrRLJ 3.1, and JuCR 9.2, and to incorporate the recommendations listed above.

Sincerely,



Joanne Moore
Director