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WASHINGTON STATE
SUPREME COURT

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WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

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August 19, 2016

Dear Chief Justice Madsen and Justices of the Supreme Court,

Thank you for proposing changes to RAP 14.2 that will clarify indigency procedures required by *Fuller v. Oregon*, 417 U.S. 40 (1974) and *State v. Blank*, 131 Wn.2d 230 (1997). OPD's enabling statute directs the agency to "recommend criteria and standards for determining and verifying indigency" and to establish guidelines for "cost-efficient systems that provide for authorized recovery of costs." RCW 2.70.020(f)(3), (5). We accordingly offer the following comment.

The proposed changes raise some potential fairness concerns for indigent defendants. Numerous indigent defendants have great difficulty filling out forms on their own. Requiring incarcerated or recently released indigent defendants to fill out and file a report with supplemental information would create insurmountable problems for many of the most vulnerable, including those who have disabilities,¹ mental illness,² illiteracy or Limited English Proficiency,³ and other barriers. These defendants are often unable to perform written tasks, yet large numbers of them are likely to remain indigent.

Moreover, OPD's appellate contract attorneys, who represent virtually all indigent defendants on appeal, are diversely located in some 11 cities statewide, often hundreds of miles from their clients who are incarcerated in relatively remote locations. As such, it is almost never feasible for appellate attorneys to communicate in person with their clients; attorneys must rely on telephone contact and letters. In addition, at the end of an appeal when costs may be assessed, a number of convicted defendants will have moved, either to another institution or to release to unknown housing situations (commonly homelessness). Therefore, as a practical matter, appellate counsel cannot assist their clients in completing forms.

¹ In 2011–12, 35% of prisoners reported having one or more disabilities. UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 at 1 (2015).

² In 2005, more than half of all prison and jail inmates reported having a mental health problem. UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

³ In 2003, seven percent of Whites, 24 percent of Blacks, 44 percent of Hispanics, 14 percent of Asian/Pacific Islanders, 19 percent of American Indian/Alaska Natives, and seven percent of multiracial Americans were found to be below the level of basic literacy in English. NATIONAL CENTER FOR EDUCATION STATISTICS, LITERACY IN EVERYDAY LIFE: RESULTS FROM THE 2003 ASSESSMENT OF ADULT LITERACY 16 (2007).

OPD suggests that a more effective procedure could be developed which still complies with *Blank*. The *Blank* case outlines the necessary features of the appellate courts' costs consideration procedure. These features include:

- Repayment may only be ordered if the defendant is or will be able to pay;
- The financial resources of the defendant must be taken into account; and
- A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.

The appellate courts can address a defendant's financial resources first by taking into account the information in the Motion for Order of Indigency, which is filled out by trial counsel and transmitted to the appellate court along with the Notice of Appeal. This form conclusively establishes a defendant's indigency at the time the appeal is filed. RAP 15.2(f) establishes the presumption that an indigent defendant remains indigent throughout the appeal, absent any information to the contrary.

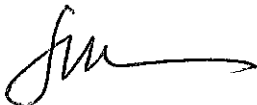
The courts can address a defendant's likelihood of *continued* indigency by adding a small number of questions to the Motion for Order of Indigency regarding the defendant's education, experience, disabilities, and so forth. A pair of suggested Motion for Order of Indigency forms are attached as Attachment A; the first would apply to all indigent defendants, while the second would apply in the relatively rare case where a defendant was not found indigent at trial, but is indigent at the time of the appeal. OPD would expect to work with the courts and other stakeholders to refine these draft forms to ensure they meet the needs of the judiciary.

This procedure would be efficient. Since trial counsel already assists the defendant in person when preparing a Motion for Order of Indigency, there is far less risk that vulnerable clients will be unable to provide the necessary information. The few added questions going to the defendant's inherent financial prospects would take only a minimal amount of additional time.

By establishing background facts about a defendant that are not likely to change, the Motion for Order of Indigency would enable the court to ensure that costs are not imposed on a defendant "if it appears there is no likelihood the defendant's indigency will end." *Blank*, 131 Wn.2d at 238.

In the unusual event that the factors bearing on future indigency do change during the appeal, the procedure outlined in RAP 15.2(f) can provide guidance. This rule requires the defendant and appellate counsel to report any significant improvement in the defendant's financial condition during review. Though RAP 15.2(f) directs that financial improvements be reported to the trial court, the rule could be changed to specify the appellate court instead. The rule could further be changed to require that appellate counsel affirmatively certify that to his or her knowledge, there has been no significant improvement in the defendant's financial condition. Or, if there has been a significant improvement to the extent that the defendant is no longer indigent, the attorney could describe such improvements in an affidavit. When combined with the proposed changes to the Motion for Order of Indigency, these updates to RAP 15.2(f) would ensure that the appellate court has adequate information in the record to satisfy the *Blank* factors.

Sincerely,



Joanne Moore

Director

Washington State Office of Public Defense

RULES ON APPEAL APPENDIX OF FORMS
FORM 13A – Motion for Order of Indigency – Previously Found Indigent

SUPERIOR COURT OF WASHINGTON
FOR _____ COUNTY

[Name of Plaintiff]
(_____))
Plaintiff,)

v.)

[Name of defendant]
Defendant)

No. [trial court]

Motion for Order of Indigency -
(Criminal), (Juvenile Offense),
(Dependency), (Termination),
(Commitment), (Civil Contempt),
Habeas Corpus), (Appeal
involving a Constitutional or
Statutory Right to Counsel) Case

_____, (defendant) (respondent) (petitioner), files a notice of appeal in the above-referenced (criminal), (juvenile offense), (dependency), (termination), (commitment), (civil contempt), (habeas corpus), (appeal involving a constitutional or statutory right to counsel) case, and moves the court for an Order of Indigency authorizing the expenditure of public funds to prosecute this appeal (wholly at public expense) (partially at public expense).

The following certificate is made in support of this motion.

DATED: _____
(Defendant) (Respondent) (Petitioner)

- WSBA #

Attorney for (Defendant) (Respondent) (Petitioner)

CERTIFICATE

Attachment A: Proposed Draft Forms – 2

I, _____, certify as follows:

1. I am the (defendant) (respondent) (petitioner) and I wish to appeal the judgment that was entered in the above-entitled cause.

2. ~~[Check one box]~~

~~[] a. I was found to be indigent by order of this court on _____. There has been no change in my financial status since that time and I continue to lack sufficient funds to seek review in this case.~~

~~or~~

~~[] b. I have not previously been found indigent by this court or there has been a change in my financial status since the court found me to be indigent and I am including a certificate providing information as to my current financial situation.~~

~~[Attach Appendix A]~~

3. I ask the court to order the following to be provided at public expense: all filing fees, attorney fees, preparation, reproduction, and distribution of briefs, preparation of verbatim report of proceedings, and preparation of necessary clerk's papers.

4. I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.

5. I will immediately report any change in my financial status to the appellate court.

6. I seek review in good faith. The following is a brief statement of the nature of the case and the issues sought to be reviewed:

7. *[For cases governed by rule 15.2(c) only]* I have a constitutional or statutory right to review at public expense, and the issues I want reviewed have probable merit: *[Identify statutory or constitutional right and briefly describe the merit of the appeal sought]*

I, _____, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date and Place

Signature of (Defendant) (Respondent) (Petitioner)

APPENDIX A [To Form 13A]: Initial Declaration of as to Future Indigency *[To be completed if party has not previously been found indigent or certifies a material change in financial status since original finding of indigency (Box 2(b) in Form 13)]*

I, _____, certify as follows:

1. That I have previously been found indigent by this court.

2. That the highest level of education I have completed is: _____.

3. That I have held the following jobs (please specify types and approximate dates and durations):

_____.

4. That I have received the following job training (please specify types and approximate dates):

_____.

5. That I have the following mental or physical disabilities:

_____.

6. That I support the following dependents (children, spouse, parent, etc.):

_____.

I, _____, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date and Place Signature of (Defendant) (Respondent) (Petitioner) 1. I have not previously been found indigent by this court.

2. That I own:

_____ () a. No real property

_____ () b. Real property valued at \$ _____.

3. That I own:

_____ () a. No personal property other than my personal effects

Attachment A: Proposed Draft Forms – 4

~~_____ () b. Personal property (automobile, money, inmate account, motors, tools, etc.)
valued at \$ _____.~~

~~4. That I have the following income:~~

~~_____ () a. No income from any source.~~

~~_____ () b. Income from employment, disability payments, social security, welfare,
insurance;~~

~~annuities, stocks, bonds, interests, etc., in the amount of \$ _____ on an average
monthly basis. I received \$ _____ after taxes over the past year.~~

~~5. That I have:~~

~~_____ () a. Undischarged debts in the amount of \$ _____.~~

~~_____ () b. No debts.~~

~~6. That I am without other means to prosecute said appeal and desire that
public funds be expended for that purpose.~~

~~7. That I can contribute the following amount toward the expense of review:~~

~~\$ _____.~~

~~I, _____, certify under penalty of perjury under the laws of
the State of Washington that the foregoing is true and correct.~~

~~_____~~

~~_____~~

~~_____ Date and Place _____ Signature of (Defendant) (Respondent) (Petitioner) _____~~

~~{December 24, 2002; amended effective September 1, 2010}~~

RULES ON APPEAL APPENDIX OF FORMS
FORM 13B – Motion for Order of Indigency – Not Previously Found Indigent

SUPERIOR COURT OF WASHINGTON
FOR _____ COUNTY

[Name of Plaintiff]

(_____))
Plaintiff,)

v.)

No. [trial court]

) Motion for Order of Indigency -
) (Criminal), (Juvenile Offense),
) (Dependency), (Termination),
) (Commitment), (Civil Contempt),
) Habeas Corpus), (Appeal
) involving a Constitutional or
) Statutory Right to Counsel) Case

[Name of defendant]
Defendant)

_____, (defendant) (respondent) (petitioner), files a notice of appeal in the above-referenced (criminal), (juvenile offense), (dependency), (termination), (commitment), (civil contempt), (habeas corpus), (appeal involving a constitutional or statutory right to counsel) case, and moves the court for an Order of Indigency authorizing the expenditure of public funds to prosecute this appeal (wholly at public expense) (partially at public expense).

The following certificate is made in support of this motion.

DATED: _____

(Defendant) (Respondent) (Petitioner)

- WSBA #

Attorney for (Defendant) (Respondent)

(Petitioner)

CERTIFICATE

I, _____, certify as follows:

Attachment A: Proposed Draft Forms – 6

1. I am the (defendant) (respondent) (petitioner) and I wish to appeal the judgment that was entered in the above-entitled cause.

2. ~~[Check one box]~~

~~[] a. I have previously been found to be indigent by order of this court on _____ . There has been no change in my financial status since that time and I continue to lack sufficient funds to seek review in this case;~~

~~or~~

~~[] b. I have not previously been found indigent by this court or there has been a change in my financial status since the court found me to be indigent and I am including a certificate providing information as to my current financial situation.~~

~~[Attach Appendix A]~~

3. I ask the court to order the following to be provided at public expense: all filing fees, attorney fees, preparation, reproduction, and distribution of briefs, preparation of verbatim report of proceedings, and preparation of necessary clerk's papers.

4. I authorize the court to obtain verification information regarding my financial status from banks, employers, or other individuals or institutions, if appropriate.

5. I will immediately report any change in my financial status to the court.

6. I seek review in good faith. The following is a brief statement of the nature of the case and the issues sought to be reviewed:

7. *[For cases governed by rule 15.2(c) only]* I have a constitutional or statutory right to review at public expense, and the issues I want reviewed have probable merit: *[Identify statutory or constitutional right and briefly describe the merit of the appeal sought]*

I, _____, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date and Place

Signature of (Defendant) (Respondent) (Petitioner)

APPENDIX A [To Form 13B]: Declaration as to Current Indigency and Likely Future Indigency

I, _____ certify as follows:

1. That I have not previously been found indigent by this court.

2. That the highest level of education I have completed is: _____.

3. That I have held the following jobs (please specify approximate dates and durations):

_____.

4. That I have received the following job training (please specify types and approximate dates):

_____.

5. That I have the following mental or physical disabilities:

_____.

6. That I support the following dependents (children, spouse, parent, etc.):

_____.

7. That I own:

- () a. No real property
() b. Real property valued at \$ _____.

8. That I own:

- () a. No personal property other than my personal effects
() b. Personal property (automobile, money, inmate account, motors, tools, etc.)
valued at \$ _____.

9. That I have the following income:

- () a. No income from any source.
() b. Income from employment, disability payments, social security, welfare, insurance, annuities, stocks, bonds, interests, etc., in the amount of \$ _____ on an average monthly basis. I received \$ _____ after taxes over the past year.

Attachment A: Proposed Draft Forms – 8

10. That I have:

- () a. Undischarged debts in the amount of \$_____.
- () b. No debts.

11. That I am without other means to prosecute said appeal and desire that public funds be expended for that purpose.

12. That I can contribute the following amount toward the expense of review:

\$_____.

I, _____, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date and Place

Signature of (Defendant) (Respondent) (Petitioner)