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October 30, 2024

Washington Supreme Court
Temple of Justice, Olympia, WA
Attention Clerk of the Court

By email: supreme@courts.wa.gov

Re: Proposed Changes to Indigent Defense Standards

Dear Honorable Justices of the Washington Supreme Court:

I urge you to reject the proposed changes to the 2012 case load limits for public defense practice. I have been practicing criminal law in Whitman County since 1991; as a public defender for seven years and as a prosecutor for over 20 years. I am no expert in the courts in all the counties in the state, so I will focus most of my comments on this county – which I do know well. There is not now, nor has there been, a crisis in public defense in Whitman County. But if you adopt the changes in case limits as proposed, you will create a crisis here. I respectfully suggest that you do not have a constitutional basis to create that crisis here, nor should you do so even if you have that authority.

"The rules of professional conduct require lawyers to limit their workloads to ensure competent representation. But what should those limits be? Clear standards for public defender workloads are essential to policymakers' ability to fund and staff the defense function at appropriate levels, to public defense authorities' ability to monitor and manage caseloads, and to attorneys' ability to provide their clients with effective assistance of counsel as guaranteed by the Sixth Amendment to the US Constitution." This statement begins the 'National Public Defense Workload Study', upon which the WSBA bases the new proposed changes to case load limits. The statement makes sense. The court has constitutional authority to implement rules that limit caseloads and that require the legislative and executive branches of government to appropriate tax money for, and hire, public defenders; but only so far as the limits are reasonably required in order to provide for

effective assistance of counsel. The new proposed limits go far too far; they are not reasonably required.

The proposal is not based on reality in Washington State.
In 2012, this Court adopted the current rules which place limits on the number of cases that a public defender can handle. Those limits did not come from thin air. There was a national study from 1973 which recommended similar numbers. But in 2010-2011, there was also a study done by the Washington Office of the Administrator of the Courts, along with the WSBA's Council on Public Defense. I know because I was part of that Council at the time. Many defense attorneys were surveyed around this State. It was from that study in 2010-2011 that the current caseload limits were born.

Contrary to that Washington-specific study, the WSBA now points to a Rand study, which reviewed 17 studies from other states, reviewed by defense 'experts' from other states. Only one of the reviewers was from Washington, and that person practices in the federal system, not Washington State courts. As you know, different state's have different procedural rules and different discovery rules. One only needs to look at the Rand study's results to see that it is not based in the reality of Washington courts. For just one example: the Rand study notes that the 'average' time needed to handle one 'low-severity' misdemeanor is 13.8 hours.

One of the most common misdemeanors in our courts is Driving While License Suspended in the Third Degree. It is certainly "low-severity." If an attorney were to go to trial by jury on that offense, one could spend 13.8 hours on the case, if it were tried in an inefficient court. But less than 5% of cases go to trial. It is simply not credible to argue that a competent attorney would need more than two hours on average to provide effective assistance of counsel to someone charged with that crime in Whitman County.

The current status in this county:
Whitman County has one Superior Court judge and one District Court judge, and does not make significant use of Court Commissioners. Public defense is primarily provided by three experienced contracted attorneys, each in different offices. Among the three attorneys, they handle a total of approximately 150 felony cases and 600 misdemeanors in a year. So the three attorneys are near their respective limits under the current rules, but still have some time for other cases if they choose. Whitman County is able to provide a competent attorney to every indigent criminal defendant. The County will pay about $550,000 for this in 2025. In this county, I do not believe that any court has found any indigent defendant had ineffective assistance from a public defender, at least not in living memory. Most certainly there has not been any rash of ineffective assistance here. (And I don't believe there has been such a rash of cases elsewhere in the state.)

This County makes use of a diversion program for some misdemeanors, has very active therapeutic courts in both District and Superior Courts, and actively promotes steps to avoid recidivism instead of incarceration in many cases. The courts are very conscious of the preciousness of the time of the public defenders, devoting certain dockets primarily to certain defense attorneys to minimize the time the public defenders must spend 'waiting' in court. The prosecutor's office is similarly conscious of this and actively tries to assist with defense attorney scheduling.

The system is working here. There are (just) enough public defenders to handle the work. The work is being done well. The constitutionally-guaranteed right to effective assistance of counsel is not at risk. The taxpayers achieve all of that through their elected representatives at the cost of $550,000 a year.

What will happen if you enact the proposal:
The effect of the WSBA's proposal would be to require Whitman County to hire 5-6 more public defenders at an extra cost of at least $1,000,000 per year (if, and that's a big if, the County could find 5-6 more attorneys to hire). This Court would be imposing that cost on the taxpayers of this

County, to "fix" a problem that does not exist here. A million dollars a year would bankrupt this county in about 10 years.

I have heard some advocates for this new rule say that all we need to do to avoid this tripling of cost of public defense is to prosecute less people, or increase the use of therapeutic courts or diversion programs. Those advocates don't have a credible answer as to which rape or robbery should be 'diverted', or into what sort of non-existent diversion program for rapists and robbers. They have no answer as to which DUI case should go unpunished, or which victim should be told their case couldn't be handled because the Court requires three times the number of defense attorneys than are actually required by the Constitution. Nor is there an answer as to what other services and infrastructure the County will have to forgo or close.

In addition, this Court should recognize that many counties in the State are experiencing a shortage of attorneys. I understand there is an actual crisis in the Tri-Cities and Yakima, for instance, where there are not enough attorneys under the current caseload limits, to represent all indigent defendants. It is important to recognize that the crisis is, reportedly, not a rash of ineffective assistance of counsel. The public defense attorneys are able to provide effective service to their current clients with their current caseload limits. If this Court were to decrease the limits by two thirds, the service by the attorneys would still be effective, but there would just be more clients who had no attorneys. Noteworthy is the fact that the shortage of attorneys is happening in both the prosecutors' offices and the public defender offices, and that the defense attorneys are already being paid on a par with the deputy prosecutors.

In Whitman County, defense attorneys are paid a bit more than deputy prosecutors, but it evens out when benefits are factored in. If the Court requires the County to hire 5 or 6 more public defenders, I have no reason to think we will be any more successful at finding lawyers than the Tri-Cities or Yakima. Instead we will have un-filled positions and a criminal justice system that grinds to a partial halt.

I urge the Court to not upend the entire criminal justice system by adopting these new proposed caseload limits. The limits go beyond what is constitutionally authorized as the court's power and even if they were within this Court's power, they are not based on the reality that the courts are experiencing in Whitman County specifically or the state in general.

Sincerely,

Denis Tracy, Whitman County Prosecuting Attorney

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Correction to Comment to Proposed Changes to Public Defense Caseload Limits
Date: Tuesday, November 26, 2024 2:42:52 PM

From: Denis Tracy <DenisT@whitmancounty.gov>
Sent: Tuesday, November 12, 2024 9:02 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Russell Brown <rbrown@waprosecutors.org>
Subject: Correction to Comment to Proposed Changes to Public Defense Caseload Limits

Dear Clerk of the Supreme Court:

I write to correct a mistake in the letter I sent on October 31st regarding the proposed changes to public defense caseloads by court rule.

On page 2 of my letter, I incorrectly identified the agencies which carried out a caseload study in Washington in 2010-2011. The agencies that conducted the study were the WSBA Council on Public Defense and the Washington Office of Public Defense. The Office of the Administrator Of the Courts may have been involved, but they were not the driving force in the study.

I hope you will forward this correction to the justices.
Sincerely,
Denis Tracy
Whitman County Prosecutor

From: Denis Tracy
Sent: Thursday, October 31, 2024 3:04 PM
To: supreme@courts.wa.gov
Subject: Comment to Proposed Changes to Public Defense Caseload Limits

Dear Clerk of the Supreme Court,
Please see the attached letter from me to the Court, as my comment on the Proposed Changes to Public Defense Caseload Limits.
Please forward it to the justices.
Thank you.

Sincerely,
Denis Tracy
Whitman County Prosecutor