From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment on Proposed Amendments to Standards for Indigent Defense
Date: Friday, November 1, 2024 8:14:44 AM

From: Heather Carroll <hllcarroll@gmail.com>
Sent: Thursday, October 31, 2024 7:50 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendments to Standards for Indigent Defense

Dear Chief Justice González and Members of the Court:

I have been a public defender in Washington State since 2006. I started at the Snohomish County Public Defender Association, then worked as a contract defense attorney in Clark County, spent a year as the indigent defense coordinator for Clark County, and since 2019 I've been an Assistant Federal Public Defender in Tacoma. I provide this comment in my personal capacity only.

I wanted to share my perspective, gained from working at a non-profit, as a contractor, and now at an agency with caseloads and staffing ratios roughly similar to the end goal for these standards to urge the Court to implement the proposed new standards on the timeline as adopted by the WSBA Board of Governors.

I want to speak particularly to my experience as a contract defense attorney in Clark County. (This year, Clark County started the process of establishing a county agency public defender office and hired a director. However, I think my experience as a contract defense attorney is representative of the experience of many contractors in jurisdictions across the state.)

When I was a contractor in Clark County, from 2013-2018, I represented those accused in adult Superior Court. My contract was generally for about 75 felonies a year, and I was paid a base rate of $75,000 per year. As a solo practitioner, 75 felony cases a year is what I felt I could ethically accept. I worked full-time representing individuals accused in Clark County Superior Court. My taxes, office overhead, health insurance premiums, professional dues and memberships, training, and retirement contributions came out of this $75,000. The contracts were flat fee per case; to make more money, I would have to take more cases.

In jurisdictions like Clark, where there was no serious internal advocate for public defense at budget

discussions, and no institutional entity providing coordinated pushback in the court, the system gets skewed. The "normal" bail is high, but contractors don't have time or resources to pursue appeals. The infrastructure is not set up for defense attorneys. Everything takes more time. At the Clark County jail, there are only 4 contact visit rooms and they were often unavailable because jail staff used them to separate inmates after a dispute. I spent countless hours sitting in the jail lobby waiting for a room to open up.

If I wanted to provide a copy of discovery to a client, I could find a contractor willing to redact it, make a funding request, and get the discovery to and from the contractor; meaning it was often easier to just do it myself. I printed and mailed my own letters. I printed my own plea paperwork. I sat through endless dockets, waiting for my few cases to be called. And judges, frustrated with the pace of cases, would set more and more review hearings in an effort to move cases along, meaning more and more time spent sitting in court waiting.

I hear from colleagues that the burden is only getting worse, especially with the advent of body cameras. Counsel has to spend hours downloading BWC video (because when choosing a system, law enforcement and the prosecutor did not consider the needs of defense counsel), and spend ever-increasing money on digital storage. There is no way to send in video discovery to the jail for clients to review on their own and discuss later with counsel; attorneys must wait for one of the scarce contact visit rooms and review video discovery with their clients.

<u>The current system will not change without immediate action from this Court.</u>

Many of the comments opposing the new standards ask the Court to delay implementation until such time as the state provides funding; or asks the Court to pause after partial implementation to reassess implementation.

I have no faith that jurisdictions (or the state) will actually provide adequate funding until they are forced to do so by these proposed standards. This is based on experience. I stuck around in Clark County for so long because I wanted to try and change the system. In 2018, I was part of a task force that spent about 6 months creating a proposal to start a public defender office with 9 attorneys and 6 staff, for an additional cost of $640,912 for the 2019/2020 biennium (i.e., about $320,000 per year). The council listened politely, but did not approve the proposal citing lack of funding, saying that they would reconsider the proposal in a supplemental budget. They did not.

Right now, in Clark County District Court, the court estimates there are 1250 cases (from both the City of Vancouver and the County) that will be filed through the end of the year for which no appointed counsel is available. Every day, indigent individuals accused of offenses are given an attorney appointment sheet that says "to be determined." The court is literally involuntarily drafting private counsel to represent these defendants.

In the face of this, the City of Vancouver is (unsuccessfully) attempting to recruit more attorneys by offering contracts up to $50,000 paying $450 per case. The County is offering about $400 per case. Applying proposed standards 3.J, 1.C, and 1.B, along with publicly available staffing and budget figures for the City of Vancouver, "reasonable compensation" for a yearly full time contract for

defense counsel on cases prosecuted by the City of Vancouver would be about $420,000 – about 10 times what the City is currently offering. This *is* reasonable compensation for an attorney to rent office space, pay overhead, hire support staff, and offer equitable pay and benefits. But in the face of a genuine crisis of representation, the City of Vancouver chooses to change nothing – charge the same number of cases, offer the same laughably low compensation, and simply allow those accused to be unrepresented. There is clearly no outside force, aside from standards imposed by this Court, that will prompt change.

In its letter to this Court, the Clark County Council said the new standards would "place unmanageable financial and capacity burdens on Clark County" and urges the Court to delay the standards until "the legislature acts to address the financial and capacity challenges that these new standards will create." The Council suggests "mandatory pro bono assistance" as part of the solution. This is a profoundly unserious response. In 2022, Clark County voters passed a new Public Safety Sales Tax; in 2024 the County anticipated $7.5 million in revenue from this tax. $58,000 went to indigent defense. The county is spending $19.7 million dollars to construct a secondary jail building with approximately 64 additional jail beds. The Council did approve creation of an office with attorneys and paralegals, but no investigators or social workers, and with almost no budget increase over the previous year. The Council – like many other jurisdictions – doesn't *want* to spend more funds on indigent defense, and will not unless these standards are adopted.

<u>The "additional" cost exists already, and is being borne by defense attorneys and those accused.</u>

[One] reason the indigent defense crisis persists is that while there is widespread agreement that the lawyers who provide representation to the poor in criminal cases have excessive caseloads, there has not been, until very recently, an evidence-based approach to establishing reasonable caseload standards. We can acknowledge that public defenders are overworked, but without a way of quantifying just how overworked they are, we can think that the level of representation they provide is still adequate in most cases.
…
These staffing deficiencies should erode our confidence in the entirety of the indigent defense system. It is not just a few defendants that receive ineffective representation; it is most defendants. Saying that an indigent defense system is functioning with only one-third of the attorneys needed is an admission that the system isn't functioning at all.
John Gross, "Reframing the Indigent Defense Crisis", <u>Harvard Law Review</u> (March 18, 2023).

The costs that many of the comments to this Court decry are not being created by these new, evidence-based standards—the costs are merely being externalized and quantified. Until now, this cost has been borne by the contractor who isn't contributing to their retirement, or the county public defender working nights and weekends. Or the individual accused, spending months in jail or taking day after day off work for court hearings because their case keeps getting continued. Or the person who takes a deal on a case they would otherwise fight just to get it over with. Five years after I left state practice, I'm still contributing in a small way—storing boxes of client files that I am contractually obligated to keep in my basement free of charge to the county.

I currently work in a system that has caseloads and staffing ratios roughly similar to those proposed

in the new standards. The defense attorneys in the federal system have time to work their cases, communicate with their clients, and (most of the time) have a life outside of work. One small but telling consequence of this system is one of the things that struck me most upon coming to the federal system: very rarely does a client fail to appear for a court date.

The judicial branch "is responsible for the delivery of justice" and the mission of the Court is in part "to uphold the constitution." There is no serious argument that the current system is just or constitutional. In choosing an implementation timeline, the Court is in essence choosing who has to continue bearing the burden of an inadequate and unjust system.

This Court is not a legislature. Adopting these new standards will unquestionably force the system to change in ways that are impossible to predict. But in deciding *Blake*, for instance, this Court did not withhold its opinion because vacating unconstitutional convictions and refunding LFOs would be a costly and logistically difficult consequence. Similarly, this Court should not shy from bold action here.

Those accused and their counsel have carried the cost for long enough. The plain evidence is that postponing implementation will only provide jurisdictions time to give lip service to the crisis without taking any meaningful action. Only prompt implementation will give relief to those accused and their counsel, stem the exodus of dedicated attorneys, and start to attract new attorneys into public defense careers.

I urge the Court to adopt the standards and implementation timeline as proposed.

Sincerely,

Heather Carroll