

October 29, 2024

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Via email: supreme@courts.wa.gov

Re: Suggested Amendments to Standards for Indigent Defense Services

To the Honorable Justices of the Washington State Supreme Court:

The injury of prodigality leads to this, that he that will not economize will have to agonize. — Confucius

I can think of no better quote to articulate how the indulgence of inefficiency has effectuated the state of public defense and the crisis before us. Quite simply, it is a self-inflicted wound.

Office of Public Defense Guidelines

For more than two decades, the Washington State Office of Public Defense has existed to provide leadership and support to the public defense profession. Over the years, OPD has provided numerous guidelines, including the very detailed 2014 report Determining and Verifying Indigency for Public Defense as well as the 2019 Status Report on Public Defense in Washington State. The reports offered clear and concise suggestions as well as a standard OPD screening form.

The 2014 report provided five simple recommendations for screeners and new judicial officers as well as suggestions for OPD. These guidelines and recommendations were provided with the stated goal that screening throughout our state would comply with statutory and constitutional requirements. Unfortunately, many courts across this state misunderstood or chose to ignore these recommendations.

It is my opinion, based on review of numerous courts' practices, there is clearly a lack of thorough screening and, as a result, the possibility that thousands of defendants were improperly placed on public defense caseloads is real. Since many courts do not perform any screening for in custody defendants, even when their incarceration is due to a no bail hold, it serves that many defendants are improperly added to public defense caseloads. Furthermore, when only minimally screened, defendants are often deemed indigent due to their current income while "liquid assets," as defined by RCW 10.101.010(2)(a), are never considered in a defendant's indigency eligibility or ability to contribute. ("Liquid assets" means cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. A motor vehicle necessary to maintain employment and having a market value not greater than three thousand dollars shall not be considered a liquid asset.) As a result, resources are wasted and thousands of unnecessary hearings are added to public defenders' caseloads.

Based on 2023 reports from the Washington State Administrative Office of the Courts, there were 132,138 criminal cases filed in Courts of Limited Jurisdiction statewide (DUI/PC, Other Traffic, and Non Traffic offenses). At the same time, there were 777,769 non trial proceedings that occurred in these courts. This amounts to 5.9 proceedings per criminal case filed. These proceedings do not include jury or bench trials, which we know is an enormous time and financial burden. Clearly, as cases are improperly assigned to public defense, it serves to exponentially impact the enormous caseloads, expenditure of resources, and misuse of taxpayer dollars.

A Micro Example

During August and September of 2024, I collected data from various clerks of court, pretrial services offices, prosecutors (elected and DPAs), private defense attorneys, public defenders, corrections officers, and staff at OPD. I collected daily in-custody sheets, daily and monthly data indicating assignment or referral to public defense, monthly/annual/YTD data regarding criminal cases filed by all counties and cities in the State of Washington. As my resources are mostly focused in Kitsap County, I am choosing to analyze that data and compare it with Pierce County District Court in custody screening data.

I am using July 2024 data because it was the last month reported by Washington State Administrative Office of the Courts while I was gathering data. In the monthly report for Kitsap County District Court (not including local municipal courts), 232 criminal cases were filed. In reviewing the daily in custody sheets, 95 defendants were in custody at the time of their Arraignment for Kitsap County District Court charges (adult Misdemeanors and Gross Misdemeanors, including those charged by the Special Assault Unit). Upon review of the Clerk's daily public defense referral sheets, other than defendants who hired private defense while incarcerated or had charges declined prior to Arraignment, all of the in custody defendants were referred to public defense without any financial screening. Of the remaining 148 *out of custody* defendants, 134 were referred to public defense. These defendants were screened by court clerks who can only refer to public defense and are not permitted to make any determination as to the defendant's ability to contribute financially. In summary, the combination of in custody and out of custody referrals to Kitsap County public defense in the month of July was **ninety-four percent**. The 2014 OPD report, which reviewed five years of data, concluded that 47.7% was the average indigency rate in Washington district courts — a 46.3% difference from Kitsap County District Court.

As I do not have Pierce County District Court data regarding assignment of public defense for out of custody defendants, I can only compare in custody screening data. As noted above, Kitsap County District Court does not screen any in custody defendants and, therefore, one-hundred percent of defendants are referred for public defense. There is no delineation between those who may not have the resources to bail out and those who are unable to post bail due to no bail holds (i.e. history of past DUI or Domestic Violence related charges). In July 2024, **forty-nine percent** of Kitsap County District Court in custody defendants were booked and, prior to arraignment, held on no bail holds.

In contrast, Pierce County District Court performs in custody screening. In July 2024, sixty-five percent of in custody Pierce County District Court defendants financially qualified for

public defense, **a thirty-five percent difference from Kitsap County District Court.** I should note that, according to the Pierce County Justice Services Administrator, there is always a small percentage of inmates who are not screened due to refusal to engage with the screeners or due to jail protocols, location of defendant, or timing. They are not factored into the eligible/ineligible percentages. Finally, in comparing the data, I think it is also important to consider poverty rate and median income for the two counties. According to census data, Kitsap County's poverty rate is 8.4% and Pierce County's rate is 9.8% while median household income is \$99,609 and \$98,174, respectively. Consequently, one might expect to see, with proper screening, the number of Kitsap County District Court defendants who qualify for public defense would be even lower than Pierce County's percentages.

Lack Of Uniformity Amounts To Inequity

As the county comparison illustrates, access to free public defense depends on the location where you are arrested. Furthermore, this issue is not just a reality across the counties in our state, it exists in neighboring municipal courts. For example, upon review of Port Orchard Municipal Court, Bremerton Municipal Court, Poulsbo Municipal Court, and Bainbridge Island Municipal Court, all four courts determine indigency differently. In one court, verification consists of asking defendants, "Do you want a public defender?" There is no verification of income or assets for in custody or out of custody referrals to public defense. There is no request or promissory note signed to contribute to the individuals defense. In another court, the judge verifies indigency by asking in custody and out of custody defendants, "Are you working right now?" Again, there is no requirement to verify income or assets. The Bremerton Municipal Court does the most thorough screening. In custody defendants are screened from the bench and, where there is evidence that the defendant is "able to contribute" to public defense, the Judge directs the defendant to court clerks for further screening. All City of Bremerton out of custody defendants are screened through the clerk's office *and* are evaluated for their ability to contribute to their defense.

Consequently, within only a few miles, the financial contribution to defense can be vastly different. For example, if an individual is arrested for DUI within the City of Bremerton and a Washington State Trooper processes the investigation and arrest, the defendant will be charged by the Kitsap County District Court Prosecutor's Office and heard in Kitsap County District Court. If the accused remains in custody at the time of Arraignment, they will be provided free criminal defense with no requirement to financially contribute regardless of financial circumstances. In fact, there is no method by which a defendant can be requested to contribute because there is no agency that will collect those funds (this was not the case ten years ago). Unfortunately for those who are arrested by a Bremerton Municipal Police Officer, the matter will be heard in Bremerton Municipal Court and the defendant will be screened with income as well as assets being evaluated to determine qualification for a public defender and whether the defendant will be required to financially contribute to public defense. Every day, this inequity exists solely based on the agency of the responding officer and the subsequent indigency screening — or lack thereof.

Lack of Proper Audits

Perhaps most troubling to me is the lack of interest in reviewing whether the limited funds available for public defense are being used properly. It was noted in OPD's 2014 report Determining and Verifying Indigency for Public Defense that several survey responses cited concern for varying indigency screening practices. The report expressed concern that due process rights may vary depending on the city and county where a defendant is charged. Unfortunately, since the 2014 recommendations were provided, it appears that local jurisdictions have come no closer to adhering to the suggested uniform practices and the access to technology that would increase uniformity has not been adopted statewide.

In 2020, our staff and attorneys noticed that a sizable number of our new clients charged in Kitsap County District Court had been "qualified" for public defense prior to seeking our services. Based on our intake interviews, we noted that at least half of these individuals would never qualify based on income and nearly all would not qualify if assets were taken into consideration during screening. Logically, I assumed there was no screening being conducted by District Court.

Near the end of 2020, the examples became so egregious that I requested an audit. The process of the audit as well as the outcome was quite troubling. To summarize, the audit was woefully lacking in understanding of the process of screening, the standards of screening, the requirement to retain records, who properly possesses the records, as well as analyzing financial data in concurrence with annual cases filed. For example, it was noted by the auditor that District Court was "in the practice of shredding indigent assessment forms" and, months later, asserted that the auditor was now unable to review screening documents because they are in public defender files and "public defender files were no longer considered public records as of August 2013. Therefore, we didn't even have a criteria we could cite to address the handling of public records." Clearly, an audit to determine screening data does not require access to public defender's files when the District Court clerks are the individuals performing the screening. This response was just one example of the auditor not understanding the process of indigency screening requirements for public defense.

In addition to the lack of data, the auditor focused on expenditures for the line item Special Legal Service. The auditor noted that fiscal year 2013 was at \$2.09 million and that "the trend did not indicate a problem." However, in my opinion, this analysis was reviewed in isolation and, therefore, gives no insight into misuse of funds. Specifically, if expenditures were reviewed in conjunction with the number of cases filed, one might come to a different conclusion. In 2013, there were 1,370 Kitsap Superior Court criminal cases filed. In 2023, there were 860. In 2013, there were 4,344 misdemeanor cases filed in Kitsap County District Court. In 2023, there were 2,118. The change in filings amount to a 37.3% reduction in Superior Court and a 51.2% reduction in District Court. This has been the trend for twenty years. In 2003, there were 6,722 District Court criminal cases (including felony complaints heard in District Court), more than three times that in 2023. Yet, it seems that budgets continue to increase faster than caseloads. To summarize, if the same amount of funds earmarked for public defense in 2013 was also distributed 2023, the county paid the same amount of funds for approximately half of the number of cases. Clearly, future audits of indigency screening should be analyzing PD referrals and distribution of funds in the context of total cases charged.

Superior Court Cases

While I think improper screening has far more of an impact on assignment of cases at the level of Courts of Limited Jurisdiction, there is no doubt that the lack of uniformity in screening practices for felony cases has also caused increased PD caseloads and a waste of public funds. While I understand the discrepancies in eligibility screening will occur due to the screener's discretion, it is my belief that many screeners of Superior Court defendants consider financial eligibility as a foregone conclusion. As I heard numerous times, "we don't do in custody screening because we don't want *pro se* defendants." Consequently, in many counties, one hundred percent of in custody defendants automatically qualify for public defense without any form of screening. I want to point out that I could find no studies to substantiate that doing proper financial screening increases *pro se* defendants. However, even if anecdotal reports exist, indigency screening is not done for the purpose of avoiding *pro se* defendants. Screening is done to ensure that taxpayer dollars earmarked for public defense are used by those who qualify under the law.

Private Defense Attorneys

In response to the public defense crisis, there have been discussions and correspondence that suggest private defense attorneys may be "volunteered" to take public defense cases. There are many challenges to this proposed solution but I would like to point out a very serious issue as it pertains to screening. If a private attorney is forced to take a case, it is imperative that the attorney have resources to do a proper screening and re-evaluate financial status throughout representation. The public defense standards require public defenders to provide an update where there has been a substantial change in financial circumstance during the course of representation. Therefore, the same can be expected of any private defense counsel involuntarily assigned PD cases. If the private attorney becomes aware that the public defense client does not qualify under the income and asset analysis, accepting payment for services in those instances would make the attorney complicit in the misuse of public funds.

Additionally, concerns already exist with cities and counties being unable to manage the qualification requirements for contracted public defenders, including carrying adequate malpractice insurance, training, staffing, records storage, investigation resources, and tracking the weighting of caseloads. Involving private attorneys, involuntarily, in the public defense standards scrutiny as well as the potential for misuse of public funds needs serious consideration.

Future Monitoring

The OPD 2019 Status Report on Public Defense in Washington State discusses the methods in which OPD monitors the use of state grant funds. Monitoring protocols such as these as well as State Auditor's Office (SAO) audits should be implemented *simultaneously* with any changes to caseload requirements. Without monitoring and audits, the problem will continue to grow.

If OPD were a private business and noticed workplace productivity was declining, it would be a simplistic error to only apply new time tracking software for its employees. A successful business uses comprehensive reviews to analyze such things as worker burnout, outdated processes, or ineffective management. Similarly, by cutting public defense caseloads without a review of the process by which these cases come to public defense amounts to approval of the failing and inefficient practices that created this crisis.

Suggestions

- 1) It is time to mandate the adoption of OPD guidelines as related to uniform statewide screening. Discretion in public defense referrals should not be permitted, including any screening from the bench or public defense offices. OPD has been clear that a neutral third party should conduct screening, which means pretrial services or court clerks should conduct all screening. This should be implemented immediately.
- 2) There should be a web-based software program that is used statewide by all courts. As indicated by statute, screening considers income *and assets*. The income-asset analysis is used in most state and federal public benefits evaluations and approval of free public defense services should be no different. The program should incorporate access to data provided by the statewide Benefits Verification System (BVS). However, the only BVS data used to determine indigency should comply with indigency standards for public defense. For example, state benefits that are offered to individuals with annual income, after taxes, *greater than* 125% of the current federally established poverty level should not automatically qualify under the statewide public defense screening software program. The goal is to reduce discretion and ensure equity of services based on eligibility.
- 3) As noted above, screening should be performed by pretrial service departments or court clerks only. Furthermore, all defendants being screened must be advised that proof of income and assets may be required at anytime during their representation as in accordance with RCW 10.101.020(6). Requests for proof of income should be encouraged.
- 4) Referrals to public defense should be automated by the software program with the option for a review if the defendant can present unique data that warrants a referral based on indigency standards. This would include situations such as involuntary commitment.
- 5) Require all screening data be retained and available for audit. This includes whether substantiating data was used (i.e. Benefits Verification System) and whether screening discretion was permitted. The monthly report should delineate referrals by in custody vs. out of custody defendants, type of court, and what entity performed the screening (clerks, pretrial services, the bench, public defense or other).
- 6) Annual audits should be performed in every jurisdiction. The results from these audits should be publicly available. Where a jurisdiction is significantly outside of the statewide average range for assignment of public defense, a further audit should be performed by OPD to review for consistent screening protocols that consider income and assets. Each year, OPD should randomly select at least ten courts to conduct its own independent audit.
- 7) The State Auditor's Office (SAO) should perform regular accountability audits for any jurisdiction receiving state funds designated for public defense purposes. Jurisdictions

receiving taxpayer funds must comply with standardized screening systems in which all screening and referral data is collected in a statewide database program reviewable by OPD and SAO.

- 8) In creating a new statewide system and database for collecting screening data, OPD should hire individuals who have a history of successfully creating or overhauling public defense screening in their jurisdictions. Those creating the system should have a reputation for being fiscally responsible with the use of public funds. For example, Andrea Kelley, currently a Senior Policy Analyst in Pierce County, was a leader in the reform of Pierce County's screening process more than a decade ago. The reform resulted in a significant reduction in screening time by using the BVS as well as adherence to standardized indigency screening, which complies with the income and asset analysis .

There is no doubt that our state has suffered from a lack of public defenders as well as financial support for public defense as a whole. However, over the past decade, it seems the courts have not been fully attuned to the escalating crisis and indiscriminate public defense referrals have significantly contributed to the problem. Many private defense firms can share frustrating experiences of wealthy clients "trying out" public defense before transitioning to private firms. Some defendants may have answered untruthfully but, for others, they simply played the broken system to their advantage. If you ask a person, who is in between tech jobs or on sabbatical, whether they were employed during the previous 30 days, you are collecting accurate data but not helpful information. One DPA recounted a story of the judge assigning a public defender where the alleged criminal conduct occurred on the defendant's yacht. Perhaps the yacht owner was unemployed but, again, accurate data may not lead to proper outcomes when managing limited funds for indigent defense.

I have no doubt that other attorneys will have varying impressions depending on the jurisdiction where they practice. Clearly, defense attorneys and prosecutors will not have the same experience in Kirkland as they do in Yakima. However, it is no less important to address this issue. Every inadequately screened defendant adds to this crisis by increasing the public defender's hearings, staff time, and expenditure of investigation resources. Unfortunately, funds are limited and, for obvious reasons, public defenders are scarce. Therefore, in the interest of justice and equity, all jurisdictions must be obligated to exercise prudence in the expenditure of taxpayer dollars and limit the unnecessary burden on public defenders by only assigning cases that are thoroughly screened by review of income and assets. Furthermore, these efforts need to be substantiated by proper audits that are reviewable by the public.

Sincerely,

Attorney Jennifer Witt