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Washington Supreme Court
Temple of Justice
Olympia, WA

RE: Comments on proposed amendments to the Standards for Indigent Defense

Submitted via email to: supreme@courts.wa.gov

The Honorable Justices of the Supreme Court,

As the elected Prosecuting Attorney for Thurston County, I write today to express my grave concerns about the proposed amendments to the Standards for Indigent Defense. I urge the court to reject the proposed amendments in their current form and instead require that any proposed amendments be evidence-based using quantitative workload data collected in the State of Washington. Having spent three decades as a criminal justice professional, I am convinced that the proposed standards severely underutilize the true capacity of competent criminal defense practitioners in this state. Furthermore, implementation of these standards will escalate the current crisis in recruiting and retaining attorneys for both prosecution and defense resulting in case processing delays, unnecessary dismissal of criminal cases, decrease in public safety, and a continued erosion of public confidence in the courts and the criminal justice system.

As you know, the proposed standards were based on a national workload study funded by the Arnold Foundation and conducted by the RAND corporation (hereinafter referred to as the RAND study).[1] The authors developed national workload standards by surveying a group of 33 defense attorneys from across the country for their "best estimate of the average time needed to provide reasonably effective assistance of counsel" for various activities associated with criminal defense. After providing their initial answers, the group was then convened and allowed to discuss the results of the survey until they reached a "predetermined level of consensus" on the time required. There is no indication in the report that individual state procedures and practices were accounted for in their decisions. No quantitative data was used. In fact, the authors specifically stated that the study was only intended to provide a basis for public defense systems to "assess overall caseloads and staffing and plan for future needs." They went on to recognize that

[1] Pace, Brink, Lee, Hanlon, *National Public Defense Workload Study*, (2023).

"[a]pplying the case weights for this purpose *requires additional jurisdiction- or provider-specific data on both caseloads and staffing."* [2] In stating this, the RAND study authors specifically recognized a need for additional local data prior to using these standards in any specific jurisdiction. Additionally, there is no indication in the report that the national standards were ever intended to be adopted as regulatory caseload standards in any specific jurisdiction.

A notable flaw in this study is the assumption that all criminal cases should and will go through trial. Using time calculations for case activities including trial preparation and trial itself to estimate the time needed for the defense of any case of a certain type has no basis in reality when most cases actually resolve before trial. This is because most plea agreements provide incentives to defendants mitigating their risks from trial. Those incentives could include referral to a diversion or therapeutic court program and/or a reduction in charge and/or sentence recommendation. A properly conducted workload study should consider that most cases will settle before trial.

While a survey of defense lawyers eliciting opinions estimating the time needed to conduct certain activities may be instructive, it is not "evidence-based" such that the court should adopt them as regulatory standards. Workload can be quantified. Quantified workload standards are only "evidence-based" when they are developed from quantitative workload data.

In adopting the RAND Study standards, however, the WSBA Counsel on Public Defense did not undertake any additional study nor make any attempt to gather additional Washington specific data as recommended by the authors. Instead, they simply adopted the standards without change. I urge the court to reject the proposed standards and instead require a workload study be conducted to provide quantitative data from which workload standards can be developed that are evidence-based for practice in Washington State.

In addition to considering the weak foundation on which the proposed standards were developed, I ask the court to also consider the harm that adopting these standards will inflict on counties, cities, and the criminal justice system overall. There is no question that the proposed standards will only serve to escalate the current crisis in recruiting and retaining lawyers into a criminal justice practice (including both prosecution and defense). The current shortage of lawyers in Washington who practice in criminal defense is well established. Similarly, although talked about less in public discourse, prosecutors throughout the state have also had significant difficulty recruiting and retaining lawyers, myself included. In Thurston County, we saw several lawyers leave prosecution to accept other jobs in both private and public practice. At one point, we had eleven open criminal DPA positions out of a total of 29. While we have slowly been able to fill most of those, we continue to lose lawyers to other career paths. Anecdotally, I have been

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[2] Id, p. xii. (Emphasis added)

told by law students that law school cultures are actively discouraging students from seeking a career in criminal justice, and more specifically in criminal prosecution.

With that as a starting point, adopting the proposed standards will instantly and dramatically increase the statewide demand for defense lawyers. Where there is demand without supply, salaries will increase thereby substantially increasing costs for counties and cities. Even if the state were to provide additional public defense funding, prosecution salaries will also need to increase to be competitive. Thus, costs will increase across the system, not just with public defense.

More concerning is the possibility that there are simply not enough lawyers to meet the demand leading to cases not being timely reviewed and filed and/or dismissed for failure to timely provide defense counsel. Such actions would deny victims their access to justice and erode overall public confidence in the criminal justice system. As that confidence erodes, crime will increase and the reporting of crimes will decrease, thereby increasing the threat to public safety in our communities. These negative consequences far outweigh any benefit of adopting the proposed standards.

I close by recognizing that the entire criminal justice system is significantly under-resourced to meet the expectations of everyone in our community, especially those who find themselves interacting in it as a victim, accused or witness. That, in itself, has already eroded public confidence in the system. Some may see amending the criminal rules to adopt the proposed standards as a necessary step to force resources to the system, just as the *McCleary*[3] case did for education. While it is true that enacting these proposed standards will likely force more resources to be dedicated to the system, forcing resources only to public defense is not the solution and will inflict more harm than good. Because the criminal justice system is more analogous to an ecosystem, I urge the court to take a wholistic and measured approach to address criminal justice resource issues based on evidence gathered in Washington. The current proposed standards are built on nothing more than a group of practitioners creating a resource wish list who are now asking the court to forcibly grant it.

Thank you for the opportunity to provide these comments.

Sincerely,

Jon Tunheim
Prosecuting Attorney

[3] *McCleary v. State*, 173 Wn.2d 477 (2012)

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