From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comments on proposed changes to indigent defense
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From: Tom Lerner <Tom.Lerner@comcast.net>
Sent: Wednesday, September 25, 2024 10:32 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Kirsten Erickson' <kl.erickson@comcast.net>
Subject: Comments on proposed changes to indigent defense

To the Supreme Court:

In the interests of fulfilling our moral and constitutional obligation to assure a fair trial to those accused of crimes, the Court should adopt the WSBA proposed caseload limitations on those appointed to provide the defense of the indigent accused. The National Public Defense Workload Study[1] succinctly described the problem:

> Public defense attorneys with excessive caseloads cannot give appropriate time and attention to each client. Excessive caseloads violate ethics rules and inevitably cause harm. Overburdened attorneys are forced to choose cases or activities to focus on, such that many cases are resolved without appropriate diligence. A justice system burdened by triage risks unreliability, denying all people who rely on it — victims, witnesses, defendants, and their families and communities — efficient, equal, and accurate justice.

In its June 4, 2020 letter to the Judiciary and Legal Community, this Court said, in part:

> As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a justice system must operate. Too often in the legal profession, we feel bound by tradition and the way things have "always" been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful.

The proposed new caseload standards recognize that there is a vast inequality in resources and capacity between the power of the State and the individual defendants whose freedom is at stake, and that inequality undermines the prospect of a full defense and a fair trial. Both the

promise of an adequate defense and the opportunity for a fair trial are constitutional obligations. As this court said in *Garfield v. Washington*, 196 Wash.2d 378, 387 (2020). "we do not shirk from our responsibility to enforce the constitution's mandates." Now, we shall learn of the sincerity of those words.

The hue and cry against the proposed revised standards has nothing to do with whether changes in caseload standards are necessary to fulfill our constitutional promises, but rather fully reflect that those whose freedom is at stake are too often disregarded or disrespected by the rest of society. But as a whole, our community has time and again shown that we aspire to be better than that. That we continue to struggle with how to fulfill our obligations towards those on the fringe demonstrates that we have not yet arrived. This court has the opportunity to lead us closer to living the values that our foundational documents express.

The Washington Rules of Professional Conduct begin by stating Fundamental Principles of Professional Conduct:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Current caseload demands on public defenders threaten their ability to fulfill their duty to their clients and the court, and the Bar. RPC 1.1 requires each attorney to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, *thoroughness and preparation* reasonably necessary for the representation." Thoroughness and preparation require, at a minimum, *time,* which current caseload demands do not afford. See also, RPC 1.3.

When courts yield to the biases of society against those who are alienated from the majority, the results are *Plessy v. Ferguson* and *Price v. Evergreen Cemetery Co. of Seattle,* 57 Wn.2d 352 (1960). When courts fulfill their obligations to the constitution even in the face of popular discontent, we get *Brown v. Board of Education* and *Garfield County v. Washington,* 196 Wash.2d at 390 n.1. The constitution is, after all, designed as an anti-majoritarian document to impose controls on the passions of the people, in favor of our individual and collective liberty.

The complaint that the new caseload standards will be expensive should give little pause, particularly when balanced against individual freedom from incarceration and the risk of wrongful convictions. No one opposing the changing standards is driving a car made in 1973. There is no reason that our liberties should be hobbled by that model year either. We should not accept the notion that one is entitled to a more robust defense simply because they can pay for it.

There are two places where citizens exercise control over governmental power: the ballot box and the jury box. Just as we should not countenance elections where lopsided control of information is managed by government power, we should not countenance trials where the fairness of proceedings invites questioning because of an imbalance of resources.

It may be that cities and counties have to make more considered choices about which cases merit prosecution in light of the constitutional obligation to provide adequate resources for a defense, or that the efforts of localities to have the state provide more funding begin to see more legislative success. None of that will occur if the caseload status quo is maintained. Rather, continuing the status quo will communicate that *this* court is content to accept a dysfunctional justice system. That is not what we have come to expect of you.

There are economies that can be realized if cities and counties are practically obligated to pay attention to the fiscal consequences of their decisions. But none of that should matter when it comes to the most significant interaction between a government and its citizens--whether, and under what circumstances the government is empowered to deprive us of our freedom or property. We can only see ourselves as a civilized society when we demand fairness in that process. The current caseload demands on public defenders and the willful ignorance of the mob as to its impact on the fairness of the proceedings permit our society to indulge in an illusion of fairness, which is not the standard that our constitution nor our morality requires. The new caseload standards should be adopted.

Respectfully,

Thomas Lerner
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[1] https://www.rand.org/pubs/research_reports/RRA2559-1.html