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# Amicus Brief of the Defender Initiative and Washington Defender Association in Support vs. of Motion to Appoint Counsel

The Defender Initiative

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IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

	)	No. 3981-11
STATE OF WASHINGTON	)	AMICUS BRIEF OF THE
	)	DEFENDER INITIATIVE AND WASHINGTON
	)	DEFENDER ASSOCIATION IN SUPPORT
Vs.	)	OF MOTION TO APPOINT COUNSEL
X F,	)	
	)	
_____	)	

The Defender Initiative at Seattle University School of Law and the Washington Defender Association urge this Court to grant the motion to appoint counsel for Mr. F. This Court should rule that Mr. F is eligible for appointed counsel under statutory, court rule, and constitutional requirements. As outlined below, the Court must consider more than simply whether the accused person's income is more than 125 per cent of the federal poverty guidelines. If a defendant is unable to pay the anticipated cost of counsel, the Court must appoint counsel.

Statement of the Case

The following facts are based on documents in the court file and the records of the hearings in this matter.

Mr. F is charged with assault in the fourth degree, domestic violence, and interfering with reporting domestic violence. He was in custody for approximately eight days before being

released on \$2500 bond posted by a bail bonds agency. At the first hearing Mr. F said he was disabled and could not afford an attorney but the Court said he was over the poverty guidelines.

Mr. F told the Court at the next hearing that he had been unable to reach any attorney while he was incarcerated. The Court reduced his bail and continued the hearing for him to get counsel. The Court originally told Mr. F that the public defender would not be appointed “because you make too much money” and because he was over the poverty guidelines.

On January 14, 2011, Mr. F appeared in court with his attorney Penny Jackson who had been appointed to represent him in another court and asked this Court to appoint counsel for Mr. F. Ms. Jackson explained to the Court that her client had no savings, had had to borrow money to pay his bond, and his expenses exceeded his income. Ms. Jackson said Mr. F was unable to hire counsel. The Court said Mr. F’ income was above the poverty guideline. The Court required Mr. F to return to court later in the day with a financial application for counsel.

Mr. F and his attorney did return with the application, in which Mr. F reported monthly expenses totaling \$2535, monthly income of \$2452, and that he was overdrawn in his checking account and also owed \$7000 to a hospital. An attorney he contacted wanted a retainer of \$3600 to represent him. Mr. F supports himself and his wife on the income he reported.

The Court questioned the standard to determine whether someone is able to pay for retention of counsel. It said that it always had applied 125% of the federal poverty guideline. It said there had been considerable consternation in the community on the issue of appointment of counsel and both cities over which he has jurisdiction have been saying that the Court should not be appointing counsel as often as it does now.

The Court appointed the public defender office for purposes of arraignment and the next hearing and asked for briefing on the issue of eligibility. The Court entered a not guilty plea for

Mr. F. The Court set a motion hearing for January 28, 2011, “for discussion of qualification for PD office to be appointed.” It set a trial date for March 9, 2011.

The court requested briefing on the law, including statutes, court rules, and case law, on what the standards are for cases in general and this case in specific. It said that both cities had raised “the opposite issue” and it would invite them to submit an amicus curiae brief. It noted that Mr. F’ income was above the poverty guideline referenced in the statute. The Court said that it wanted everybody that has an interest in this issue to have an opportunity to tell the court how the law should be applied.

### **ISSUES PRESENTED FOR REVIEW**

Mr. F is eligible for appointed counsel under court rules, statutory and constitutional requirements. National standards inform the policy that undergirds these requirements. While income level is one factor to consider, the key question is whether the accused person is able to hire counsel. The Court should appoint counsel for Mr. F and make clear that the court rules, statutory requirements and constitutional requirements, and not simply the federal poverty guidelines will be enforced in this Court.

### **ARGUMENT**

#### **The Court Rules Require Appointment of Counsel**

CrRLJ 3.1 provides in part:

d) Assignment of Lawyer.

(1) Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family. A lawyer shall not be denied to any person merely because his or her friends or relatives have resources adequate to retain a lawyer or because he or she has posted or is capable of posting bond.

(2) The ability to pay part of the cost of a lawyer shall not preclude assignment. The assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection.

The key phrase in this rule is “financially unable to obtain one without causing substantial hardship to the person or to the person's family.” In this case, Mr. F’ expenses are greater than his income, he owes \$7000 to a hospital, and the cost of private counsel is \$3600. Mr. F is unable to obtain counsel without substantial hardship.

Interpreting an earlier version of the court rule, the Washington Supreme Court held: “If the legislature has provided for a jail sentence for any designated crime, then it follows that in any prosecution therefor, every person who is financially unable to employ counsel must have counsel appointed unless he or she has intelligently and knowingly waived the right to counsel.” McInturf v. Horton, 85 Wn.2d 704, 706 (1975).

#### The Statute Requires Appointment of Counsel

RCW 10.101 sets out the requirements for appointment of counsel, and Mr. F’ provisional counsel has outlined them for the Court. Amici will emphasize certain provisions here.

RCW 10.101.005 states: “The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.”

RCW 10.101.010 provides in part: “(1) "Indigent" means a person who, at any stage of a court proceeding, is: ...**(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.**” [Emphasis added.] Mr. F qualifies for appointed counsel as he is unable to pay the anticipated cost of counsel and his available funds are insufficient to pay any amount for the retention of counsel.

The Statute Requires Use of a State OPD Eligibility Determination Form

RCW 10.101.020(6) states in part:

(6) The office or individual charged by the court to make the determination of indigency shall provide a written report and opinion as to indigency **on a form prescribed by the office of public defense**, based on information obtained from the defendant and subject to verification. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided by this chapter.

[Emphasis added.]

Counsel note that this Court has its own form that appears to have been drafted in 2003. Amici suggest that the Court use the state Office of Public Defense form. A copy of the form and a June 2010 cover memorandum from OPD are attached for the Court’s reference.

The Washington and United States Constitutions Require Appointment of Counsel

The Washington Constitution provides in pertinent part:

§ 22. Rights of the accused

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, ...In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. Art. I, § 22

The Sixth Amendment of the United States Constitution provides in pertinent part:

“In all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance

of Counsel for his defence.”

As Mr. F’ counsel has pointed out, the United States Supreme Court has made clear that this right applies to misdemeanor cases. Argersinger v. Hamlin, 407 U.S. 25 (1972). The Supreme Court, citing Argersinger, later held that “a suspended sentence that may ‘end up in the actual deprivation of a person's liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.” Alabama v. Shelton, 535 U.S. 654, 658 (2002).

Clearly Mr. F has a right to counsel under both the state and federal constitutions.

#### National Standards

The American Bar Association (ABA) Ten Principles of a Public Defense Delivery System provide: “3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointments, as soon as feasible after clients’ arrest, detention, or request for counsel.” Available at

<http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

The ABA Criminal Justice Section Standards for Providing Defense Services provide in pertinent part:

#### **Standard 5-7.1 Eligibility; ability to pay partial costs**

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

Available at [http://www.abanet.org/crimjust/standards/defsvcs\\_blk.html#1.1](http://www.abanet.org/crimjust/standards/defsvcs_blk.html#1.1)

Mr. F qualifies for appointed counsel under these national standards which provide support for the Court’s application of the court rules and statutes to provide counsel.

## CONCLUSION

This Court should confirm appointment of counsel for Mr. F at no cost to him. The court rules, statutory requirements, and state and federal constitutional provisions require this result.

Amici suggest that this Court begin using the Washington Office of Public Defense eligibility determination form and follow the requirements in RCW 10.101 when it considers eligibility for public defense counsel.

DATED this 24th day of January, 2011.

Respectfully submitted,



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WASHINGTON STATE  
OFFICE OF PUBLIC DEFENSE

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## MEMORANDUM

**TO:** County and City Officials, Presiding Judges, Public Defense Directors and Coordinators

**FROM:** Kathy Kuriyama, Public Defense Services Manager

**DATE:** June 9, 2010

**RE:** Court Indigency Screening

The Office of Public Defense (OPD) is providing this notice pursuant to RCW 10.101.020 (6).

OPD reviewed local court indigency screening forms. A number of the courts are using forms that do not reflect current law. The following is a summary of changes in the law that should be incorporated into local screening forms.

- Engrossed Second Substitute House Bill 2782, Chapter 8, Laws of 2010, 61<sup>st</sup> Legislature, 2010, section 4 in the definitions section substituted "general assistance" with "disability lifeline benefits" and defined the "disability lifeline program."
- Engrossed Second Substitute Senate Bill 5688, Chapter 521, Laws of 2009, 61<sup>st</sup> Legislature, 2009, an act relating to further expanding the rights and responsibilities of state registered domestic partners, added a new section to Chapter 10.101 RCW-Indigent Defense Services. The new section expanded the term "spouse" to also include individuals in a state registered domestic partnership.
- Laws of 1998, ch. 79 section 2, in the definitions of "Indigent" in subsec. (1)(a), following "food stamps" inserted "or food stamp benefits transferred electronically".
- Laws 1997, ch. 59 section 1, in subsec. (1)(a), substituted "Temporary assistance for needy families" for "Aid to families with dependent children".
- Laws 1997, ch. 41, section 5, in the first sentence of subsec. (6), following "on a form prescribed by the office of" substituted "public defense" for "the administrator for the courts".

The attached screening form incorporates the above changes. If you have any questions, please contact me at (360) 586-3164, extension 114 or [kathy.kuriyama@opd.wa.gov](mailto:kathy.kuriyama@opd.wa.gov).

711 Capitol Way South • Suite 106 • P.O. Box 40957 • Olympia, Washington 98504-0957

INDIGENCY SCREENING FORM

**CONFIDENTIAL**  
[Per RCW 10.101.020(3)]

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

1. Place an "x" next to any of the following types of assistance you receive:

- |  |  |
|--|--|
| <input type="checkbox"/> Welfare                       | <input type="checkbox"/> Poverty Related Veterans' Benefits      |
| <input type="checkbox"/> Food Stamps                   | <input type="checkbox"/> Temporary Assistance for Needy Families |
| <input type="checkbox"/> SSI                           | <input type="checkbox"/> Refugee Settlement Benefits             |
| <input type="checkbox"/> Medicaid                      | <input type="checkbox"/> Disability Lifeline Benefits            |
| <input type="checkbox"/> Other – Please Describe _____ |  |

***{If you marked an "x" by any of the above, please stop here and sign at # 15 below.}***

2. Do you work or have a job?  yes  no. If so, take-home pay: \$ \_\_\_\_\_

Occupation: \_\_\_\_\_ Employer's name & phone #: \_\_\_\_\_

3. Do you have a spouse or state registered domestic partner who lives with you?  yes  no

Does she/he work?  yes  no If so, take-home pay: \$ \_\_\_\_\_

Employer's name: \_\_\_\_\_

4. Do you and/or your spouse or state registered domestic partner receive unemployment, Social Security, a pension, or workers' compensation?  yes  no

If so, which one? \_\_\_\_\_ Amount: \$ \_\_\_\_\_

5. Do you receive money from any other source?  yes  no If so, how much? \$ \_\_\_\_\_

6. Do you have children residing with you?  yes  no. If so, how many? \_\_\_\_\_

7. Including yourself, how many people in your household do you support? \_\_\_\_\_

8. Do you own a home?  yes  no. If so, value: \$ \_\_\_\_\_ Amount owed: \$ \_\_\_\_\_

9. Do you own a vehicle(s)?  yes  no. If so, year(s) and model(s) of your

vehicle(s): \_\_\_\_\_ Amount owed: \$ \_\_\_\_\_

Indigency Screening Form-  
Rev 04/2010

10. How much money do you have in checking/saving account(s)? \$ \_\_\_\_\_
11. How much money do you have in stocks, bonds, or other investments? \$ \_\_\_\_\_
12. How much are your routine living expenses (rent, food, utilities, transportation) \$ \_\_\_\_\_
13. Other than routine living expenses such as rent, utilities, food, etc., do you have other expenses such as child support payments, court-ordered fines or medical bills, etc.? If so, describe: \_\_\_\_\_
14. Do you have money available to hire a private attorney? \_\_\_\_yes \_\_\_\_no
15. **Please read and sign the following:**

**I understand the court may ask for verification of the information provided above. I agree to immediately report any change in my financial status to the court.**

**"I certify under penalty of perjury under Washington State law that the above is true and correct. (Perjury is a criminal offense-see Chapter 9A.72 RCW)**

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
City State

FOR COURT USE ONLY - DETERMINATION OF INDIGENCY

- \_\_\_\_\_ Eligible for a public defender at no expense
- \_\_\_\_\_ Eligible for a public defender but must contribute \$ \_\_\_\_\_
- \_\_\_\_\_ Re-screen in future regarding change of income (e.g. defendant works seasonally)
- \_\_\_\_\_ Not eligible for a public defender

\_\_\_\_\_  
JUDGE