Senate Bill 321

Testimony by: Wisconsin State Public Defender Nicholas L. Chiarkas

December 4, 2007

Good afternoon, Members of the Senate Judiciary, Corrections and Courts Committee. I am honored to appear here today in support of Senate Bill 321, and to thank you for your consideration of this important legislation.

Justice, in the criminal sphere, is the law-breaker receiving what is due him or her, both in process and punishment. And it is the process, not the punishment, which distinguishes just governments. In the United States, we have agreed that before the government can take away our liberty, it must first provide us with a fair process. This process is not a gift—rather, it is owed to us...it is due us. That is the simple meaning of Due Process. What this process includes is what makes it complex. So complex, that whenever the government seeks to remove a citizen's liberty, the government is represented by an attorney (a prosecutor). Justice therefore dictates that throughout this complex process, the citizen facing the loss of liberty should also be represented by an attorney. Our pledge of allegiance promises in its last three words: "...justice for ALL." Consequently, citizens too poor to afford an attorney must be provided an attorney by the government.

SB 321 keeps the promise of our pledge of allegiance...it is the ideal that is Wisconsin and the Idea that is America.

More specifically, and as you know, the Wisconsin State Public Defender's Office (SPD) provides constitutionally-mandated legal representation to indigents who

meet financial eligibility standards. The standards, set by statute, have not been updated since 1987—leaving many of our poor without access to SPD representation.

I would like to point out some problems with the current law. Many individuals who do not qualify for SPD representation are still too poor to afford a lawyer. In these cases, the courts (must) appoint a lawyer at county taxpayer expense. Consequently there is inconsistent application from court to court, and county to county. For example, a person may be provided a county-appointed attorney in one court, yet be denied an appointed attorney under the same circumstances in an adjoining courtroom or in another county. Passage of this legislation would ensure consistency and equal access throughout all 72 Wisconsin counties.

In addition, courts and counties have to divert resources from other important services to create an appointment-of-counsel structure that already exists within the SPD. The reimbursement rate for county-appointed attorneys is, in many cases, almost twice the rate paid by the SPD ($40/hour) to its appointed private attorneys. Seventy of the 72 counties reported spending approximately $4.7 million (total for all reporting counties in 2006 to appoint counsel for these indigent individuals). In 2004, fifty-eight of the 72 counties reported that they spent $3.3 million. The actual amounts change from year to year and may actually be higher as there is not a standard reporting system required for use by the county court systems. Unlike the SPD, which implemented a statewide client collections program with consistent standards more than 10 years ago, individual judges have discretion to order defendants with court-appointed counsel to pay attorney fees; thus the offsetting revenue varies from court to court and from county to county.

If enacted, this legislation will not only save taxpayer money but will ensure consistent eligibility standards and equal protection throughout Wisconsin.

With your help, we are hopeful this significant problem will be resolved. SB 321 would make SPD's financial eligibility criteria consistent with the W2 program eligibility criteria (except the SPD criterion takes the cost to hire an attorney into account). The new criteria will dramatically reduce county liability for providing counsel to indigent persons who do not qualify for SPD representation. The SPD will provide legal representation in about 15,400 additional cases per year. The legislation authorizes 33.6 new attorney and 17.7 new support staff positions to handle approximately 75% of these cases, with the remaining 25% appointed to private attorneys.

With an effective date of July 1, 2009, no state costs will be incurred during the current 2007-2009 biennium. The annual cost in FY 2010 is projected to be $4.3 million. The ongoing annual cost, beginning in FY 2011 is projected to be $ 4.6 million. These costs would largely be offset by savings in county budgets due to fewer court appointments.

I am happy to answer any questions. Thank you very much for your consideration, leadership and support of this important legislation.

Supreme Court of Wisconsin

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A. John Voelker
Director of State Courts

Testimony
of
A. John Voelker

Senate Bill 321
Criteria for Determining Indigency by the State Public Defender

Senate Committee on Judiciary, Corrections, and Housing
Senator Lena Taylor, Chair
December 4, 2007

Senator Taylor and members of the Committee, my name is John Voelker, the Director of State Courts. I appear today on behalf of the Legislative Committee of the Judicial Conference in support of Senate Bill 321 that would update the eligibility standards used by the State Public Defender (SPD). This bill addresses a longstanding problem. I suspect this committee has been made aware of this problem during your hearings around the state on the justice system. Today I would like to address both the policy reasons and the financial implications that make this a critical issue within the justice system.

There is no doubt the current indigency standards, relying as they do on the 1987 Aid to Families with Dependent Children financial standards, are outdated. Basing the indigency standards on the Wisconsin Works (W-2) program makes far greater sense.

The judiciary has been aware for several years that the current indigency standards are inadequate. More and more defendants are clearly financially unable to afford their own attorneys. Nevertheless, they do not meet the requirements for representation by the (SPD). Circuit court judges are bound by constitutional principles to appoint counsel for indigent defendants, but under these circumstances the responsibility for paying appointed counsel falls to the counties. I would like to elaborate on the dilemma judges face.

The right of indigent defendants to counsel has been recognized in Wisconsin for nearly 145 years. In *Carpenter v. Dane County,* 9 Wis. 249 (1858), Wisconsin's supreme court reasoned that the right enumerated in article 1, section 7 of the Wisconsin Constitution – to be heard by counsel, to demand the nature and cause of the accusation, to meet witnesses face to face – would be meaningless without the right to legal counsel.

In *State v. Dean*, 163 Wis. 2d 503 (Ct. App. 1991), the Court of Appeals provided guidance to judges faced with the situation in which a defendant does not qualify for representation by the SPD but who claims not to be able to afford counsel. The court said judges must consider all relevant evidence presented by the defendant that is material to the defendant's

present ability to retain counsel and cannot be restricted to the statutory criteria for SPD representation. This often requires an additional hearing. If a criminal defendant does not meet the public defender criteria, the trial court must nevertheless determine whether the defendant is indigent, and if he or she is, the trial court should appoint counsel from the private bar. A judge in one county may decide something differently than a judge in another county, even if both have similar information.

It is also clear the outdated indigency standards are presenting an increasing financial burden on the counties. As the standards have become more outdated, counties have picked up greater costs. I have attached to my testimony a table showing the indigent counsel costs that counties have reported to us for the calendar years 2004 and 2005.

Counties report this unaudited information to the Director of State Courts Office each May as required under s. 759.19 (5)(e), Wis. Stats. For calendar year 2004, counties reported, in total, spending $4.9 million on indigent counsel, and for calendar year 2005, $5.9 million. This information is unaudited, but we believe it is a reflection of what is happening in the counties.

When you combine the judge's duty to appoint with his or her concern about the increasing cost to the county, individual judges are in a difficult situation.

As Chief Justice Shirley Abrahamson noted, when she addressed the Joint Committee on Finance on March 14, 2007:

> The efficient delivery of the constitutional right to representation for those who cannot afford to pay for an attorney impacts the fairness and efficiency of the entire system. I therefore urge you to update the State Public Defender indigency standards so that it can once again fully perform its mandated function.

The Legislative Committee strongly favors the change in the indigency standards that is contained in SB 321. I would be happy to answer any questions. Thank you.

CY 2004 and CY 2005 Indigent Counsel Costs for Counties as reported on Annual Report of Actual Court Costs

County	CY 2004	CY 2005
Adams	$15,052	$19,692
Ashland	33,927	35,813
Barron	75,025	105,515
Bayfield	15,762	19,032
Brown	279,847	371,614
Buffalo	6,747	2,829
Burnett	18,133	14,789
Calumet	28,567	31,873
Chippewa	30,814	34,564
Clark	29,011	31,979
Columbia	34,289	45,700
Crawford	15,675	24,642
Dane	310,503	378,786
Dodge	69,368	98,948
Door	51,446	77,707
Douglas	21,118	22,657
Dunn	13,918	21,420
Eau Claire	152,189	121,202
Florence	500	-
Fond du Lac	145,152	129,918
Forest	1,865	6,502
Grant	32,100	44,342
Green	44,111	28,657
Green Lake	10,592	3,244
Iowa	44,090	40,876
Iron	-	-
Jackson	36,944	33,245
Jefferson	1,996	180,474
Juneau	26,250	39,026
Kenosha	-	-
Kewaunee	23,091	-
La Crosse	256,506	253,331
Lafayette	15,603	15,174
Langlade	2,640	11,056
Lincoln	55,852	45,804
Manitowoc	7,461	9,416
Marathon	224,966	261,281
Marinette	25,784	55,955
Marquette	39,112	57,044
Menominee	-	-
Milwaukee	1,159,005	1,328,606
Monroe	53,967	73,079
Oconto	51,278	65,186
Oneida	-	-
Outagamie	111,754	141,343
Ozaukee	32,498	48,114
Pepin	5,280	9,217

Pierce	10,286	26,760
Polk	8,053	6,135
Portage	69,947	94,547
Price	533	3,947
Racine	175,396	236,741
Richland	14,795	5,421
Rock	127,884	185,154
Rusk	11,739	-
Sauk	94,441	129,312
Sawyer	3,423	8,978
Shawano	1,503	10,866
Sheboygan	68,296	85,729
St. Croix	67,220	73,143
Taylor	41,647	33,973
Trempealeau	31,896	52,968
Vernon	21,672	27,850
Vilas	8,500	15,551
Walworth	100,636	96,255
Washburn	-	-
Washington	140,043	130,802
Waukesha	234,738	290,494
Waupaca	-	-
Waushara	45,807	43,250
Winnebago	-	-
Wood	30,030	31,910
	$4,918,272	$5,929,438

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MEMORANDUM

TO: Honorable Members of the Senate Committee on Judiciary, Corrections and Housing

FROM: Sarah Diedrick-Kasdorf, Senior Legislative Associate

DATE: December 4, 2007

SUBJECT: Support for Senate Bill 321

The Wisconsin Counties Association supports Senate Bill 321, which changes the criteria for determining indigency for the purposes of State Public Defender representation.

Wisconsin's eligibility standards have not been updated since 1987. Each year, one of two scenarios occurs - county responsibility for funding legal representation for indigent defendants increases or an increased number of defendants attend court without legal counsel. Neither of these scenarios is acceptable.

In 1977, the state of Wisconsin created the Office of the State Public Defender (SPD) to provide legal representation for individuals who were unable to afford private counsel. There are numerous benefits to having a centralized system, including consistent eligibility guidelines, providing attorneys to indigent clients with expertise in the field of criminal defense, administrative and financial efficiencies.

Uniformly, counties across the state are frustrated with the current SPD eligibility standards, which are clearly outdated. Counties are required to pay for defense services for individuals who are truly indigent, but fail to qualify for SPD services due to standards that are increasingly difficult to meet. The burden of funding indigent defense services on the backs of county property taxpayers continues to grow every year. These costs vary year to year by county, making budgeting for defense costs extremely difficult. While counties do not question the need for adequate legal representation for individuals subject to legal proceedings in the criminal justice system, WCA strongly objects to county government bearing the cost for this service when the State Public Defender's office was created for that very purpose. Unless the SPD eligibility standards are changed to allow the SPD to represent individuals who are indigent by "real world" standards, counties will continue to fund increased indigent defense services at a cost to the taxpayer equivalent to twice the cost of representation by the State Public Defender's office.

The changes in the eligibility standards contained in Senate Bill 321 ensure that Wisconsin citizens' constitutional rights are protected at a cost most economical/affordable to the taxpayers of this state.

WCA respectfully requests your support for Senate Bill 321.

JAMES T. DWYER
County Board Chair

DANIEL P. VRAKAS
County Executive

December 4, 2007

TO: Senator Lena Taylor, Chair
Members of the Senate Judiciary, Corrections & Housing Committee

FR: Dave Krahn, Legislative Policy Advisor

RE: **SB 321 – State Public Defender Criteria for Determining Indigency**

On behalf of Waukesha County, I ask you to please support SB 321.

This legislation will overhaul the state public defender's indigency determination process which has not been updated since 1987.

Because these standards are so outdated, there are individuals who fall through the cracks and end up on the county dime, which is to say their legal representation is paid for by the county property taxpayer. That is not where the bill should be sent.

In Waukesha County in 2006, our expenditure for court appointed attorneys for indigent individuals was $134,528; for 2007, it is estimated to be approximately $180,000.

SB 321 would ensure that there is more cost-efficiency and program effectiveness if SPD provides representation, because that is what they do; it just makes sense to ensure that they have the where-with-all to do the job.

And, with passage of SB 321, there would be assurance that some progress had been made in the effort to have the state incrementally pick-up the cost of the state court system.

To summarize, SB 321 would:

- Ensure a consistent eligibility standard is used throughout the entire state.
- Provide equal protection under the law for Wisconsin citizens.
- Avoid the potentiality of a lawsuit that the state would more than likely lose.
- Be more cost-effective

This initiative is long overdue. Please support passage of Senate Bill 321.

Thank you!

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Statement of ACLU of Wisconsin on 2007 SB 321 & 2007 AB 576

The American Civil Liberties Union of Wisconsin urges the Wisconsin Legislature to pass 2007 Senate Bill 321 and 2007 Assembly Bill 576. These bills make long-overdue corrections to financial eligibility limits that have denied many indigent criminal defendants state public defender services, has left them at the mercy of a county-by-county appointment process that violates minimum standards recommended by the organized bar, and undermines fundamental rights guaranteed by the U.S. and Wisconsin constitutions.

The Sixth Amendment right to counsel helps level the playing field when a lone criminal defendant faces the overwhelming power of the state in a criminal proceeding. As the Supreme Court recognized in *Gideon v. Wainwright*, making that right to counsel contingent on the ability to pay for a private lawyer mocks the principle of equal justice under law.

Wisconsin's State Public Defender Office has provided exemplary representation (either directly or through assigned private counsel) to criminal defendants throughout the state. Unfortunately, under current law too many people who are "indigent" by any definition of that term do not qualify for SPD representation because they have incomes that exceed $248 per month, which comes to less than $3000 per year. Effectively, the only people eligible for SPD services are those in jail and not receiving any public benefits.

For those making too much to qualify for SPD representation, judges from county to county must, under the rule established in *State v. Dean*, 163 Wis.2d 503 (Ct. App. 1991), make an individualized determination about whether a particular defendant is unable to afford private counsel and is thus entitled to be appointed a private lawyer at county expense. In addition to the inherent subjectivity of such a determination, judges face strong disincentives to appointing counsel for those who do not qualify for state-funded SPD representation. If a judge appoints private counsel, the attorney is paid not by the state, but by the county, which also provides the court with its staff and other resources. Every dollar spent on indigent defense is a dollar that could otherwise be spent on court security, courtroom clerks and other crucial judicial resources.

(over)

The reliance on so-called *Dean* appointments to fill the gap caused by the SPD income eligibility limit violates at least two of the American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002). The first ABA principle demands that defense counsel be independent of the judiciary. This is impossible in a *Dean* appointment, because the judge determines the attorney's pay and access to resources for experts and investigations. The second principle demands that, since the responsibility to provide defense services rests with the state, there should be state funding to ensure uniform access and quality of services statewide. Again, the county-by-county *Dean* process makes such uniformity impossible.

Continued reliance on *Dean* appointments also threatens to render the entire indigent defense system in Wisconsin unconstitutional. The wide variations in appointment practices from county to county and even from judge to judge result in arbitrary differences in which defendants get representation and which don't. This process almost certainly results in significant numbers of indigent individuals being denied their Sixth Amendment right to counsel.

As news reports over the years make abundantly clear, the income eligibility limits have caused real harm to real people – including innocent people – facing criminal charges without a lawyer. *See, e.g.*, Mary Zahn & Jessica McBride, "Poor Often Left Defenseless in Courtroom: $250 a Month Too Much to Qualify for Public Defender," *Milwaukee Journal-Sentinel* (Dec. 7, 2002). These bills represent a meaningful step toward providing adequate representation to every indigent criminal defendant in Wisconsin and should be adopted expeditiously.

WISCONSIN CATHOLIC CONFERENCE

TO: State Senator Lena Taylor, Chair
Members, Senate Committee on Judiciary, Corrections, and Housing

FROM: Barbara Sella, Associate Director

DATE: December 4, 2007

RE: Senate Bill 321—Eligibility for State Public Defenders

The Wisconsin Catholic Conference thanks you for the opportunity to offer testimony in support of Senate Bill 321, which would require the State Public Defender's (SPD) office to raise its eligibility standards and to hire additional staff.

In 1998, Wisconsin's Catholic bishops convened a 15-member Task Force on Corrections to review the state's criminal justice system.

The members of the Task Force included a former Supreme Court Justice; the director of a community program that helps place offenders in jobs and housing; an assistant district attorney for Milwaukee County; an ex-offender; a prison chaplain; a retired county sheriff; a former probation officer; priests who minister to offenders and victims; and several crime victims.

The Task Force heard testimony from Department of Corrections officials; prison inmates; victims of crime; theologians; and advocates for judicial and prison reform.

A year later, in 1999, the bishops published *Public Safety, the Common Good, and the Church: A Statement on Crime and Punishment in Wisconsin*, based on the findings of the Task Force.

In their statement, the bishops recognized that our current judicial system leaves many defendants without access to impartial, independent and speedy justice, even when their life and liberty are at stake.

As the bishops stated, "Criminal justice policies and pastoral responses to crime must take special care to address and serve those with little or no money. Policies must ensure that justice is as accessible to victims and offenders who are poor as it is to those who are more affluent."

One of the major reasons for this lack of access to effective legal counsel is that the indigency standards have not changed since 1987. If the guidelines were to be made consistent with W-2,

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as this bill proposes, it is estimated that the SPD could represent an additional 15,400 cases per year.

Wisconsin's Catholic bishops support SB 321, not just because it is in line with our nation's and our state's constitutional right to justice, but also because it is in line with the principles of Catholic social teaching. According to this teaching, the measure of all institutions is the degree to which they either enhance or diminish the life and dignity of every human being, and the degree to which they protect or threaten the poorest and most vulnerable members of our society.

Because SB 321 seeks to protect the legal rights of our state's poorest residents, we respectfully urge you to support it.

Thank you.

WISCONSIN LAWYERS
STATE BAR of WISCONSIN®
EXPERT ADVISERS. SERVING YOU.

MEMORANDUM

To: Senate Committee on Judiciary, Corrections and Housing

From: Atty. Thomas Basting, President
State Bar of Wisconsin

Date: December 4, 2007

Re: State Bar of Wisconsin support for SB 321 (Indigence/State Public Defender)

The State Bar of Wisconsin supports Senate Bill 321, which would increase the eligibility limits for a public defender from the antiquated 1987 AFDC limits to current W-2 limits, which generally are 115% percent of the federal poverty level. The State Bar has a long-standing position in favor of using federal poverty guidelines as minimum financial criteria for determining indigence and eligibility for constitutionally mandated appointment of counsel.

Outdated eligibility limits for a public defender are part of a mosaic of issues, all related to chronic under-funding of our justice system and lack of access to justice for those of limited means. While the need for this legislation is great, it is only one solution to one discreet part of a much broader problem. State Public Defender reimbursement rates for private bar appointments, which have been frozen at $40 per hour since 1995, also need to be increased. Forty dollars per hour is not sufficient to cover the overhead of the average law practice, and that fact makes it difficult to secure qualified attorneys to take these cases at such a low reimbursement rate. The State Bar of Wisconsin looks forward to working with the State Public Defender on a future effort to increase the $40 per hour reimbursement rate to a more reasonable level.

The State Bar supports the increased eligibility levels in SB 321 because it is the right thing to do. A free society cannot deny justice to the poor and remain free. However, I would be remiss not to acknowledge that this legislation carries an economic cost to our members. This bill would limit, if not eliminate, the number of *Dean* appointments made at county expense, generally at reimbursement rates much higher than the $40 per hour currently paid by the State Public Defender. The effect of this bill, then, would be to shift many of what are currently *Dean* appointments to private bar appointments at a much lower reimbursement rate.

That being said, the State Bar's support for SB 321 is not contingent upon a future increase in State Public Defender reimbursement rates, but reimbursement rates are a problem that the Governor and the Legislature need to address soon. The members of the State Bar of Wisconsin have a long history of providing *pro bono* legal services to people of limited means, both in the form of free legal services and reduced-cost legal services, such as private bar SPD appointments. According to at 2005 survey, attorneys in Wisconsin annually contribute approximately 220,000 hours of free or reduced-cost legal services to the poor.

It is time for the State of Wisconsin to meet its obligation to make justice accessible to the poor by updating both SPD eligibility limits and private bar reimbursement rates.

State Bar of Wisconsin
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