



# Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS

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A. John Voelker  
Director of State Courts

January 9, 2004

The Honorable Garey Bies  
Chair, Assembly Committee on Corrections and the Courts  
Room 125 West, State Capitol  
Madison, WI 53702

RE: Assembly Bill 616, Relating to Indigency Standards for persons Entitled to Representation by the State Public Defender

Dear Representative Bies:

I will be unable to attend your committee's public hearing next week regarding Assembly Bill 616, which would change the criteria for determining indigency for purposes of obtaining representation by the State Public Defender's office.

The Legislative Committee of the Wisconsin Judicial Conference took no position on AB 616 as originally introduced. However, the committee expressed a number of concerns about the underlying issue that has prompted Representative McCormick and others to sponsor this bill.

First, 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indigency standards, relying as they do on the 1987 Aid to Families with Dependent Children financial standards, are outdated.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 were inadequate. More and more defendants, who present themselves before the courts, 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.

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.

The Legislative Committee strongly favors the change in the indigency standards that is contained in AB 616.

I understand the authors of the bill are considering delaying the effective date of the bill in order to eliminate the interim funding mechanism. If that mechanism is removed, it is likely the Legislative Committee would support the bill. In the long run, there are potential savings by having the SPD staff provide representation to the group of defendants who now have counsel appointed by the circuit courts and paid for by the counties.

I hope these comments will assist your committee in its deliberations. If you have questions, please do not hesitate to contact me or our Legislative Liaison, Nancy Rottier. Thank you.

Respectfully submitted,



A. John Voelker  
Director of State Courts

AJV:NMR

cc: Members, Assembly Committee on Corrections and the Courts



## WISCONSIN CATHOLIC CONFERENCE

TO: State Representative Garey Bies, Chair  
Members, Assembly Committee on Corrections and the Courts

FROM: Barbara Sella, Associate Director 

DATE: January 14, 2004

RE: Assembly Bill 616

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The Wisconsin Catholic Conference thanks you for the opportunity to offer testimony in support of Assembly Bill 616, which would require the State Public Defender's office to raise its eligibility standards to those of W-2.

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."

Representative McCormick and others have pointed out that one of the major reasons for this lack of access to effective legal counsel is that the indigency standards have not changed in nearly twenty years. Estimates are that a person earning \$2.87 an hour would currently *not* qualify for a public defender.

If the guidelines were to match those of W-2, as this bill proposes, it is estimated that an additional 13,000 individuals (making under \$5.00 an hour) would qualify for public defender services.

Not insignificant, of course, is the savings that would accrue if the state hired additional public defenders, rather than relying on more expensive private bar attorneys.

We also affirm the provision in Assembly Bill 616 that would require state public defenders to represent anyone who is faced with involuntary commitment for mental health or alcoholism treatment, with protective placement, or with the appointment of a guardian for reasons of medication.

Wisconsin's Catholic bishops support AB 616, 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, which holds at its core that the measure of all institutions is the degree to which they either enhance or threaten the life and dignity of every human being, and the degree to which they protect and empower the poorest and most vulnerable members of our society.

In seeking to provide legal representation for our state's poorest residents, Assembly Bill 616 upholds these fundamental principles and so we urge you to support it.

Thank you.



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## MEMORANDUM

**To:** Members of the Assembly Committee on Corrections and the Courts  
**From:** State Bar of Wisconsin  
**Date:** January 14, 2004  
**Re:** Assembly Bill 616 - SUPPORT

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The State Bar of Wisconsin supports AB 616 which raises to 115% of the federal poverty level (FPL) the financial criteria for determining eligibility for representation by the State Public Defender's Office. Updating the eligibility standards will fulfill the state's constitutional obligation to provide counsel to indigent defendants and improve the administration of justice.

More and more poor defendants are ineligible for representation by a public defender in Wisconsin because the eligibility criteria are so outdated, tied by statute to the obsolete AFDC table and equal to approximately 1/3 of the FPL. Those who earn too much money to qualify for a public defender, but have a constitutional right to representation, look to judges to appoint counsel for them, at county taxpayer expense. Since the state standards have not been updated in 16 years, the burden on counties is growing every year.

At the county level, judges are appointing at varying standards of indigency. One county may appoint counsel at 100% of the FPL, while another county may appoint at 60% of the FPL. The inconsistent manner in which poor defendants are treated after being denied a public defender raises issues of equal protection, possibly inviting a court challenge.

To address this constitutional crisis, Rep. McCormick has developed an innovative proposal to ensure that indigent accused are treated alike without draining state coffers during the 2003-2005 fiscal biennium. Under the substitute amendment that will be offered, effective May of 2005, Assembly Bill 655 will ensure that those who meet the bill's eligibility standard of 115% of the FPL will receive representation.

Raising indigency standards will also improve the administration of justice. Right now the indigent accused languish in county jails while courts scramble to find representation for those who are not eligible for a public defender. Courtroom proceedings are delayed while the search continues and the costs to counties escalate.

To ensure the state honors its constitutional obligation to the indigent accused and to promote equal justice, the State Bar of Wisconsin urges committee members to support AB 616.

*If you have any questions, please contact Deb Sybell, SBW Government Relations Coordinator, at (608) 250-6128.*

**State Bar of Wisconsin**

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**Rock County, Wisconsin  
County Administrator's Office  
51 South Main Street  
Janesville, Wisconsin 53545  
608/757-5510**

January 14, 2004

Rep. Garey Bies  
Room 125W  
P.O. Box 8952  
Madison, WI 53708-8952

RE: AB 616

Dear Rep. Bies:

Thank you for the opportunity to submit written comments pertaining to AB 616 to the Assembly Corrections & the Courts Committee. My attached comments explain in more detail why Rock County is opposed to AB 616. In summary, we are opposed to this piece of legislation that shifts the costs from the state to the county as a result of raising indigency standards for legal representation by the SPD.

I have had the opportunity to review Assembly Substitute Amendment #1 to AB 616. While the substitute amendment raises the indigency standard for legal representation by the SPD, it does not shift the cost to Wisconsin counties. I believe this amendment is a very positive step. Thus, I encourage the Assembly Corrections & the Courts Committee to adopt the substitute amendment.

Sincerely,

Philip H. Boutwell  
Assistant to the County Administrator

cc: Assembly Corrections & Courts Committee  
Richard Ott, Rock County Board Chair

enc.

**Rock County Testimony Regarding AB 616**  
**Prepared by Phil Boutwell**

Prior to 1977, counties paid for the court appointed private attorneys to defend the indigent in criminal cases. In 1977 the Legislature created the SPD Office with the expressed roles of providing indigent representation. Thus, the state hired attorneys and relieved the counties of paying private attorneys for that service. Indeed, that was what happened and it worked well for a number of years. But as it is so often the situation when the state cannot control its own costs, it began shifting cost back to counties. In essence the Legislature froze the SPD eligibility requirements for determining who qualifies for indigent counsel. Those standards have not been raised since 1987. The result has been a cost shift back to the counties. That cost shift to counties was further exacerbated by 1995 Wisconsin Act 27 that eliminated representation for indigent parents whose children are involved in CHIPs cases. Thus, counties are back in the business of paying for court appointed private attorneys to represent people who are indigent, but don't meet the SPD standards.

The issue we are talking about today is not whether people are entitled to indigent counsel, but about who pays for indigent counsel. Judges have the constitutional responsibility to see that defendants have counsel. Furthermore, the SPD can only work within the constraints placed upon it by the state. Thus, the Judges and the SPD has no control over who pays for the legal representation of the poor. The Legislature does, and if it lived up to its commitments, county property taxes would be lower and we would not be having this discussion.

What does AB 616 do? It increases the eligibility standard, assigns the increased caseload to the SPD, and the SPD sends the bill to the county. That arrangement is nothing more than a cost shift from one level of government (the state) to another level of government (the county) without any incentive to control cost. It is a recipe for fiscal irresponsibility to the detriment of the property taxpayer.

Supporters of this proposed legislation would say that counties should accept this burden because it is temporary. In essence they are saying, "counties, you pay the cost for the next 18 months, and the state will pick-up the cost of indigent representation beginning in the next state budget". While that may be the intention of the bill's author and co-sponsors, in reality, the outcome will be very different.

If passed, AB 616 builds additional structural deficit in the next state budget. Why should counties be supportive of AB 616 when the track record of the Legislature has been to pass on portions of its structural deficits to counties while threatening tax freezes? Here are just a few of the many examples (public safety only – the list gets extensive when health and human services are included) that you find in the last state budget:

1. A 6.1% percent increase in JCI rates in SYF04, which counties pay to the state to place adjudicated youth in state correctional facilities (Youth Aids that pay for placements actually declined).
2. The promise of paying counties the statutory rate of \$40/day for holding state P&Ps county jails (in reality it is something less because the Legislature appropriates a sum certain figure)
3. The 60% percent reimbursement to counties for mandated victim witness staff. (When the Legislature initiated the mandate, it funded 90% of the cost)

Given the Legislature's track record of funding its commitments, you can see why counties are cynical regarding AB 616. Thus, we urge the Legislature to oppose AB 616.

January 14, 2004

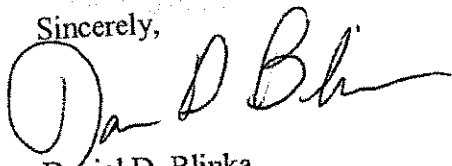
Assembly Corrections and Courts  
Committee Members  
c/o Representative McCormick  
State Capitol  
127 West  
Madison, WI 53707

Dear Rep. Bies, Rep. Albers, Rep. Colon, Rep. Lasee, Rep. Owens, Rep.  
McCormick, Rep. Pocan, Rep. Staskunas, Rep. Underheim, and Rep.  
Wasserman:

I sincerely regret that I cannot personally address the Corrections and  
Courts Committee hearing in support of AB 616 on Wednesday, January  
14, 2004. I respectfully request that the committee review my attached  
written testimony.

Please contact me if you need any further information or if you have any  
questions. Thank you.

Sincerely,



Daniel D. Blinka  
President, Milwaukee Bar Association  
Professor of Law, Marquette University Law School



**MILWAUKEE BAR  
ASSOCIATION, INC.**

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## Summary of Constitutional Right to Counsel

My name is Daniel D. Blinka and it's my honor to serve as the current president of the Milwaukee Bar Association, a professional organization of over 2,500 lawyers. Without doubt I would have appeared in person today to advocate on behalf of this excellent legislation, but by ironic happenstance I am committed to speak about professionalism to young lawyers for the State Bar of Wisconsin. In my 25 years of experience as a prosecutor, lawyer, and law professor at Marquette Law School, I know firsthand the fundamental importance of ensuring adequate representation for those unable to afford private counsel. AB 616 will help make that lofty abstraction a reality.

Our justice system is founded on the experience that the truth emerges when both the prosecution and the defense vigorously advocate their cases in court. Each side benefits when a qualified attorney presents its case according to applicable laws and procedures. As a prosecutor, I valued the insights and advocacy of a skilled defense lawyer in achieving justice, whatever the outcome.

Nor is the value of defense counsel limited to trial. As we know, the vast majority of cases are resolved without trial. Negotiated settlements achieve fair outcomes only when both sides are represented by a qualified attorney who knows the facts and understands the risks.

It is a regrettable fact that in Wisconsin and throughout the United States most people charged with crimes are poor and lack the resources to hire an attorney. The prosecution is, of course, always represented by an attorney who is paid by the government. To ensure greater fairness in the justice system, the U.S. Supreme Court decided forty years ago that the government must assign a lawyer for a poor person in a criminal case.

The State Public Defender's strict financial guidelines deny representation to persons who qualify for other needs-based programs, such as W2. Thus, many poor people do not qualify for representation by the State Public Defender, although they have a constitutional right to have legal representation.

As a result of the present guidelines, many applicants ask the court to appoint counsel at county expense, after being found ineligible for State Public Defender representation. Thus, courts are frequently required to review financial information already gathered and reviewed by the State Public Defender. This process is not only inefficient, but also inconsistent in applying the constitutional right to counsel.

This bill will improve the quality of justice in Wisconsin by providing counsel more fairly, more efficiently, and more consistently throughout the state.



## Wisconsin Clerks of Circuit Court Association

————— *Serving Wisconsin Courts* —————

January 14, 2004

### Testimony to the Committee on Corrections and Courts

Good morning. We are here today representing the Wisconsin Clerks of Circuit Court Association to voice our support of AB 616. I am Diane Fremgren, President of the association and with me is Donna Seidel, chair of our legislative committee. I want to thank Rep. McCormick for her efforts to increase public defender services for indigent defendants appearing in our courts. I'll turn this over to Donna who can elaborate on the position of our association.

Good morning. Diane and I, along with several other clerks from around the state had many opportunities to work with Rep. McCormick, her staff and others to identify issues our courts and counties had with the initial proposal and define the impact this would have if passed. We applaud Rep. McCormick's efforts to effect a much needed change to indigency standards currently in place to qualify for public defender representation. The clerks association has identified this as a priority issue for a number of years and we were, of course, eager to see this change. The primary significance of this bill is that more criminal defendants unable to pay for the services of an attorney would be afforded the protection of representation – an essential right we must provide our citizens. Currently in many and hopefully most of our courts, instances in which the defendant does not qualify for a public defender but clearly is not able to hire a lawyer, judges have been appointing counsel at county expense. Thus, the county's burden to financially support the operations of the courts has been escalating and the "unfunded state mandate" complaint was being heard louder and louder in Madison.

AB 616 will address and correct this critical problem. From the initial stages of this proposal's life, clerks identified concerns about short term funding mechanism that would have placed the costs of the SPD temporarily on the counties. Through a truly collaborative effort, Rep. McCormick listened to our concerns, responded to our issues and developed what we have before us today. Thank you again, Rep. McCormick for inviting us to work in this partnership with you. AB616 is an initiative we advocate and a bill we strongly support.

Diane and I would be happy to answer any question. If not, thank you for your consideration.

Diane Fremgren Clerk of Circuit Court, Winnebago County  
Donna Seidel Clerk of Circuit Court, Marathon County



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MEMORANDUM

TO: Honorable Members of the Assembly Committee on Corrections and the Courts  
FROM: Sarah Diedrick-Kasdorf, Senior Legislative Associate *SDK*  
DATE: January 14, 2004  
SUBJECT: Assembly Bill 616

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. Current standards for eligibility are based on 1987 AFDC guidelines.

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. 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 purpose. Since the passage of the 1995-97 state biennial budget bill, counties have been bearing the costs associated with the representation of parents of children in need of protection and services. 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.

While counties across the state were appreciative from the beginning that Assembly Bill 616 was drafted to alleviate these problems, we had significant concerns with the legislation as the phase-in of state funding for the new standards would have created a fiscal impact to counties in the millions of dollars. WCA would like to thank Representative McCormick and the State Public Defender's Office for listening to the concerns of counties and drafting a substitute amendment which alleviates these concerns.

Page Two  
WCA Assembly Bill 616 Memo  
January 14, 2004

WCA fully supports the substitute amendment to Assembly Bill 616 which:

- Changes SPD eligibility standards to coincide with W-2 eligibility.
- Requires the SPD to provide legal representation to any person who seeks SPD representation and is the subject of an involuntary commitment proceeding for mental health or alcoholism treatment, a protective placement proceeding, or a proceeding to appoint a guardian because the person is alleged to be not competent to refuse psychotropic medication.

The changes in the eligibility standards, as well as the funding source included in the substitute amendment, ensures 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 the Substitute Amendment to Assembly Bill 616.

Thank you for considering our comments.

## Assembly Bill 616, relating to State Public Defender (SPD) Eligibility Guidelines

### Follow-up Questions from Assembly Committee on Corrections and the Courts Hearing of January 14, 2004

#### **How does this bill change who is eligible for a State Public Defender?**

This bill updates the outdated financial eligibility standards for representation by the State Public Defender by establishing financial eligibility standards that are consistent with those for the Wisconsin Works (W-2) program. The revised SPD eligibility guidelines:

- ◆ allows income up to 115% of the Federal Poverty Level (e.g., a single person paid up to 10,327 per year, or a family of four at \$21,160), and
- ◆ are consistent with allowable W-2 assets with the exception of equity in the principal residence. It allows assets with a combined equity value up to \$2,500, excluding the equity value of vehicles up to \$10,000 and equity in the principal residence up to \$30,000. (Note that the W-2 program has no limit for excludable equity in the residence.)

#### **Equal Justice Issues:**

##### ***Which counties aren't appointing now?***

Court appointment of counsel is not happening consistently around the state, or even from judge to judge within individual counties. A series of articles in The Milwaukee Journal Sentinel in late 2002 highlighted this problem, particularly in Milwaukee County.

A comparison of what several counties reported spending for indigent defense for adult criminal cases in calendar 2002 supports the conclusion that while some judges are appointing counsel to those who now are constitutionally indigent, yet not statutorily indigent, many defendants in many courts throughout the state are not being provided legal representation to which they are constitutionally entitled. For example:

	Spent <u>In 2002</u>
Milwaukee County (pop. 940,164 in 2000)	\$161,078
Eau Claire County (pop. 93,142)	\$141,622
Walworth County (pop. 93,759)	\$176,900
Manitowoc County (pop. 82,887)	\$ 6,051

##### ***Does this bill affect judicial discretion to appoint counsel?***

No – Judges may still choose to appoint counsel - at county expense – for defendants who do not meet the SPD's new eligibility guidelines yet. However, this is not likely to happen under the new guidelines.

## **Fiscal Effect Issues:**

### ***How much will this proposal cost in the current (2003-2005) biennium?***

Because the effective date of May 1, 2005 is late in the biennium, there will be no fiscal effect in 2003-2005. Cases assigned to private bar attorneys between May 1 and June 30, 2005 will not be completed (or paid for) prior to FY06.

### ***How much will this proposal cost in FY06 and beyond?***

The bill provides 44.25 full-time equivalent, GPR-funded positions. This level of staffing, which is consistent with the statutory caseload expectations for SPD staff attorneys, will provide the resources necessary for the SPD to appoint staff attorneys to 75% of the projected additional 13,000 cases that would qualify for a State Public Defender under this bill.

The estimated total cost of \$3.4 million per year would fund those positions, and the projected cost to appoint the other 25% of these cases to private bar attorneys.

### ***How much are counties currently paying for court-appointed counsel?***

The most recent year for which the SPD has complete statewide figures is calendar year 2001. In that year, counties reported spending \$2,187,135 for court-appointed defense attorneys in adult criminal cases, and another \$608,077 in involuntary commitment cases. The Wisconsin Counties Association or Wisconsin Clerk of Courts Association might have figures for 2002 and/or 2003.

### ***Could a provision to permit interception of state tax refunds from former SPD clients be added to the bill?***

Yes, the Committee could choose to do so. An amendment to this effect could authorize the Department of Revenue to conduct the intercepts. But, in order for the measure to be feasible, the bill would also need to exempt SPD collections from the DOR's requirement for a judgment to initiate the intercept.

## **Current law issues, not affected by this bill:**

### ***The statutory rate paid to private bar attorneys (\$40 per hour for in- and out-of-court, \$25 for travel) is too low. Could this bill be amended to increase the rates?***

The rate the SPD is permitted by statute to pay our private bar partners is a problem. The SPD's 2005-07 biennial budget request is an appropriate mechanism to increase the reimbursement rate. AB 616 is a focused effort on improving access to justice for our poorest people.

### ***Under this bill, would an attorney who wishes to represent only juveniles be required to represent adults?***

No. Attorneys may continue to specialize, and apply for various types of certification as they wish.

**Would the entire household's income (or just defendant's) considered under this bill?**

The SPD would continue to consider the income and assets of the client and his/her spouse under this bill. Family size would also continue to include dependents.

**Does the State Public Defender collect fees from Juvenile clients?**

Juveniles automatically qualify for SPD representation. Pursuant to statute, at the end of the case the judge orders a parent to pay for the representation of their minor child. This is known as juvenile recoupment. Since FY99, the SPD has received an average of \$350,000 per year from this income source. This amount represents about 25% of all annual revenues from collections.

**Does the SPD collect fees from juveniles when waived into adult court?**

Yes, when waived into adult court, the client is required to fill out an eligibility form and is assessed a collection fee based on the type of case.

**Resource Balance (Public Defenders and Prosecutors) Issues:**

***If the SPD needs more resources under this bill, doesn't the prosecution need more resources as well?***

We project that this bill will increase the State Public Defender's appointments by approximately 13,000 cases per year. However, these cases are already in the court system. At present, counsel is appointed at county expense, if at all.

***What was the effect of the cuts in the 2003-2005 biennial budget on the SPD and the DAs?***

Act 33 reduced the budgets of both the SPD and the DAs:

- Prosecutors were cut 2.5% - \$900,000 and 15.0 FTE each year.
- The SPD was cut 5% - \$3.5 million each year - \$2,648,700 in private bar funding and \$851,300 for 15.25 FTE staff positions. Because staff attorneys provide counsel in the most cost effective manner, the Legislature approved the State Public Defender's proposal to reallocate the cuts to the private bar appropriation. The \$3.5 million annual reduction in private bar capacity is equal to 33 full-time attorneys. Had the cuts not been reallocated to the private bar appropriation, the resulting staff reduction of 33 full-time attorneys would have exacerbated the deficit even more

TESTIMONY FOR REPRESENTATIVE TERRI MCCORMICK

AB 616 – INDIGENT DEFENSE

ASSEMBLY COMMITTEE ON CORRECTIONS AND THE COURTS

January 14, 2004

Good morning Chairman Bies and members of the committee on Corrections and the Courts. Thank you for the opportunity to speak today and for holding a public hearing on this very important bill. I urge your support for AB 616.

I am pleased to share with you today legislation that is not about a luxury - but a sacred constitutional right. Since 1987, eligibility by the State Public Defender's office has been tied to amounts under the now defunct, Aid to Families with Dependent Children (AFDC), program. Today I am presenting legislation that raises the eligibility standards to correlate with Wisconsin's more current determinant, Wisconsin Works (W2.)

I believe we have no greater responsibility as a legislature than to ensure the effective administration of justice. This legislation takes aim at our broken system so that we as Wisconsin Legislators, and more importantly as Wisconsin citizens will honor the mandates of our Wisconsin and Federal Constitutions.

The eligibility requirements for State Public Defenders are severely outdated. As I mentioned earlier, the standards have not changed since 1987 and are tied to the old AFDC table, which has not kept up with the Federal Poverty Levels. Wisconsin Works or W-2, which replaced AFDC, is currently at 115% of the Federal Poverty Level. Under this legislation, this will become the new standard for Wisconsin.

*SPD has an effective system in place for provide legal counsel to those that cannot afford their own.*

*More cost-effective, but it's still taxpayer \$, & 3.4 million more taxpayer dollars.*

*Will 44 positive actually be enough? Does not seem like it. -Sider*

*Owens: Co-pay for certain individuals?*

*Albers: Individual income vs Household income.*

*Opposition to bill dissolved with sub that removed financial burden from counties. → The significant fiscal impact to the state.*



There are numerous people who are considered indigent under the Federal Poverty Level or W-2, but do not presently qualify for State Public Defender Representation. For example, a person making just \$2.87 an hour might not qualify for representation under the current standard for certain cases. The current standards are not providing justice to our working poor. Because of this, judges *must* appoint counsel for these individuals at county expense. The constitution of both the United States and Wisconsin provide a right to have counsel appointed for any person who is charged with a crime and too poor to hire a lawyer. The gap between the constitutional standard and the old AFDC table has led to inefficient dual systems of state and county appointments.

Currently, counties are appointing counsel for these cases at a higher cost than State Public Defender representation. For instance, in 2002 the State Public Defender paid private bar attorneys, at \$40 per hour, an average of \$734.43 for each regular felony assigned. In calendar 2001, the most recent for which data is available, counties reported paying, on average, \$69 per hour to private attorneys. At \$69 per hour, a county would pay an average of \$1,266.90 for each felony, which is 72.5% more than the SPD paid at \$40 per hour. This ultimately places a large and unnecessary burden on taxpayers.

The counties have been burdened with this for too long and this bill would ultimately provide a permanent fix. In our original draft of this legislation we increased the eligibility standards in January of 2004. In the draft, we asked the counties, in the short term (through the end of the 03-05 biennium) to provide reimbursement for the representation, knowing that in the next biennium, the state will phase in full funding, ending county liability for representing indigents.

We soon realized that increasing the eligibility standards as of January 2004 was not a realistic timeline, and that many counties were concerned with the reimbursement period. Therefore, I have drafted a substitute amendment-which is included with my testimony. This amendment eliminates the county charge back period and changes the start date to May 1, 2005.

The new substitute amendment has no GPR cost during the two months of the 2003-2005 biennium that will remain after the May 1, 2005 effective date. Appointments to the private bar are paid at the conclusion of the case – on average, six months after appointment.

★ [ Beginning in fiscal year 2005-2006, the annual cost for the state to assume full responsibility for these cases for which counties are currently responsible, is estimated to be \$3.4 million.

I have every confidence that moving all of the appointments to the State Public Defender is a sound decision. The SPD is a Wisconsin Forward Mastery Award Recipient, in recognition of its dedication to organizational excellence and cost efficiency. The Agency's reputation of achieving cost efficiency with quality is known worldwide as other countries, notably Israel and Japan, have modeled their indigent defense programs after the SPD's. It has been my pleasure to work with our State Public Defender, Nick Chiarkus and his staff on this very critical issue.

More realistic eligibility standards will help re-establish a fair and efficient justice system for Wisconsin's indigents, but the list of those who win with this legislation doesn't stop there. Under this bill,

- Overcrowded jails will see relief
- Judges, courts and district attorneys will not have calendars backed up for weeks and months

- and Taxpayers could see relief from inflated county taxes used to cover the cost of appointing indigent council

Assembly Bill 616 is not about a luxury – but a constitutional right. This legislation is innovative not simply for what it does, but for how it accomplishes its goal of representation. As vice chair of the Assembly Judiciary Committee and long time advocate for court reform, I am honored to introduce AB 616, legislation that will at long last repair our system and guarantee liberty and justice for all.

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I have been practicing criminal law my entire legal career. After graduating from Cornell Law School in 1989, I clerked for Frank M. Johnson, Jr. on the Eleventh Circuit Court of Appeals, the federal appeals court covering appeals arising out of cases from Alabama, Georgia and Florida. Upon completion of that one-year clerkship, I spent four years as a federal prosecutor in the United States Attorney's Office in Chicago. I moved to Milwaukee in 1994, after meeting my husband, and practiced as a federal prosecutor in the United States Attorney's Office in Milwaukee for three years. Upon leaving the government in 1997, I established my own practice. I defend clients in federal court in Milwaukee, Madison and Chicago, and in state court in several southeastern Wisconsin counties. I represent clients at every stage of the criminal process, from pre-charging investigations through appeals and habeas corpus matters. I currently accept appointments from Federal Defender Services of Wisconsin, Inc., and in the past have accepted numerous appointments from the State Public Defender.

Currently I am the secretary of the Board of Governors of the State Bar of Wisconsin, and serve on that body's executive committee. I am the vice-president of the Milwaukee Bar Association (assuming the presidency in 2005), current chair of the criminal law section, and past chair of the law practice management committee and the judicial selection committee. I am the treasurer of the Association for Women Lawyers, an officer of the Eastern District of Wisconsin Bar Association, and newsletter editor for the Seventh Circuit Bar Association. I am vice-chair and a founding board member of Federal Defender Services of Wisconsin, Inc. I have been appointed by Governor Doyle to sit on the board of directors for the State Public Defender, with confirmation hearings tentatively scheduled for mid-February. Finally, for the last several years, I have been an adjunct professor at Marquette Law School.

I strongly urge you to support 2003 AB 616, which proposes that the eligibility standards for determining whether a criminal defendant qualifies

for State Public Defender representation be raised to 115% of the federal poverty level. This legislation is crucial for a number of reasons.

Currently, the State Public Defender's guidelines for determining whether a person is "poor" are woefully outdated. They are tied by statute to the obsolete AFDC table, and have not been adjusted for inflation in some fifteen (15) years. The result of this severely outdated standard is that people with incomes *well below* the 2002 federal poverty level of \$8,860.00 do not qualify for State Public Defender representation.

This results in a class of "working poor" defendants. Imagine the person who makes \$8,000 a year—the annual salary of a low-wage worker making approximately \$4.50 an hour, or of workers who are able to work only when the work is available and cannot count on a steady income. At \$8,000 a year, this person must support him/herself, and perhaps children, on \$666.00 a month. This amount must cover housing, utilities, food, clothing, transportation (likely bus fare), medical costs, and whatever other sundry items might be necessary (such as school supplies).

To many of us, the concept of making ends meet in any way that seems palatable to us on that amount of money is extremely difficult to imagine. Imagine further, however, finding oneself in the cross-hairs of a criminal prosecution, not understanding the system or your rights, and being told that you cannot have a lawyer appointed to help you because you "make too much money."

Aside from the general unfairness of this situation, it violates the Constitution. One of the reasons I chose to practice criminal law was because I truly believe that our criminal justice system, while it has its flaws, is one of the best in the world. Part of the reason for its superiority is the fact that the system depends upon having two, relatively equally-matched adversaries who each vigorously present their sides in court. Judges and juries, having seen the evidence and presented advocacy from both sides, may then make informed and well-reasoned decisions. This truly adversarial system sets us apart from systems elsewhere in the world where the "State" acts as prosecutor, jury and judge, with the inevitable injustices that follow. We need look no further than the recent Steven Avery case to see how necessary that adversarial system is, if we truly believe in ensuring that no innocent person is punished.

Yet most people who are charged with crimes are poor. They cannot go out and hire a private attorney; they can barely feed themselves or their

families. While the government is always represented by trained, and usually very experienced, counsel, these poor defendants face the possibility of proceeding with no representation in a legal system fraught with peril for those who do not know its intricacies and customs.

Some forty years ago, in the watershed case of Gideon v. Wainright, the United States Supreme Court concluded that the Sixth Amendment of the Constitution—which guarantees the right to counsel to everyone—required that, if a person did not have the ability to hire a lawyer to represent her, the government must, at its expense, provide counsel, ensuring that no one accused of a crime would ever have to find his way through the criminal justice system without help unless he chose to do so. With that decision, it became *constitutionally required* that the government provide counsel to those who cannot afford it. It is not discretionary—it is mandated by the Constitution.

Yet, as a result of the outdated eligibility guidelines, the State Public Defender must, every day, deny representation to people who are considered “poor” under virtually every other measure—the W-2 guidelines, the federal poverty guidelines, etc. These people have an absolute constitutional right to have a lawyer, and yet the State Public Defender is not permitted to provide that lawyer.

In an attempt to address this problem, some judges opt to appoint counsel anyway, and have counties pay the expense. This procedure is far from ideal; it is costly, inefficient, and unfair. It costs much more to appoint a private lawyer at county expense than to utilize the services of an experienced public defender. The inefficiency for circuit court judges is enormous; they must duplicate the effort already expended by the State Public Defender in reviewing financial information; if they conclude that the individual is not deserving of appointed counsel at county expense, they often must schedule additional court appearances to allow the person sufficient time to try to find an attorney who will represent him/her for the amount of money the client can produce. If they find the person deserving of counsel appointed at county expense, they must find counsel willing to accept the representation, and then must spend time when the case is over reviewing the appointed attorney’s voucher to decide if the hours of work done are reasonable and if the bill should be paid. Needless to say, all of this administrative work—which the State Public Defender is already set up to do—adds to an already overwhelming case load for circuit court judges.

Further, the process is extremely inconsistent. A person who makes

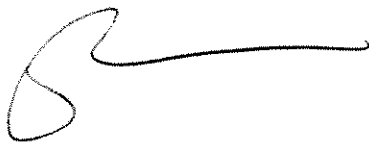
\$8,000 might be assigned to Judge X's courtroom, where Judge X immediately decides that of course the person needs counsel and appoints an attorney immediately at county expense. That same person might be assigned to Judge Y's courtroom, where Judge Y concludes that if a person does not meet the State Public Defender's indigency standards, that person is not poor, and refuses to appoint counsel. There is no difference in financial situation; the difference is in the judges.

This inconsistency is damaging to more than just the individual defendant who is denied representation. This inconsistency—where through an arbitrary process, one person's constitutional rights are upheld, while another's are denied—creates a dangerous perception that the system is not fair. When our State Public Defender was founded in the 1970s, it contributed to Wisconsin's reputation as a progressive, forward-thinking state in the area of criminal justice. Wisconsin was considered a precedent-setter, a model in how to uphold the rights of the accused. The outdated SPD eligibility guidelines have eroded that proud position. We haven't reached the low point achieved by the state of Texas, commonly considered one of the worst states in the Union for protecting the constitutional rights of the accused. But we are no longer a frontrunner.

The State Public Defender was created 30 years ago to represent people charged with state crimes who cannot afford lawyers. It has policies and procedures in place for handling such representation, and a cadre of well-trained, experienced lawyers and staff to do the work. If 2003 AB 616 is passed, and the SPD is authorized to hire additional staff, it can represent roughly 75% of the newly-eligible individuals, at a much lower cost than appointed counsel at either state or county expense. This is the logical, cost-efficient, fair, constitutional way to address this issue.

The passage of this legislation is critical. It will result in a more fiscally responsible, efficient and fair process for assuring that our state upholds the rights guaranteed to all of us under the Constitution.

Thank you for taking the time to consider my testimony.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line that tapers to the right.

## MEMORANDUM

**To:** Members of the Assembly Committee on Corrections and the Courts  
**From:** State Bar of Wisconsin  
**Date:** January 26, 2004  
**Re:** Assembly Bill 616 - SUPPORT

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The State Bar of Wisconsin supports AB 616 which raises to 115% of the federal poverty level (FPL) the financial criteria for determining eligibility for representation by the State Public Defender's Office. Updating the eligibility standards will fulfill the state's constitutional obligation to provide counsel to indigent defendants and improve the administration of justice.

More and more poor defendants are ineligible for representation by a public defender in Wisconsin because the eligibility criteria are so outdated, tied by statute to the obsolete AFDC table and equal to approximately 1/3 of the FPL. Those who earn too much money to qualify for a public defender, but have a constitutional right to representation, look to judges to appoint counsel for them, at county taxpayer expense. Since the state standards have not been updated in 16 years, the burden on counties is growing every year.

At the county level, judges are appointing at varying standards of indigency. One county may appoint counsel at 100% of the FPL, while another county may appoint at 60% of the FPL. The inconsistent manner in which poor defendants are treated after being denied a public defender raises issues of equal protection, possibly inviting a court challenge.

To address this constitutional crisis, Rep. McCormick has developed an innovative proposal to ensure that indigent accused are treated alike without draining state coffers during the 2003-2005 fiscal biennium. Under the substitute amendment that will be offered, effective May of 2005, Assembly Bill 655 will ensure that those who meet the bill's eligibility standard of 115% of the FPL will receive representation.

Raising indigency standards will also improve the administration of justice. Right now the indigent accused languish in county jails while courts scramble to find representation for those who are not eligible for a public defender. Courtroom proceedings are delayed while the search continues and the costs to counties escalate.

To ensure the state honors its constitutional obligation to the indigent accused and to promote equal justice, the State Bar of Wisconsin urges committee members to support AB 616.

*If you have any questions, please contact Deb Sybell, SBW Government Relations Coordinator, at (608) 250-6128.*

**State Bar of Wisconsin**

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## Assembly Committee on Corrections and the Courts

DATE \_\_\_\_\_

Moved by \_\_\_\_\_

Seconded by \_\_\_\_\_

AB 616 \_\_\_\_\_

SB \_\_\_\_\_

Clearinghouse Rule \_\_\_\_\_

AJR \_\_\_\_\_

SJR \_\_\_\_\_

A \_\_\_\_\_

SR \_\_\_\_\_

Other \_\_\_\_\_

A/S Amdt \_\_\_\_\_

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Be recommended for:

Passage

Introduction

Adoption

Rejection

Indefinite Postponement

Tabling

Concurrence

Nonconcurrency

	Committee Member	Aye	No	Absent	Not voting
1.	Rep. Garey Bies, chair	1			
2.	Rep. Sheryl Albers, vice-chair	2			
3.	Rep. Greg Underheim				
4.	Rep. Carol Owens		1		
5.	Rep. Frank Lasee		2		
6.	Rep. Scott Suder		3		
7.	Rep. Mark Pocan	3			
8.	Rep. Pedro Colon	4			
9.	Rep. Tony Staskunas				
10.	Rep. Sheldon Wasserman	5			
Totals		5	2		

MOTION CARRIED

MOTION FAILED

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