HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, et al., Plaintiffs, v. CITY OF MOUNT VERNON and CITY OF BURLINGTON, Defendants.	No. C11-1100RSL **MOTION OF WASHINGTON DEFENDER ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

I. INTRODUCTION

The Court issued an Order for Further Briefing, Dkt. No. 319. Question number 3 in the Court's Order asks: "Has any state or municipality adopted 'hard' caseload standards like those that Washington is contemplating?" The answer to the Court's question is yes. For the reasons set forth below, The Washington Defender Association ("WDA") respectfully moves the Court for leave to file the attached Amicus Curiae Brief (Exhibit A) which addresses Question number 3.

/ /

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II. IDENTITY AND INTEREST OF *AMICUS*

A. WDA's Mission

WDA is a statewide non-profit organization with 501(c)(3) status. WDA has more than 1300 members and is comprised of public defender agencies (some of which are city or county agencies, and some of which are non-profits that contract with governmental entities), private attorneys who are on contract or appointment lists to represent indigent defendants (in all areas of the state, including urban and rural jurisdictions), and those who are committed to seeing improvements in indigent defense. WDA is the voice for indigent defense in Washington and with the Federal Government; for example, we have signed on to a number of amicus briefs filed in the United States Supreme Court, worked with United States legislators to write bills and have met with representatives of the executive on issues relating to indigent defense. Our advocacy extends to legislative reform and work within the courts and the Washington State Bar Association. We also have authored publications on issues such as the consequences of criminal convictions. See, *Beyond the Conviction*, located at http://www.defensenet.org/resources/publications-1/beyond-the-conviction/Beyond%20the%20Conviction%20-Updated%20-%202007.pdf.

WDA's primary purposes include improving the administration of justice and remedying inadequacies and injustices in substantive and procedural law. WDA advocates on issues of constitutional effective assistance of counsel and professional norms and standards under the laws of the State of Washington and the United States.

B. WDA's Role in Developing Hard Caseload Standards in Washington

WDA first drafted standards for Washington public defense services, including numerical caseload standards in 1984. The Washington State Bar Association (WSBA)

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endorsed the standards, including the caseload standard, in 1990. The versions of the standards relevant to this case are the 2007 and 2011 versions, which were admitted as Trial Exhibits 18 and 239. The WDA/WSBA standards have in large part been approved by the Washington Supreme Court under CrR 3.1.

WDA has participated in the WSBA committees that have studied and updated the standards for years. WDA's Executive Director was a member of the WSBA Blue Ribbon Panel on Criminal Defense and the Committee on Public Defense, and is now a standing member on the Council on Public Defense. These committees consist of a broad and balanced group of criminal justice stakeholders, including prosecutors, judges, public defenders working in municipal and county courts state, law school professors, county and municipal representatives and non-attorneys. These stakeholders come from across the state and work in diverse localities. A broad consensus of these groups support the current standards.

C. WDA's Prior Amicus Participation in the *Weston* Case Involving Excessive Public Defense Caseloads in Mount Vernon

WDA and its members have previously been granted leave to file amicus briefs on issues relating to criminal defense issues. For example, WDA participated as amicus in the case of *Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1992), which has been cited to this Court in this litigation a number of times (fn. 1 in the decision acknowledges the WDA amicus brief).

III. REASONS WHY MOTION SHOULD BE GRANTED

WDA moves for leave to file the proposed amicus brief pursuant to the inherent authority of the Court. This Court previously granted WSAMA's motion to participate as amicus in this case, Dkt. No. 136, on the grounds that the perspective of other municipalities

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facing similar challenges in operating their public defense systems may be helpful to the Court. WSAMA's amicus brief, Dkt. No. 74, like WDA's proposed amicus brief, addresses the issue of caseload standards.

The same reasoning the Court used in granting leave to file WSAMA's amicus brief applies to WDA's motion. WDA provides the statewide public defender perspective on the issues before the Court at this point in the case. WDA has a particularly helpful perspective on question #3, regarding jurisdictions with "hard" caseload limits within Washington, based on its experience in developing the standards as described above.

Courts have recognized that federal district courts possess the inherent authority to accept amicus briefs. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) ("[D]istrict courts possess the inherent authority to appoint 'friends of the court' to assist in their proceedings."). The role of an amicus is to assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A. C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir.1991). This authority supports the Court's exercise of its discretion to accept WDA's proposed amicus brief.

IV. CONCLUSION

For the foregoing reasons, the Court should grant WDA's motion for leave to file the attached amicus brief.

DATED this 14th day of August, 2013.

Respectfully submitted,

By: /s/ Travis Stearns
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Attorney for *Amicus* Washington Defender Association

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, I sent a copy via email of the foregoing *Motion of Washington Defender Association for Leave to File Amicus Curiae Brief* to the parties listed below; and on August 14, 2013, I electronically filed the foregoing *Motion of Washington Defender Association for Leave to File Amicus Curiae Brief* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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EXHIBIT A

HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, et al., Plaintiffs, v. CITY OF MOUNT VERNON and CITY OF BURLINGTON, Defendants.	No. C11-1100RSL **BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER ASSOCIATION**

I. ISSUE ADDRESSED BY *AMICUS*

The Court issued an Order for Further Briefing, Dkt. No. 319. Question number 3 in the Court's Order asks: "Has any state or municipality adopted 'hard' caseload standards like those that Washington is contemplating?" The answer to the Court's question is yes, as this brief will address.

II. INTEREST OF *AMICUS*

A. WDA's Mission

The Washington Defender Association ("WDA") is a statewide non-profit organization with 501(c)(3) status. WDA has more than 1,300 members and is comprised of

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public defender agencies (some of which are city or county agencies, and some of which are non-profits that contract with governmental entities), private attorneys who are on contract or appointment lists to represent indigent defendants (in all areas of the state, including urban and rural jurisdictions), and those who are committed to seeing improvements in indigent defense. WDA is the voice for indigent defense in Washington and with the Federal Government; for example, we have signed on to a number of amicus briefs filed in the United States Supreme Court, worked with United States legislators to write bills and have met with representatives of the executive on issues relating to indigent defense. Our advocacy extends to legislative reform and work within the courts and the Washington State Bar Association. We also have authored publications on issues such as the consequences of criminal convictions. See, *Beyond the Conviction*, located at http://www.defensenet.org/resources/publications-1/beyond-the-conviction/Beyond%20the%20Conviction%20-Updated%20-%202007.pdf.

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WDA first drafted standards for Washington public defense services, including numerical caseload standards, in 1984. The Washington State Bar Association (WSBA) endorsed the standards, including the caseload standard, in 1990. The versions of the standards relevant to this case are the 2007 and 2011 versions, which were admitted as Trial

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Exhibits 18 and 239. The WDA/WSBA standards have in large part been approved by the Washington Supreme Court under CrR 3.1.

WDA has participated in the WSBA committees that have studied and updated the standards for years. WDA's Executive Director was a member of the WSBA Blue Ribbon Panel on Criminal Defense, the Committee on Public Defense, and is now a standing member on the Council on Public Defense. These committees consist of a broad and balanced group of criminal justice stakeholders, including prosecutors, judges, public defenders working in municipal and county courts, law school professors, county representatives and non-attorneys. These stakeholders come from across the state and work in diverse localities. A broad consensus of these groups support the current standards. Information on the current Council can be found at http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Council-on-Public-Defense.

The standards begin by making clear that they are the minimum requirements for providing legal representation to poor persons accused of crimes in Washington. These standards were developed by drawing on (1) the practical experience of defense attorneys around the state and (2) on national standards that set forth minimum requirements for public defender and assigned counsel programs. The particular numbers used in the "hard" caseload standard resulted from a broad spectrum of practical attorney experience. These numbers take into account public defense practices, statutes and case law, and city and county criminal laws, factors that contribute to the amount of time necessary to provide actual representation to clients charged with violating those laws. The caseload standard is a carefully considered measure of the maximum number of cases that a misdemeanor public defender in Washington can handle while still fulfilling the constitutional duty to adequately represent each client.

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The standards were also explicitly designed and intended to help governmental bodies establish and maintain public defense systems that operate efficiently and meet the constitutional requirements for effective assistance of counsel. The standards are intended to be a practical document for governments and are not based on an ideal public defense system; rather, the standards represent the "minimum acceptable qualities" of a workable and efficient public defense system. 2007 Standards, p. 1. The standards describe in detail how governments within Washington can carry out their responsibility to operate a public defense system without violating the independence of public defense attorneys.

C. WDA's Prior Amicus Participation in the *Weston* Case Involving Excessive Public Defense Caseloads in Mount Vernon

WDA and its members have previously been granted leave to file amicus briefs on issues relating to criminal defense issues. For example, WDA participated as amicus in the case of *Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1992), which has been cited to this Court in this litigation a number of times (fn. 1 in the decision acknowledges the WDA amicus brief). The WDA amicus brief in that case is attached as Appendix 1.

The state Court of Appeals cited the WDA caseload standards favorably in *Weston* and used the standards to point out that the City of Mount Vernon had excessive caseloads. The Court of Appeals' ruling was based on evidence in the record that the Mount Vernon public defender's office had a caseload of 1800 to 1900 cases per year, with only two attorneys handling that caseload. *See* attached Appendix 2. The public defender informed the Superior Court Judge in a public hearing that she personally had a caseload of 800 to 900 people for one year and that was over double the state guidelines.

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III. ARGUMENT

A. MANY CITIES AND COUNTIES IN WASHINGTON CURRENTLY COMPLY WITH THE WDA/WSBA "HARD" MISDEMEANOR CASELOAD STANDARD

WDA is aware of at least 23 jurisdictions in Washington that have officially adopted numerical caseload standards which are substantially similar to the WDA/WSBA misdemeanor standard, including cities as small as Asotin and counties in all parts of the state.[1] Indeed, a close neighbor of the defendant Cities—the City of Bellingham—has adopted a numerical caseload standard of 300 to 400 misdemeanors per year. Similarly, Skagit County, whose misdemeanors are handled in the same district court system as Mount Vernon's and Burlington's, has adopted a numerical caseload standard of 425 misdemeanors per year.

The number of jurisdictions in Washington with hard caseload standards is even larger if public defender agencies with internal policies supporting compliance with the WDA/WSBA caseload standards are considered, the best example of which is the City of Spokane, which has a policy of keeping caseloads at or below the 400 standard.

Many of WDA's members already have caseloads that substantially comply with the WDA standard, in that each fulltime attorney handles approximately 400 unweighted cases or 300 weighted cases. For example, this is true of the cities of Spokane, Bremerton, and Olympia, and the counties of Jefferson, King, Spokane, Skagit, and Thurston. As such, the state Office of Public Defense readily found over 40 attorneys around the state to participate

[1] The 23 jurisdictions with hard caseload standards either by ordinance or contract are: cities Asotin, Bellingham, Bonney Lake, Medina, Port Angeles, Seattle, and Shelton; counties Adams, Benton, Cowlitz, Grays Harbor, Island, Jefferson, King, Klickitat, Lewis, San Juan, Skagit, Skamania, Spokane, Thurston, Whitman, and Yakima.

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in the time study regarding the misdemeanor caseload standard. All participants were required to have total caseloads no more than approximately 400 misdemeanors per year (unweighted). http://opd.wa.gov/TrialDefense/TimeStudy/0105-2013_TimeStudy.pdf. In addition to the cities and counties that have already been mentioned as having and/or complying with the WDA/WSBA standard, misdemeanor public defenders who maintain caseloads of approximately 400 unweighted misdemeanors range from Ferry and Adams County to Pierce County and Tacoma.

B. COMPLIANCE WITH THE WDA/WSBA "HARD" MISDEMEANOR CASELOAD STANDARD IS ESSENTIAL TO PREVENT HARM TO INDIGENT DEFENDANTS.

The WDA caseload standard is intended to be considered with the other indigent defense standards in order for the minimum requirements for public defense representation to be met. In particular, the caseload standard must be read with the preceding standard which states that "Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client." The misdemeanor standard of 300 cases per year, or 400 where certain special circumstances are present, represents the upper limit of cases that, based on the collective experience of our members, can adequately be handled while providing the minimum constitutionally required assistance of counsel for each client. A caseload of 300 misdemeanor cases per year for a full-time public defender translates to approximately 5.5 hours on average per case. The standard allows minimally adequate time for investigation and effective presentation of each client's case. It takes account of the fact that misdemeanor cases in this state have varying levels of complexity.

The comment to the WDA caseload standard (p. 13) explains why a "hard" or numerical caseload standard is critical to a constitutional public defense system:

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> Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads, even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.

Another form of harm from excessive misdemeanor caseloads is discussed in the comments to the WDA caseload standard. Misdemeanor charges for crimes such as driving under the influence and domestic violence have grown more complex and result in consequences that are more serious than those experienced in the past. Public defenders are required to consider the immigration consequences of misdemeanors in advising their clients, and many other forms of consequences of misdemeanor convictions must also be considered. *See*, WDA standards p. 17-18, 29, 31-33; *and see*, WDA Guide "Beyond the Conviction," *supra*.[2]

IV. CONCLUSION

The answer to the Court's question number 3 is yes. Many jurisdictions in Washington comply with a hard caseload standard, and there are important reasons for doing so.

DATED this 14th day of August, 2013.

Respectfully submitted,

By: /s/ Travis Stearns

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[2] WDA has for years provided free technical assistance to public defenders around the state regarding the immigration consequences of criminal cases, through its Immigration Project, described in greater detail at http://www.defensenet.org/immigration-project/about-wdas-immigration-project.

Attorney for *Amicus* Washington Defender Association

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APPENDIX 1

No. 30881-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CITY OF MOUNT VERNON,

Respondent,

vs.

GARY WESTON

Petitioner

BRIEF OF AMICUS CURIAE

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Statement of the Case

This petition for discretionary review asks the Court of Appeals to reverse a Superior Court's order denying the trial lawyer's motion to withdraw and appoint different counsel on appeal from an RALJ decision. The trial lawyer, the lead public defender in a two lawyer office, herself responsible for approximately 700 cases per year in the Mt. Vernon Municipal Court and for running a city department (Motion to Reconsider p.2), asked that new counsel be appointed because of the "enormous caseload" she faces at the trial level, the time demand of her administrative responsibilities, and because of her own inexperience in the appellate courts.

The Superior Court judge, relying on RAP 15.2(f), directing the trial court to determine questions relating to the appointment and withdrawal of counsel for an indigent party on review, denied the motions. The court identified as its reasons for its ruling the following:

1. "That's double tax payers money as far as I am concerned..rather than send it down to WADA and let them come up and get a transcript and go through

the whole process again to find out what the heck is going on, I think that the attorneys who defend these cases in most instances ought to handle it on appeal. If they think that there is a good faith basis for the appeal, they ought to handle it." RP 2

2. " I think that for proper judicial administration and savings of tax dollars for this county, I'm going to...." RP 3

3. " I think the burden should be on local counsel to handle these. They know the issues to appeal them. The[y] know the case better than WADA and they have been through it at the local level, and it seems to me that it's a simple matter for someone in your position to put this case together on appeal...They have to go through the entire transcript, understand the issues. I suppose they call you, and it just seems like to a point duplication of effort." RP 4

The Court added, "If I make error, you can get the appellate court to reverse." RP 3.

Argument

The trial judge misapprehended the facts of how

appellate cases are handled and how counsel is paid in Washington. He ignored the crushing caseload of the trial attorney and the logical consequence that she would have to choose which clients receive effective assistance and which would not if she handled the appeal. His only answer to the claim that counsel did not have the time and resources to handle the appeals was that the prosecutor did not have any more time and resources, a factual conclusion for which there is no support in the record and which is irrelevant to the issue of effective assistance by defense counsel. RP 3 He ignored the trial lawyer's claim that she believes "that it would probably be malpractice for me to do my appeals myself." RP 3 She has no experience arguing cases in the Court of Appeals. Motion to Reconsider, p. 2.

The judge was confused about what he called "double" payment; there would be no greater payment to a new attorney than to the trial defender for handling the appeal, as generally appeals are paid on a per case basis. In fact, the Washington Appellate Defender could be paid less for a standard

Motion for Discretionary Review than would other appointed counsel. [1]

This Court should reverse the trial court, permit withdrawal by the public defender, and order that new counsel be appointed on appeal.

I. The Trial Court's Denial of the Motion to Withdraw Denied the Appellant's Right to Effective Assistance of Counsel

The United States Supreme Court has made clear that an indigent defendant has a right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985), Douglas v. California, 372 U.S. 353 (1963). The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee that right.

In a case excusing exhaustion of state remedies in a habeas corpus proceeding because of excessive

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[1] The Washington Appellate Defender is paid $1148 for petitions for discretionary review which result in a decision. Phone call with Suzanne Elliott, Director of the Washington Appellate Defender, July 21, 1992. Under the Appointed Attorney's Fee Schedule published by the Supreme Court Clerk, Motions for Discretionary Review granted in the Court of Appeals have a fee of $1648, and motions denied have a fee of $1000. See Appendix A.

elay by appellate counsel because of their enormous aseload, the Tenth Circuit wrote:

> It is the obligation of this court and the federal district courts to insure that the constitutional rights of indigent habeas petitioners are not violated by the denial, individually or systematically, of effective counsel on their first direct criminal appeals.
>
> Harris v. Champion, 938 F.2d 1062, 1073 (10th Cir. 1991).

The Court made clear that "Competent court-ppointed counsel is a constitutional right for all ndigent criminal defendants in a first appeal rovided of right by the state." Harris, supra, 938 .2d at 1065, citing Evitts, supra. The Court dded: "It is the duty of the state in this case to rovide effective and adequate counsel that will nsure indigent convicts a timely direct appeal." arris, 938 F.2d at 1066.

As in Harris, where the defendant technically ad appointed counsel, so would the appellant here f the Mt. Vernon Defender is forced to represent im. Yet because of the caseload pressure and the ack of experience of the Defender counsel, at some oint the workload demands in the trial court and ne lack of time and experience available will

render such assistance ineffective.

As the Evitts court wrote: "[N]ominal representation on an appeal...does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Evitts, supra, 469 U.S. at 396.

Appellate and trial courts across the country are moving increasingly to relieve unacceptably high public defender caseloads. See, Louisiana v. Peart, et. al., No. 346-331, Criminal District Court Parish of Orleans, February 11, 1992, ordering that the Legislature immediately provide additional money to the Public Defender and that a long-term plan be developed to add significant numbers of staff to the office.[2]

See also, In re: The Matter of Continued Indigent Representation by the District Public Defender's Office in the Knox County General

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[2] The Peart order was stayed by the Louisiana Supreme Court, which is expected to issue a decision this fall. No. 92-KD1039, 92-KA0907.

Sessions Court, General Sessions Court, Knox Co., Tennessee, Division III (1991), copy attached as Appendix B. In Knox County, the court found that because of excessive caseload, additional appointments would constitute a conflict of interest between new clients and current clients of the Defender, and ordered that new appointments would be suspended.

In Arizona v. Smith, 681 P.2d 1374, 1381, (Supreme Ct. Ariz. 1984), the Court found that "an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective." In that case, defender attorneys were handling cases far in excess of the NLADA Guidelines for Negotiating and Awarding Indigent Defense Contracts, which were cited with approval by the Court.[3]

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[3] These Guidelines were endorsed by the American Bar Association and are similar to those endorsed by the Washington State Bar Association and referenced by the Legislature in RCW 10.101. For example, misdemeanor attorneys should not carry more than 300 cases per year under either set of standards.

The Court criticized the attorneys who accepted the excessive caseloads, citing rules of professional responsibility and ABA Standards on workload. ABA Standards for Criminal Justice, Standards 5-4.3 (1980).[4] In this case, counsel did seek to be relieved from the appellate appointments which she felt would be unethical to accept.

II. Three Different Sets of Standards Hold that Defenders Should Not Handle More than 300 Misdemeanors Per Year

There are three sets of defender standards relevant to the appeal by the Mt. Vernon Public Defender. One has the imprimatur of the American Bar Association, one that of the Washington State Bar Association, and one of the Seattle-King County Bar Association. The relevant caseload ceiling, 300 misdemeanors per year, is the same in all three

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[4] These standards have been published in a new edition, ABA Standards for Criminal Justice (Third Ed. 1990, 49 CrL 2013). Commentary is in an Approved Draft (1992), and are pending publication in a new volume which will include both standards and commentary. Telephone call with Professor Richard J. Wilson, American University, Reporter for the Defense Services Standards, July 23, 1992. The workload standard is now 5-5.3.

sets. The ABA-endorsed standards have been relied upon by the Arizona Supreme Court in State v. Smith, supra.

ABA Policy Supports 300 Misdemeanor Ceiling

The American Bar Association has endorsed the National Legal Aid and Defender Association's **Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services.**

The ABA House of Delegates voted in July, 1985, to approve the following resolution as ABA Policy:

> **Be it resolved,** That the American Bar Association urges jurisdictions which choose to utilize governmental contracts for criminal defense services to do so in accordance with both the National Legal Aid and Defender Association's **Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, and Chapter 5 (Providing Defense Services)** of the second edition ABA Standards for Criminal Justice.

The NLADA document was the result of four years of work within the national defender group. NLADA, having drawn extensively on the ABA Standards in its work, requested input from the ABA, which assigned the matter to the Criminal Justice Section, Defense Services Committee. The committee vice-chair, counsel for amicus herein, Robert C. Boruchowitz,

chaired a subcommittee reviewing the document. Among the subcommittee members was Professor Norman Lefstein of the University of North Carolina School of Law, who acted as a reporter for the ABA on the defense services section of the ABA Standards for Criminal Justice.

The Section Council adopted changes recommended by the committee, and the NLADA accepted those changes, and the House of Delegates approved the policy in 1985.

The original NLADA group included Vincent Aprile, from the defender program in Kentucky, Alex Landon, then the director of the largest defender office in San Diego, and Malcolm Young, then a staff attorney with NLADA and an experienced defender lawyer.

The allowable caseload guideline reads as follows:

> Guideline III-6: Allowable caseloads. The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation.

The comment, which was relied on in **Arizona v.**

Smith, supra, reads as follows:

> Under no circumstances should maximum allowable caseloads for each full-time attorney exceed the following: (a) 150 felonies per attorney per year; or (b) 300 misdemeanors per attorney per year;...The maximum allowable caseloads specified here are those recommended in previous drafts and in Guidelines-Seattle, p.3. Allowable caseloads must necessarily be lower in many jurisdictions.

In Smith, supra, the Arizona Supreme Court found that the excessive caseload of a contract defender in Mohave County raised an inference of inadequate representation. The Court cited the NLADA caseload guidelines (then in draft form, before receiving the ABA endorsement), and found that the lawyer's caseload "was excessive, if not crushing." 681 P.2d. 1374, 1380. The trial attorney had handled in eleven months 149 felonies, 160 misdemeanors, 21 juvenile and 33 other types of cases--on a "part-time" basis while maintaining a private civil practice.

In reaching its decision, the court relied on the standards, on the judges' own experience as attorneys, and on requests for compensation by attorneys who appear before them. The court observed that even though this particular defendant

was given minimum adequate representation,

> The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads.
> Smith, supra, at 1381.

To avoid this problem, the Mt. Vernon Public Defender has acted correctly in bringing to the Court the matter of her excessive caseload, so that she does not have to choose to which of her many clients she will provide adequate representation. As the Arizona court emphasized, the fact that one of the 149 felony clients received minimally adequate representation did not mean that the rest of them did.

The Arizona court held that the low-bid contract system violated state and federal due process and right to counsel constitutional guarantees, noting, " ... an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective." Smith, supra, at 1381.

The court faulted not only the system used by the local government but also the attorneys

involved, who "are in a position to know when a contract will result in inadequate representation of counsel." Smith, supra, at 1381. The Court cited with approval disciplinary rules on accepting employment that cannot adequately be performed and the ABA workload standard 5-4.3 cited above.

The ABA Standards for Criminal Justice, Providing Defense Services, (Third. Ed. 1990, 49 CrL 2013, 2023) Standard 5-5.3, Workload, also supports the Mt. Vernon Defender's request for appointment of new counsel.[5]

> (a)Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. ...
>
> (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads,

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[5] The Third edition of the Standards renumbered the Workload Standard 5-5.3 which was 5-4.3 in the 1990 edition relied on in Smith, supra.

> including the refusal of further appointments. Courts should not require individuals or programs to accept workloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations. (Emphasis added.)

The commentary makes clear that excessive workloads impede the provision of quality legal services to the poor. "Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable....The attorney who has too many clients also experiences special concerns about his or her ethical duties." Providing Defense Services, (Third. Ed. 1992, Approved Draft) 5-5.3, Commentary, p. 104.

The ABA points out that "a managing attorney who has extensive supervisory responsibilities but a very low caseload may have a heavier workload than a staff attorney whose caseload is average." Id., at 101. The Mt. Vernon defender has both supervisory responsibilities and a heavy caseload.

The commentary states unequivocally: "In the case of a defender program with excessive workload, additional cases must be refused and, if necessary,

pending cases transferred to assigned counsel." Id., at 110.

An ABA Informal Opinion, No. 1359 (1976), supports the argument that failure to limit caseload may constitute a violation of DR 6-101. See Mounts, "Public Defender Programs, Professional Responsibility, and Competent Representation," 1982 Wisc. L. Rev. 473, 483, fn.53 (1982). The Wisconsin Committee on Professional Ethics, Formal Opinion E-84-11, Sept. 1984, states that a staff lawyer faced with a workload "that makes it impossible...to prepare adequately for cases and to represent clients competently" should, "except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the extent that the duty of competent, nonneglectful representation can be fulfilled." The attorney "should withdraw from a sufficient number of matters to permit handling of the remaining matters." Cited in Providing Defense Services, supra, at 104, fn.4.

Washington Bar Supports Defender Caseload Standards

The Washington Bar Association Board of Governors has endorsed the standards developed by the Washington Defender Association. The WDA developed these standards in part with financial assistance from the American Bar Association's Bar Information Project and from the State Bar Criminal Law Section. Standard Three, Caseload Limits and Types of Cases, reads in part as follows:

> The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The standard states that the caseload should not exceed 300 misdemeanors per attorney per year. Standards for Public Defense Services (1989), Washington Defender Association, endorsed by the Washington State Bar Association Board of Governors (1990).

The Legislature, referring to these standards, has directed that local governments adopt standards

for public defense. RCW 10.101.030.

Seattle-King Co. Bar Supports Declining Case Assignments

The Seattle-King County Bar Association based its standards on the year-long work of a "blue-ribbon" committee of attorneys and judges, including former defenders and former prosecutors. With regard to excessive caseloads, it wrote:

> Whenever the agency director, in light of the workload standards in 1 above, determines that the assumption of additional cases reasonably might result in inadequate representation for some or all of the agency's clients, the agency should decline any additional cases until the situation is eased. Individual agency attorneys have the duty not to accept more clients than they can effectively handle. Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies, Guideline No.1, 3-4 (1982).**

III. **Withdrawal is Appropriate Remedy for Defender Facing Excessive Caseload**

The remedy sought by the Mt. Vernon Defender has been afforded by several courts presented with overworked defenders. In Schwarz v. Cianca, 495 So.2d 1208 (Fla.App.4 Dist.1986), the trial court denied relief to the public defender who sought to withdraw from certain pending juvenile and misdemeanor cases and future filings. The appellate

court granted the relief, noting the unrebutted showing that the defender's caseload was so excessive at the time of the hearing on the motion to withdraw as to disable the petitioner from rendering effective counsel to the defendants in the 150 oldest cases, but ordered all parties to respond within 30 days to show cause why the defender should not be discharged from the other cases. Observing that the county was concerned about costs, and the impact on the attorneys general who handled the cases for the state, the court said: "...funding is not within this court's province but protection of constitutional rights is." 504 So. 2d 1349,1351.

Citing State ex. rel. Escambia Co. v. Behr, 354 So.2d 974 (Fla.Ist.Dist.1978), upheld, Escambia Co. v. Behr, 384 So.2d 147 (Supreme Ct. Fla, 1980), the Court made clear that "**Behr** stands for the proposition that excessive caseload is a legitimate ground for relieving a public defender ...." 504 So.2d, at 1352.

In Behr, the defender moved to withdraw from six non-capital felony cases citing excessive

caseload and inability to render effective assistance. See also, Young v. Florida, 580 So.2d 301 (Fla. App. 1 Dist. 1991), permitting defender to withdraw from 47 appeals because inadequate funding made it impossible to hire enough attorneys to prepare briefs in a timely fashion.

IV. The Cost of Appointed Counsel is the Same Whether Trial or New Appellate Counsel do the Work

The Supreme Court pays appointed counsel based on the type of case. (See Appointed Attorney's Fee Schedule, Appendix A, footnote 1 supra.) Motions for discretionary review granted in the Court of Appeals are paid at $1648; motions denied are paid $1000. There are provisions for extraordinary compensation. It is likely that experienced appellate counsel without enormous caseloads would have less need for extraordinary compensation than inexperienced counsel who might have to spend additional hours learning procedures and caselaw which experienced attorneys would not.

The judge's expressed concern that it would cost more for new counsel to handle the case has no basis in the facts of the current procedures and

practices, and in fact it is likely that either new counsel would receive the same pay as the trial counsel, or, if the Washington Appellate Defender handles the case, new counsel actually could receive less money.

The judge seemed to think that local counsel would not have a transcript prepared and that new counsel would need one. As this is an appeal from an RALJ, the transcript of the Superior Court hearing, if needed, is likely to be quite short. Any counsel on appeal will need a record of the trial court proceedings. RAP 9.2 makes clear that "only those portions of the verbatim report of proceedings necessary to present the issues raised on review" should be prepared. The issue is what is necessary to present the issues on review, not what the trial lawyer may remember about the case. The rule on which the judge relied, RAP 15.2(f), requires that if new counsel is appointed, trial counsel must assist in preparing the record, which

reduces time and effort required by the new counsel.[6]

Conclusion

This Court should grant discretionary review and permit the withdrawal of the public defender and appointment of new counsel. A significant question of law under the Constitution of the State of Washington and the Constitution of the United States is involved, namely, the right to effective assistance of counsel. In addition, the case involves an issue of public interest which should

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[6] An indigent appellant is entitled to a transcript at public expense. See, State v. Williams, 84 Wn.2d 853, 529 P.2d 1088 (1975): conviction reversed because of the failure of the trial court to provide defendant and his counsel with a statement of facts reflecting the proceedings during the first trial.

> A long line of cases beginning with Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956),..., mandate that indigent criminal defendants be provided with the basic tools of an adequate defense or appeal, when those tools are available for a price to nonindigents. 84 Wn.2d at 856.

The judge's apparent fear that the cost of transcripts would be engendered only if new counsel is appointed has no basis in fact. Counsel on appeal are not expected or permitted to argue cases with no record or to determine the issues to raise simply from their memory of the case.

be determined by an appellate court. RAP 2.3 (d). It appears that this case is not an isolated one. Counsel for amicus understands that at least two other cases present similar issues to this court. State v. Norris, No. 30104-7-I; Mt. Vernon v. Soriano, No. 30803-3-I.

The Superior Court has misapprehended the facts of the costs and procedure on appeal. It has ignored the overwhelming caseload of the trial counsel which would threaten her ability to represent her client on appeal. There is no reason to force the defender to represent the client on the appeal, in light of her crushing workload and her lack of appellate experience. New counsel, whether the Washington Appellate Defender, another defender organization, or private counsel, can be appointed.

Respectfully submitted,

Robert C. Boruchowitz
WSBA #4563
Attorney for Amicus

Washington Defender Association
810 3rd Avenue
Seattle, Washington 98104
(206) 447-3900

APPENDIX A

Appointed Attorney's Fee Schedule

Category A:

For the following categories of appellate cases, the fee is $1648.00.

1. Direct Appeals.
2. Motion for Discretionary Review granted in the Court of Appeals.
3. Civil in forma pauperis motions granted by the Supreme Court.
4. Personal Restraint Petitions only where an attorney is appointed.
5. Notice of Appeal and direct review concluding with an opinion or a decision pursuant to a motion on the merits.
6. Motion for Discretionary Review granted in the Supreme Court.

Category B:

For the following categories of cases, the fee is $1000.00.

1. Petitions for review granted.
2. Appeals from probation revocation hearings.
3. Appeals from guilty pleas.
4. Sentencing appeals.
5. Accelerated review of a disposition in a juvenile offense matter.
6. Motion for Discretionary Review denied in the Court of Appeals.
7. Motion for Discretionary Review denied in the Supreme Court

Category C:

For the following categories of appellate cases, the fee is $1100.00.

1. Notice of Appeal and filing an Anders brief concluding in a ruling/order of dismissal.

Category D:

For the representation in a review of an aggravated first degree murder case, the base fee is $3300.00.

In addition to the base fee, appointed counsel shall be awarded on an hourly basis for attorney hours in excess of eighty hours, reasonably and necessarily incurred, in accordance with said prevailing standards as determined by the Supreme Court.

Withdrawal and Substitution

Where a withdrawal and substitution results in two or more counsel appearing in the same review proceeding, each counsel will receive, an appropriate apportionment of the standard fee for the entire review as determined by the Supreme Court.

You should consult the attached guidelines to determine the basic services expected for each fee, any factors which might result in a reduction of the fee, and extraordinary factors which might result in an increased fee. The fees listed above include your out-of-pocket expenses during the appeal process. Payments will be cumulative unless otherwise directed by the Supreme Court.

COMPENSATION GUIDELINES FOR INDIGENT APPELLATE APPOINTMENTS

Standard Compensation

An attorney appointed to represent an indigent in an appellate court shall be compensated by a basic fee set by the Washington State Supreme Court from the total funds authorized by the Washington State Legislature. (See current fee list attached). The following basic services are expected to be preformed, where appropriate, by an appointed attorney in an appellate court:

1. Consultation with client and attorney client communication.

2. Consultation with trial counsel to advise on:

   A. Issues to be raised on appeal.
   B. Portion of trial record necessary for appeal.
   C. Other matters as needed.

3. Consultation or coordination with co-appellate counsel.

4. Review of trial record for error; independent review and investigation for possible error outside trial record.

5. Preparation and perfection of the appeal including:

   A. Notice of Appeal.
   B. Authorization of indigency.
   C. Preparation, transmittal and docketing of record on appeal including,
      i. Clerk's Papers,
      ii. Verbatim Report of Proceedings or other summary of testimony,
      iii. Trial exhibits,
      iv. Other including motions for trial court proceedings necessary for disposition by the reviewing court.
      v. Research, preparation and timely filing of brief.

6. Research, preparation and timely filing of reply or answer.

7. Preparation and delivery of oral argument.

8. Routine motions practice.

9. Perfection of client's rights for subsequent review.

These are not exclusive requirements, but should be considered along with relevant court rules and the Washington Appellate Practice Handbook (Wash. State Bar Association, 1980).

POTENTIAL FACTORS REDUCING FEES

In addition to the factors in RAP 15.5(b), an appointed attorney may have the standard compensation automatically reduced for:

1. Failure to comply with relevant court rules including:

   A. Form of brief, RAP 10.3,
   B. Citation to the record, RAP 10.4,
   C. Citation of authority, RAP 10.4.

2. Failure to meet time requirements without prior leave of court.

3. Failure to perform the basic services necessary.

4. Dismissal prior to filing brief.

EXTRAORDINARY COMPENSATION

In extraordinary cases, an appointed attorney may petition the Supreme Court for additional compensation reflecting the unusual work required beyond basic services. Factors which may entitle an attorney to extraordinary compensation include:

1. Death penalty cases.

2. Complex or unusual legal issues requiring unusual research or costs.

3. Issues of first impression under the law of Washington without stare decisis requiring unusual research.

4. Complex and lengthy trial record relevant to issues raised on appeal.

5. Supplemental briefing requested or authorized by the Supreme Court.

6. Cases creating an unusual financial hardship upon the attorney.

7. A certification of extraordinary status by the Court hearing the case.

An attorney seeking extraordinary compensation must submit an affidavit and supporting materials necessary to a review of the request. (See RAP 15.4 and 15.5).

APPENDIX B

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

IN RE: THE MATTER OF CONTINUED INDIGENT REPRESENTATION BY THE DISTRICT PUBLIC DEFENDER'S OFFICE IN THE KNOX COUNTY GENERAL SESSIONS COURT

ORDER TO TEMPORARILY SUSPEND INDIGENT REPRESENTATION BY THE DISTRICT PUBLIC DEFENDER'S OFFICE IN THE KNOX COUNTY GENERAL SESSIONS COURT

It being made to appear to the Court that Mark E. Stephens, District Public Defender for the Sixth Judicial District, has filed a Motion to temporarily suspend his office from receiving appointments to represent indigent defendants charged with criminal offenses in the Knox County General Sessions Courts, both City and County Division until such time a their caseloads are reduced so as to allow each member of that office to provide that quality of representation required by law to the citizenry of Knox County, Tennessee, and further, this Court recognizing that Tennessee Code Annotated, Section 8-14-20 requires this Court, upon a determination of indigency of a citizen accused, to " . . . make and sign an Order appointing th District Public Defender, or such other appointed counsel as provided by law to represent the person." After careful review of the Motion filed by the District Public Defender and the Affidavits attached to that Motion by his assistants assigned to the Knox County General Sessions Courts, City and County Division, and further, after careful consideration of relevant statutory authority, the directives and mandates of the Code of Professional Responsibility and a review of the relevant sectio of the Code of Judiciary, and after a full and complete hearing where all effected parties were given an opportunity to appear and be heard, this Court believes that to deny this Motion and require the District Public Defender to continue to accept appointments under conditions that exist at the present time would create a conflict of interest as between any new clients assigned to the Public Defender and the clients they presently

represent. Further, this Court believes that the responsibility to render effective assistance of counsel to the citizen accused is not only the responsibility of the District Public Defender but is likewise the responsibility of this Court and the Distric Attorney General as well. See: Nelmes v. State, 219 Tenn. 727, 413 SW2d 378 (1967). Consequently, this Court, recognizing the present caseload of the District Public Defender's Office, certifies that receipt of continued appointments constitutes a conflict of interest and does, thereby, temporarily suspend the District Public Defender's Office from the receipt of appointments of representation to the indigent citizenry of Knox County, Tennessee, until such time as that office can reduce their present caseloads so as to allow them to provide that quality of representation required by law, but in no event to be more than sixty (60) days. This Order to become effective November 25, 1991.

ENTER this 22nd day of November, 1991.

Bob McGee, Judge

Geoff Emery, Judge

Gail Harris, Judge

Brenda Waggoner, Judge

ATTEST 7-16-92
Certified a True Copy
Lillian G. Bean
Circuit Court Clerk
By Margaret Thomas DC

APPENDIX 2

MAY - 3 1991

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

GARY M. WESTON,
Appellant,
vs.
CITY OF MOUNT VERNON,
Respondent

NO. 91-1 00493-4

ORDER OF INDIGENCY

THIS MATTER having come before the Court upon the motion of Defendant, and the Court having considered the Affidavit in Support of the Motion, and being fully advised, now, therefore orders as follows:

1. That the Defendant is unable by reason of poverty to pay for any of the expenses of appellate review.
2. That the Defendant can not contribute anything towards the cost of appellate review.
3. That Defendant is entitled to the following at public expense:
   a) Those portions of the verbatim report of proceedings reasonably necessary for review;
   b) A copy of the Clerk's Papers;
   c) Preparation of the original documents to be reproduced by the Clerk as provided in RAP 14.3(b);
   d) Reproduction of briefs and other papers on review;
   e) Waiver of court fees and costs, including filing fee;
   f) Fees of court appointed counsel on appeal;
4. That the Mount Vernon Public Defender is allowed to withdraw and Washington Appellate Defenders hereby appointed for Defendant in the Court of Appeals.

MOUNT VERNON PUBLIC DEFENDER IS APPOINTED FOR DEFENDANT IN THE COURT OF APPEALS.

ORDER OF INDIGENCY - 1

Mount Vernon Public Defender
321 West Washington #203
Mount Vernon, WA 98273
(206) 336-6220

5. That counsel on appeal, or his representative, is authorized to remove the clerk's file from the clerk's office for one day for the purpose of reproducing clerk's papers and designating the record on appeal.

Done in open court this 7th day of May, 1992.

JUDGE

Presented by:

MARILYN MCLEAN
Attorney for Appellant
#15007

Mount Vernon Public Defender
321 West Washington #203
Mount Vernon, WA 98273
(206) 336-6220

CITY OF MOUNT VERNON v. WESTON

SKAGIT COUNTY NO. 91-1-00493-4

HONORABLE STANLEY K. BRUHN

JUNE 1, 1992

THE COURT: City of Mount Vernon v. Weston. Ms. McLean.

MS. MCLEAN: Good morning, Your Honor.

THE COURT: This comes on a motion of yours, Ms. McLean?

MS. MCLEAN: Yes, Your Honor.

THE COURT: I don't see a motion in here.

MS. MCLEAN: Well, what it is, Your Honor, is I recently submitted a motion and affidavit of indigency which the Court -- this is an appeal out of Mount Vernon Municipal Court. I submitted an order of indigency which the Court signed. However, the Court crossed out paragrpah 4 of the order of indigency. It stated that the Mount Vernon Public Defender is allowed to withdraw and Washington Appellate Defenders is hereby appointed for the defendant in the Court of Appeals, and the Court did cross that out and wrote in that the Mount Vernon Public Defender is appointed for the defendant in the Court of Appeals, and I am before the Court to find out why the Court did that. It was my understanding that you didn't want any ex parte

communication about that so I noted it up just to find out why you had done that.

THE COURT: I thought when Kelly called over that I had Kelly give you the court rule under which I proceeded, but I will tell you why. I don't understand why the Mount Vernon Public Defender's Office should be permitted to withdraw and appoint Washington Appellate Defenders. That's double tax payers money as far as I am concerned. You know this case. It's a simple issue, and rather than send it down to WADA and let them come up and get a transcript and go through the whole process again to find out what the heck is going on, I think that the attorneys who defend these cases in most instances ought to handle it on appeal. If they think there is a good faith basis for the appeal, they ought to handle it. So that is what I am doing.

MS. MCLEAN: Your Honor, just to expain -- well, I'll first address your concerns regarding the cost. I forward all the transcripts as well as all of the work I have done with an explanation to WADA about the situation. In fact WADA applies for the same funds I will -- I would for compensation for the appeal. So it's not really saving anyone money.

Had I the time and the money -- in a case like this I would probably have to hire someone to do the appeal. We apply to the Supreme Court to get reimbursed for the appeal,

the same thing that WADA does.

THE COURT: Then why couldn't it stay with you?

MS. MCLEAN: Because I don't have the time and resources to do this.

THE COURT: Mr. Nelson doesn't have any more time and resources and he has to handle it. He doesn't get --

MS. MCLEAN: My office will handle eighteen to nineteen hundred cases this year. I have two attorneys. I personally carry a caseload of eight to nine hundred people this year. That's over double what the State guidelines are. I believe that it would probably be malpractice for me to do my appeals myself. I don't have the resources to do -- WADA is set up and handles all the cases on the west coast for public defender offices for that very reason.

THE COURT: Well, I'm not going to change my mind. If I make error, you can get the appellate court to reverse. I'm not going to change my mind. I think that for proper judicial administration and savings of tax dollars for this county, I'm going to --

MS. MCLEAN: But it's not the county that is costing any money.

THE COURT: Somebody is. They're tax dollars -- the county or state.

MS. MCLEAN: You understand though that WADA applies for the same money I would or my office?

THE COURT: They're tax dollars, right?

MS. MCLEAN: Well, no matter who it is, the same money will be spent. I think that if WADA spends it or if I am going to have to hire somebody to do this, if you don't allow it, that means that's a person vs. WADA.

THE COURT: I think the burden should be on local counsel to handle these. They know the issues to appeal them. The know the case better than WADA and they have been through it at the local level, and it seems to me it's a simple matter for someone in your position to put this case together on appeal.

MS. MCLEAN: Just on this case?

THE COURT: They have to go through the entire transcript, understand the issues. I suppose they call you, and it just seems like to a point duplication of effort.

MS. MCLEAN: So that's your rulling about all cases or just this case?

THE COURT: I'm going to decide one on one. I'm not speculating as to future cases, but that is my decision in this case. I have done that twice now in the last two weeks, you know.

MS. MCLEAN: Did you do that on another case?

THE COURT: Yes.

MS. MCLEAN: I was not informed of that, Your Honor.

THE COURT: Well, Kelly called your office, didn't

you?

KELLY LUVERA(BAILIFF): I talked to Ida on Friday.

MS. MCLEAN: I was told that the case -- motion for reocnsideration, it wasn't on the calendar for today, but no one told me about -- that anything was changed.

THE COURT: Well, it was done. That's going to be my ruling.

MS. MCLEAN: Thank you, Your Honor.

MR. NELSON: For the record, for your information, I looked -- saw what authority the Court acted under. RAP 15.2(f) says, "The trial court shall determine questions relating to the appointment and withdrawl of counsel for an indigent party." So I assume that is what --

THE COURT: That is the exact rule I am proceeding under.

MS. MCLEAN: Thank you, Your Honor.