SENATE FINANCE AND CLAIMS
EXHIBIT NO. 8
DATE 3-8-05
BILL NO. SB146

Date: July 16, 2004

To: Sheri Heffelfinger, Research Analyst
Legislative Sub-Committee on Reforming Montana's Public Defense System,
Law & Justice Interim Committee

From: David J. Carroll, Director of Research and Evaluations
National Legal Aid & Defender Association (NLADA)

*A Primer on Indigency Determination**

All states limit publicly funded defense services to those financially unable to retain counsel on their own behalf. *Gideon* requires no more. However, in order to ensure that indigent defendants have access to the representation to which they are constitutionally entitled, systems for screening financial eligibility must include three procedural safeguards.

First, pre-determined financial criteria related to client resources and local economic factors must be in place. Second, national standards direct that client eligibility determinations be performed by public defense agencies or a neutral screening agency of the court.[1] A financial "disqualification" should be subject to review and reversal by a judge. Third, these determinations must occur in a timely manner.

The manner in which defendants are screened for indigency and the timing of the assignment of counsel can have a significant impact on the quality of defense provided. Screening mechanisms that are too restrictive prevent defendants who lack the financial means from having any attorney at all. Systems lacking pre-determined criteria and those without an appropriate locus of decision-making authority expose indigent defendants to arbitrary denials and are vulnerable to the potential for manipulation and abuse. Timely eligibility determinations are necessary to permit immediate commencement of representation so that a public defender may begin work on the case early on, a critical measure for effective representation.

The *Guidelines for Legal Defense Systems in the United States* issued by the National Study Commission on Defense Services state that, "[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to

[1] *NSC*, Guideline 1.6. *Cf.* ABA *Defense Services*, Standard 5-7.3.

himself or to his dependents, to obtain such representation."[2] "Substantial hardship" is also the standard promulgated by the ABA.[3] While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted. In practice, the "substantial hardship" standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly expenses, local private counsel rates) would result in a "substantial hardship" were they to seek to retain private counsel. The great majority of defendants currently being offered the services of public defenders in Montana should qualify for public counsel under the presumptive standard, thus minimizing the need to use a more expansive screening and verification process. Examples of such presumptive standards include:

- A defendant is presumed eligible if he or she receives public assistance, such as Food Stamps, Aid to Families of Dependent Children, Medicaid, Disability Insurance, or resides in public housing.[4]

- A defendant is presumed eligible if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

For those who do not meet the presumptive standard but who may still qualify under the "substantial hardship" standard, many jurisdictions have developed financial eligibility formulas that take into account a household's net income, liquid assets, "reasonable" necessary expenses and other "exceptional" expenses. The National Study Commission on Defense Services guidelines are more comprehensive than other national standards in guiding this second tier of eligibility determinations. The first step is to determine a defendant's net income (usually verified through documented pay stubs) and liquid assets. Under Guideline 1.5, liquid assets include cash in hand, stocks and bonds, bank accounts and any other property that can be readily converted to cash. Factors not to be considered include the person's car,[5] house,[6] household furnishings, clothing, any

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[2] Guideline 1.5.

[3] *ABA Standards for Criminal Justice: Providing Defense Services* 5-7.1 states: "Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship."

[4] An additional benefit to using public aid as a presumptive threshold is that other agencies already rigorously screen and verify the person to qualify for such assistance. Using these standards allows a jurisdiction to, in effect, "piggy-back" onto the verification process without duplicating efforts.

[5] A defendant's vehicle may be the only thing keeping him and her off of public assistance by allowing him or her the means to get to work, or comply with conditions of probation or pretrial release such as drug or mental health treatment, or family counseling. In a large geographically expansive counties, including a car in a person' liquid assets may be ultimately more costly than appointing the person a public defender.

property declared exempt from attachment or execution by law, the person's release on bond, or the resources of a spouse, parent or other person.

Next, the screening agency assesses a defendant's reasonable necessary expenses and other money owed for exceptional expenses, like medical care not covered by insurance, or court-ordered family support. Though jurisdictions vary as to what constitutes "necessary" expenses, most include rent, day-care and utilities.

Screeners then determine an individual's available funds to contribute toward defense representation by adding the net income and liquid assets and subtracting from the total the sum of reasonable and exceptional expenses. [(Net Income + Liquid Assets) – (Reasonable + Exceptional Expenses) = Available Funds]. The resulting "available funds" can then be measured against a second tier presumptive eligibility standard. In many jurisdictions, this second presumptive level is tied to a percentage of the Federal Poverty guidelines. For instance, Florida sets its presumptive standard at 250% of the Federal Poverty guideline.[7] Table A-1 (below) shows the 2002 Health and Human Services Poverty Guidelines, by family size and annual income, and compares the 250% and 150% standard for both annual and monthly income.

Table A-1
Federal Poverty Guidelines[8]

Family Size	Poverty Index	150%		250%	
		Annual	Monthly	Annual	Monthly
1	$8,860	$13,290	$1,107.50	$22,150	$1,845.83
2	$11,940	$17,910	$1,492.50	$29,850	$2,487.50
3	$15,020	$22,530	$1,877.50	$37,550	$3,129.17
4	$18,100	$27,150	$2,262.50	$45,250	$3,770.83
5	$21,180	$31,770	$2,647.50	$52,950	$4,412.50
6	$24,260	$36,390	$3,032.50	$60,650	$5,054.17

In some jurisdictions, eligibility screening is terminated if a person's net income and liquid assets exceed these income thresholds, and the person is deemed ineligible for public appointment of counsel. In others, persons can be deemed eligible if their net income and liquid assets exceed these thresholds, but reasonable and exceptional expenses bring them under the threshold.

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[6] It is assumed that the goals of the criminal justice system are not served by rendering homeless a charged-but-unadjudicated defendant, or his or her family.

[7] FL. Stat. §27.52. Though a state-by-state, county-by-county study has not been conducted to determine the total number of jurisdictions that use the Federal Poverty guidelines and some presumptive percentage thereof, the evaluation team's range of experience suggests a national norm of approximately 150% of the federal rate.

[8] *Federal Register*, Vol. 67, No. 31, February 14, 2002, pp. 6,931-6,933. For each additional household member, add $3,080.

One example of jurisdiction employing such a financial determination system is New York City. There, the formula also takes into account the seriousness of the charge. As with most jurisdictions, defendants in New York City whose gross income falls at or below the current federal poverty index are presumptively eligible for assigned counsel. However, even defendants with household gross incomes above these levels are eligible for assigned counsel, if they are financially unable to retain counsel. In determining whether a defendant is unable to retain counsel, the court considers the household's other financial commitments, including rent or mortgage payments, the cost of food and utilities, debts, the likely cost of counsel, unusual expenses, and available liquid assets.[9]

As in Florida, New York City's guidelines provide that defendants charged with misdemeanors are presumptively eligible for assigned counsel when the gross household income is at or below 250% of the federal poverty standard. The guidelines similarly provide that defendants charged with felonies are presumptively eligible for assigned counsel when the gross household income is at or below 350% of the federal poverty standard.

In lieu of the Federal Poverty guidelines, other jurisdictions take into account the going rate for private counsel to represent a defendant on various case types. For instance, private attorneys may routinely ask for a $5,000 retainer to represent a person on a felony indictment, in which case a defendant may fall above the 150% Federal Poverty index ($1,107.50 monthly available funds) but would still face a "substantial hardship" if he or she were to retain private counsel.

The three-tiered screening system described above has an added benefit to the overall justice system. In many jurisdictions, public defenders employ investigation interns to conduct these eligibility screenings at little or no cost.[10] These interns regularly go to the jail each morning and afternoon to conduct the financial screening on all people brought in on new charges. The appointment of the public defender can be made as soon as the eligibility is determined, and attorneys are able to make bail recommendations earlier, reducing the number of beds in the County jail used for pre-trial detention. And early appointment of counsel allows earlier investigation, discovery and preparation, which results in more prompt decisions regarding either negotiated dispositions or going to trial.

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[9] Once the public defender has been assigned, a court may not relieve it on the ground of non-indigency unless the defender agency first moves to be relieved. Construing County Law §722-d, the Appellate Division has stated that "the report of counsel [is] a predicate to any action on the part of the court to relieve counsel of the assignment." *Matter of The Legal Aid Society v. Samenga*, 39 A.D.2d 912, 913 (2d Dept. 1972). Thus, for example, where a court suspects that a defendant has the resources to retain counsel because bail has been posted, at most it would ask the assigned attorney to review the accused's eligibility, keeping in mind that persons who contribute to bail cannot be required to assign their money for purposes of hiring an attorney unless they also are obligated to contribute to the defendant's support. Therefore, where bail is posted by the accused's spouse, that money can be considered as an asset in evaluating eligibility, but bail money posted by an employer, family friend or member of the defendant's extended family (aunt, uncle, cousin) ordinarily should not be considered as an asset of the accused.

[10] Other jurisdictions employ Pre-Trial Services departments that are able to make financial eligibility determinations at the same time as screening to determine eligibility for release on one's own recognizance.

* Excerpted from a lengthier letter from Mr. Carroll to Ms. Heffelfinger

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 8
DATE 3-8-05
BILL NO. SB146

BILL SUMMARY: SB 146
MONTANA PUBLIC DEFENDER ACT

By Request of Senator Dan McGee, Bill Sponsor

Prepared by Sheri Heffelfinger, Research Analyst, Bill Drafter
SB 146, 2nd Reading Copy (version SB0146.02)
March 7, 2005

The meat of the bill is in NEW SECTIONS 1 through 15:

Section 1. Short Title.

Section 2. Definitions.

Section 3. Purpose.

Section 4. Scope and structure of the state wide public defender system.

Structure: A public defender commission would supervise the system, develop a strategic plan, divide the state into regions, provide for the delivery of services:
- by contract with a single attorney or law firm or with a consortium of attorneys or law firms; or
- through a regional office with state staff (see section 11)

Scope: Covers all courts (district, justice, municipal, and city courts)
Covers all the cases listed in subsection (4)
- (4)(a) lists cases where a person is entitled to a PD because they are indigent
- (4)(b) lists the cases where a person is entitled to a PD even if not indigent

Section 5. Public defender commission composition and membership.

This section provides that a Public Defender Commission of 11 members would be appointed by the governor as follows:
- 2 attorneys nominated by Supreme Court
- 3 attorneys nominated by President of State Bar
  - -- 1 experienced in felony defense and was a full-time PD for at least 1 yr
  - -- 1 experienced in defense of juvenile delinquency and abuse and neglect cases involving the Indian Child Welfare Act
  - -- 1 who represents criminal defense lawyers
- 2 from general public, not attorneys, judges (active or retired)
- 1 nominated by President of Senate
- 1 nominated by Speaker of the House
- 1 advocate for indigent persons

- 1 advocate for racial minorities
- 1 advocate for people with mental illnesses and dev. disabilities
- 1 employed by an organization providing addictive behavior counseling
- 1 with significant experience in defense of criminal or other cases subject to the public defender act who has a strong commitment to quality representation for indigent defendants

Section 6. Commission duties and responsibilities.

This section provides that the Public Defender Commission would:

- hire and supervise a Chief Public Defender
- set statewide standards and policies covering:
  - -- education
  - -- experience
  - -- caseload and workloads
  - -- access to support services (paralegals, investigators, etc)
  - -- continuing education/training
  - -- performance criteria and evaluation
- develop strategic plan and approve budget proposals
- develop process for handling cases presenting conflicts of interests
- ensure process for recording and reporting detailed expenditure and caseload data
- submit a detailed biennial report to the Governor, Supreme Court, and Legislature

Section 7. Office of state public defender, personnel, compensation, expenses.

This section:

- establishes central office
- establishes the structure of the central office
  - -- chief public defender
  - -- administrative director
  - -- chief appellate defender
  - -- chief contract manager
  - -- training coordinator
  - -- deputy public defenders in each region
  - -- assistant public defenders (state staff to assist regions if requested)
  - -- other positions as needed
- lists other types of operational expenses that are paid by the office:
  - -- witness fees
  - -- transcript fees

Section 8. Chief public defender -- duties.

This section:

- outlines the duties of the Chief Public Defender to:
  - -- present to commission a regional strategic plan
  - -- supervise regional deputy public defenders and state staff of assistant public defenders
  - -- ensure conflict cases are handled appropriately
  - -- ensure detailed expenditure and caseload data is kept
  - -- manage caseloads
  - -- establish standards for assigning capital cases consistent with Supreme Court guidelines
  - -- establish and supervise a training program
  - -- establish performance and evaluation criteria
  - -- etc.

Section 9. Office of appellate defender -- chief appellate defender.

This section provides that:

- the Chief Public Defender hires and supervises the chief appellate defender
- the Chief Appellate Defender supervises the Office of Appellate Defender (contacted services and state appellate staff in regional offices)
- the Office of Appellate Defender, not the public defender who handled the original case, would handle all appeals in which the defendant is entitled to a public defender

Section 10. Training program -- coordinator.

This section:

- provides that a centralized training coordinator would be appointed by the Chief Public Defender
- training coordinate would
  - -- coordinate statewide training
  - -- help establish standards
  - -- provide consultation and assistance with research for briefs
  - -- apply for and assists in disbursement of federal funds or other grant money
  - -- perform other duties as assigned

Section 11. Regional offices -- deputy public defenders -- office space.

This section provides that:

- if a regional office is established by the Commission (rather than having contracted services provided for in the region), then the regional office will be managed by a deputy public defender
  - -- there are PD offices in Missoula, Yellowstone, Bozeman, Anaconda-Deer Lodge, Cascade, and Lewis & Clark Counties and one FTE in Dawson County

Section 12. Contracted service program.

This section:

- authorizes the Office of State Public Defender and each regional deputy public defender to contract for services.
- contracting must be done fairly and consistently throughout the state and within each region.
- places specific parameters on the contracting to ensure:
  - -- that contracts consider attorney qualifications and caseloads
  - -- adequate contract oversight
  - -- contracts aren't awarded based solely on the lowest bid
  - -- that there will be no fixed rate contract (i.e. a set fee no matter the caseload handled).

Section 13. Public defender account.

This section provides that:

- all gifts, grants, or donations to the Office of State Public Defender would be deposited to a special revenue account
- all payments ordered by a court to pay for the cost of defense provided by a public defender would be deposited to the special revenue account

Section 14. Eligibility and determination of indigence.

This section describes the process to be used to determine whether a person is eligible for a public defender.

Under this section:

- the Office of State Public Defender (through the regional offices or through contracted services) will determine whether a person is indigent and eligible for a public defender, or not.

- subsection (3), which begins on page 15, line 4, provides that anyone with a household income at or less than 133% of federal poverty guidelines AND whose disposable income and assets are insufficient to retain competent counsel without substantial hardship will be determined "indigent" and eligible for a public defender.

- NOTE: the partial indigence language of subsection (5), page 15, beginning on line 12 was stricken by an amendment in Senate Judiciary. This raises an issue with the "and" on **page 15, line 8.** Leaving in "and" means that no one with an income higher than 133% of poverty could be determined eligible for a public defender. Changing "and" to "or" would allow for a person with an income higher than 133% of poverty to qualify for a public defender if their income and assets are insufficient to retain private counsel.

Section 15. Right to counsel.

This section concerns child abuse and neglect cases:
- consolidates current law and
- changes current law to provide that whenever a charge of child abuse or neglect is filed against a parent, the parent is immediately entitled to counsel (a court would no longer have to wait until a petition for the termination of parental rights has been filed)

Other key sections in the bill

Section 21. Amending 15-1-121. Entitlement share payment -- appropriation.

This section provides the funding mechanism for the Office of State Public Defender.

County and city share of funding: Beginning on **page 26, line 29 through page 32, line 29**, the amount of each county's and cities' entitlement share for FY 2006 will be reduced by the amount shown before the growth factor and entitlement share amount is calculated and paid out for FY 2007. This will permanently reduce the amount of the entitlement share paid to the county's and cities from the general fund.

Audit of certain counties: In order to base entitlement share reduction amounts for the state's largest counties on **actual costs** rather than on estimates, the bill provides that an audit will be conducted of certain county public defender expenses. **(See page 32, line 30, through page 33, line 3.)** The 6 counties to be audited are:
- Cascade
- Flathead
- Gallatin
- Lewis & Clark
- Missoula
- Yellowstone

The key language discussing how this audit will be conducted and identifying what expenses will be audited is provided in **Section 74, page 87, beginning on line 10.**

Section 48. Examination of defendant.

This section relates to mental examination of a defendant's fitness to proceed. Fitness to proceed may be raised by the prosecution, the defense, or the court. Key language to note is in **subsection (4), beginning on page 61, line 10.**

Section 63. Expense of trial for offenses committed in prison.

Current language:

- Dept. of Corrections pays all costs "incurred by the county" **(page 79, line 9)**

Issue:

- who should pay the costs for the prosecution, defense, and court expenses (such as for juries) in cases where the offense is committed in prison?

- NOTE: with the Public Defender Act in place, a county should not incur any public defender costs and therefore would not "invoice" the Department of Corrections. However, currently, the DOC is being billed by the counties for public defender costs in these cases.

- this section needs amending to further clarify the technicalities of who should pay for what

Implementation Sections

Section 70. Implementation

Time line:

Public Defender Commission appointed by	July 1, 2005
Chief Public Defender hired by	December 31, 2005
Standards and Procedures in place by	July 1, 2006

Section 71. Transition -- transfer of county and city employees to state employment

Local public defender staff become state employees	July 1, 2006

Section 72. Transition of appellate defender commission and office

Appellate Defender Commission and Public Defender Commission work together beginning	July 1, 2005
Office of Appellate Defender transferred to Office of State Public Defender and Appellate Defender Commission and old statutes repealed	July 1, 2006

Section 74. Determination of actual costs -- legislative audit

Audit of FY 2003 and FY 2004 "actual costs" for "public defender services" in district court and justice court in the following 5 counties:

- Cascade
- Flathead
- Lewis & Clark
- Missoula
- Yellowstone

Gallatin County just recently started their PD office so the audit will be only of the FY 2004 calendar year

"Actual costs" is defined on pg 88, beginning on line 11
"Public defender services" is defined on pg 88, beginning on line 14

Section 75. Interim report.

The Public Defender Commission and the Office of State Public Defender must provide a progress report in FY 2007 to:

- Governor
- Legislative Audit Committee
- Legislative Finance Committee
- Law and Justice Interim Committee
- Supreme Court

Section 80. Three-fifths vote required.

A three-fifths vote of the members of each house is required because the entitlement share statutes state that any adjustments to the entitlement share may be done only by a three-fifths vote.