September 9, 2011

Clerk of the Supreme Court of Wisconsin
Attention: Carrie Jsanto, Deputy Clerk
P.O. Box 1688
Madison, WI 53701-1688

Re: Supreme Court Petition 10-08

Dear Justices of the Supreme Court of Wisconsin,

I will be appearing before the Court on October 4, 2011, to offer testimony in support of Supreme Court Petition 10-08 and its call for a court rule identifying criteria trial courts would be expected to apply in deciding whether and when to appoint counsel in certain categories of civil cases implicating vital human needs. I am a retired Justice of the California Court of Appeal, but unlike some of the other witnesses who will be testifying, I cannot purport to represent any organization or group. Rather this letter offers some thoughts and information accumulated during forty years of interest in seeing America move toward honoring its pledge of "justice for all." My hope is that this will supply the court some background, useful I hope, for the issues you are asked to address. This letter and its endnotes--primarily containing excerpts from cases, statutes, or articles--are intended to provide the support, the "footnotes" if you will, for the testimony I expect to offer on October 4th.

At the risk of appearing to personalize the submission and only because I suspect the members of this court might well have arrived at the same views I have, had they shared my experiences over the past four decades, I will briefly retrace that journey. Fair warning: there may be some surprises along the way.

It was while I was the director of the OEO Legal Services Program in the mid-1960s that I first realized the vast majority America's poor and near-poor were not getting justice in the nation's courts, despite what our program and the 2,000 lawyers we funded could do for a small percentage of them. It was one of my mentors, Howard Westwood, a senior partner in Covington and Burling, who suggested that need would never be met until the courts accepted what seemed an obvious principle to him. That is, that the constitution's due process and equal protection guarantees mean indigent civil litigants have a constitutional right to counsel just as

they do if charged with a crime. This conversation with Westwood planted the seed, leading me to some research that seemed to reinforce his notion.[1].

It was several years later, 1973, however, while a professor at USC law school that I had a mild epiphany. Invited by an Italian law professor to co-author the first book surveying and comparing legal aid programs around the world, I arrived in Florence with a typical American attitude—we had the best justice system and clearly the best legal aid system in the world, now that we had the OEO Legal Services Program, at least. Then I began researching other countries' legal aid programs. I quickly was surprised to learn that most European countries had had statutory rights to counsel in civil cases for decades or centuries[2] and several of those countries invested far more in civil legal aid on a per capita basis than did the U.S. I also learned that the development of civil legal aid in those countries paralleled the development of indigent criminal defense in our country. First, a statute conferring a right to counsel, but with the representation to be provided by uncompensated private lawyers. Then, years later, in most countries the legislature appropriated funding for the lawyers providing the services the statute guaranteed.

I was even more intrigued to learn during our research on the book that as early as 1937 the Swiss Supreme Court had found the Swiss Constitution's provision that "all Swiss are equal before the law" meant indigent *civil* litigants enjoyed a *constitutional* right to counsel in that country.[3]

Returning to the United States a chastened man, I began telling others in our country about our relatively low standing when it came to our commitment to providing justice to the nation's poor. This task was made somewhat easier by the publication of our book, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*[4], in 1975, But still few heard the message. Then encouraged by a pair of opinions the California Supreme Court issued in the late 1970s, *Payne v Superior Court*[5] and *Salas v. Cortez*[6], I published an article arguing those opinions combined with other jurisprudence in that state laid the groundwork for a full-blown right to counsel for indigent California civil litigants.[7]

I learned of the next revealing development abroad while attending an international access to justice conference in Florence in the fall of 1979. That conference happened to coincide with the release of an opinion by the European Court on Human Rights declaring that the European Convention on Human Rights and Fundamental Freedoms required member governments to provide free counsel to indigent civil litigants in cases heard in the regular courts.[8] That right to counsel was found in the Charter's guarantee that all civil litigants are entitled to a "fair hearing."[9] In that case, *Airey v. Ireland,* the court concluded an indigent Irishwoman seeking a judicial separation from her husband could not have a "fair hearing" nor could she enjoy "*effective* access to justice" unless she was provided a lawyer.[10] (Notably, Mrs. Airey was a plaintiff and the main objective of her lawsuit was to obtain property, e.g., financial support for her and her children, despite living apart from her husband.)

Although I wrote a few articles and made a few speeches bearing on this subject after joining the California Court of Appeal in 1982, my next significant involvement came in 1999, when invited to join the International Legal Aid Group (ILAG). This is an organization of scholars from around the world who specialize in research on legal aid and access to justice. Every other year

they hold a conference and invite the heads of the national legal aid programs in most countries to join them for an exchange of information between researchers and policymakers. This has kept me up-to-date on legal aid developments throughout the world. During that time I learned, among other things that courts in both Canada and South Africa had found constitutional rights to counsel in certain kinds of civil cases—child neglect in Canada[11] and land evictions in South Africa. [12] I also learned the European Court on Human Rights had issued another landmark opinion finding a right to counsel, this time for defendants in an English libel case, this time emphasizing an absence of an "equality of arms" between the represented plaintiffs and these pro se defendants. As a result, the court not only reversed the plaintiff's judgment but gave those defendants a large monetary award to be paid by the British government for denying them their right to counsel. [13]

Then in 2005, ABA President-Elect Mike Greco (whom the court will be hearing from on October 4th) appointed me to his Presidential Commission on Access to Justice. This Commission produced the resolution the ABA House of Delegates adopted without a dissenting vote in August 2006. This resolution called on federal, state and local governments to guarantee counsel to poor people in cases involving basic human needs, such as sustenance, safety, shelter, health, and child custody. After being appointed to the ABA Standing Committee on Legal Aid and Indigent Defendants, I chaired that Committee's sub-committee on the right to counsel in civil cases and later became part of the ABA Working Group on Civil Right to Counsel, which produced the 2010 ABA resolutions—the Model Access Act and the Principles for Implementation for a Civil Right to Counsel. These activities gave me an opportunity to participate in the American Bar Association's efforts to encourage the creation of legally enforceable guarantees of counsel for low income litigants.

Meanwhile, motivated in part by the ABA's August 2006 resolution and a similar resolution the California Conference of Bar Associations adopted the following month, the California Legislature enacted the Sargent,Shriver Civil Counsel Act in 2008. This program entered its planning stages in 2010 with the appointment of the "Implementation Committee" the Act authorized, a committee I now chair. The legislation creating this program (AB 590) is designed to test the best ways to deliver *effective* access to justice to poor people as a matter of right in certain categories of civil cases—housing, domestic violence, and child custody, among them. We chose eight of the nearly twenty legal aid-trial court partnerships which vied for grants under this program. The funding for these grantees is scheduled for release on October 1, 2011 and it is anticipated the pilots will begin operating by January 1, 2012. The Act also requires an extensive evaluation of the pilots.

Perhaps the most useful feature of the Sargent Shriver Civil Counsel Act for this court is the legislative findings the California Legislature adopted as part of the Act, especially the following:.

"The Legislature hereby finds and declares all of the following:

> "(h) Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and

responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions.

"(j) Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.

"(*l*) The state has an interest in providing publicly funded legal representation and nonlawyer advocates or self-help advice and assistance, when the latter is sufficient, and doing so in a cost-effective manner by ensuring the level and type of service provided is the lowest cost type of service consistent with providing fair and equal access to justice. Several factors can affect the determination of when representation by an attorney is needed for fair and equal access to justice and when other forms of assistance will suffice. These factors include the complexity of the substantive law, the complexity of the forum's procedures and process, the individual's education, sophistication, and English language ability, and the presence of counsel on the opposing side of the dispute." (Assembly Bill 590, Chapter 457, Section 1)

Although the presence of counsel on the opposing side is the last factor mentioned as requiring appointment of counsel in the "legislative findings" section of the report, that position on the list did not reflect the lawmakers' opinion of its priority. Later in the statute, the presence of counsel on the other side and the imbalance that entails emerges as the primary factor in deciding when counsel should be provided under the Act.[14]
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I hope the foregoing brief account, and especially the accompanying excerpts from some of the key statutes and cases, supply some general background that is helpful as the Wisconsin Supreme Court considers this extraordinarily significant petition. While the Wisconsin Supreme Court already has recognized the state's trial judges possess an *inherent* right to appoint counsel in civil cases,[15] this petition asks for court rules that will establish some criteria for exercising that discretion, without which that inherent power has little meaning for Wisconsin's low income litigants.

Perhaps because I served on an intermediate court to which litigants had an absolute right of appeal, I had the opportunity during my quarter century on that court to hear scores if not hundreds of cases in which one side had been unrepresented and faced a represented party at the trial level. Far too often, the transcript revealed a high probability the pro se party had been the victim of injustice rather than the recipient of justice during the trial. Objections the opposing lawyer made, which it was obvious any attorney could have overcome, that excluded critical evidence; the failure to understand or argue legal issues that determined the ultimate outcome: the failure to introduce relevant evidence the record revealed the party possessed; tripping over procedural hurdles the unrepresented litigant wasn't aware even existed; and the like. All these doomed one or more pro se litigants to lose a case he or she should or at least could have won, if only they had been represented by counsel. Many trial judges have expressed these same sentiments about proceedings over which they presided.[16]

Ours is an adversarial system. It depends on the competing litigants finding the applicable law and uncovering the relevant facts and then presenting the contrasting views to neutral judges and juries. To perform these difficult tasks requires an expertise that begins with seven years of higher education—the final three in a professional law school. If only one side has the benefit of that expert assistance, the adversarial system is doomed to fail. Unless the neutral judge abandons that neutrality and employs his or her own expertise in aid of the unrepresented party, only one side will be properly presented for decision. Frequently, even should the judge intervene in that way, it will be too late to restore "equality of arms" because the unrepresented party won't have come to court with the needed evidence. After all, trial preparation requires as much knowledge and skill as does trial presentation. This is to say nothing of the ethical issues and the apparent loss of impartiality when a trial judge tries to help one of the parties.

California's former Chief Justice, Ronald George, perhaps said it best in his 2001 State of the Judiciary speech to the legislature. "

> "If the motto 'and justice for all' becomes 'and justice for those who can afford it', we threaten the very underpinnings of our social contract."

Unfortunately, it is not the danger of "becoming" justice only for those who can afford it that we need fear. For all too many poor people that is the way it has always been. Sometime—preferably sometime soon—"justice for all" can become the norm. The Wisconsin Supreme Court can take a major step in that direction if it approves the recommendations in Petition 10-08. I sincerely hope it does.

Respectfully submitted,

Earl Johnson, Jr.
Associate Justice (retired),
California Court of Appeal, Second Appellate District

[1] Among the articles published in the 1960s making the case for a right to counsel in civil cases were: Note, *The Right to Counsel in Civil Litigation*, 66 Columbia.Law.Review 1322 (1966);

O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio State Law Journal 5 (1967); and Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale Law Journal 545 (1967).

[2] Typical of the early legal aid provisions in Europe were those found in England and Germany.

ENGLAND: In 1495, the English parliament codified what had evolved as a discretionary power to appoint counsel, converting it into a right to free counsel. The operative language in the English of the era reads as follows:

"And after the seid writte or writes be returned, . . . the Justices . . .shall assigne to the same pou psone or psones Councell lerned by their discretions which shall geve their Councelles nothing taking for the same, and in like wise the same Justices shall appoynte attorney and attorneys for the same pou psone and psones . . . which shall doo their duties without any rewardes . . . ."

> Statue of Henry VII, 1495, 11 Hen.7, ch 7, 2 Statutes of the Realm 578 (transcribed in 2 Statutes at Large 85).

In 1949, England replaced this Statute of Henry VII and its successors with a comprehensive system of legal aid in the courts, and advice and assistance outside the courts. Titled, the "Legal Aid and Advice Act, 1949", this new statute provided compensation for the solicitors and barristers who served legal aid clients under the Act. Under this law, the legal profession in the form of the Law Society (representing the nation's solicitors) replaced the courts as the program's administrators. For an account describing the creation and first 25 years of legal aid under this new statute, written by the man who headed it for most of that quarter century, see Seton Pollock, *Legal Aid-The First 25 Years* (London: Oyez Publishing, 1975).

GERMANY: In 1877, when Count Bismarck unified the German-speaking areas of Europe into the German nation, the basic law of the new nation included a right to free counsel for poor people in civil cases. The operative language of the statute reads as follows:

"A party who is unable to defray the costs of the litigation without jeopardy to the means necessary for his and his family's sustenance *shall* be granted legal aid upon application therefor, if the intended action or defense offers a sufficient prospect of success and does not appeal to be capricious. An action is deemed to be capricious if the prospects for the prosecution of the claim are such that a party not claiming legal aid would refrain from litigation or assert only a part of the claim."

> *German Code of Civil Procedure (Zivilprozessordnung), sec. 114* [first enacted in 1877], emphasis supplied. (For an English translation of the complete set of provisions related to legal aid, see [2]Mauro Cappelletti, James Gordley, and Earl Johnson Jr. *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, reprint 1981) 387-92.

For a recent comprehensive survey of the civil right to counsel as expressed in European legal aid programs, see Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World,* 15 Temple Political and Civil Rights Law Review *769 (2006).*

[3] The relevant section of the Swiss Constitution reads: "All Swiss are *equal before the law*. In Switzerland there is neither subjection or privilege of locality, birth, family or person."

> Bundesverfassung, Constitution Federale, Costituzione Federale [B.B., Cst, Cost. Fed] art. 4 (Switz.), translated in Cappelletti, Gordlley & Johnson, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Giuffre/Oceana, 1975) at 705.

In 1937, the Swiss Supreme Court held: "[The constitutional] principle of equality before the law [requires the cantons to provide a free lawyer to indigent litigants] in a civil matter where the handling of the trial demands knowledge of the law."

> Judgment of October 8, 1937, Arrets du Tribunal Federal [ATF] 63 I 209 (Switz.) translated and quoted in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L. J. 1, 5 (1967).

[4]Mauro Cappelletti, James Gordley, and Earl Johnson Jr. *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, reprint 1981, 756 pgs).

[5] *Payne v Superior Court*, 17 Cal.3d 908 (1976) [holding equal protection requires appointment of counsel for incarcerated prisoners involved in civil litigation when procedural posture leaves no other options].

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[6] *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 *cert. den*. 444 U.S. 900 (1979).[holding due process requires appointment of free counsel for indigents alleged to be fathers in paternity cases].

[7] Johnson and Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles Law Review 249 (1978).

[8] *Airey v. Ireland*, Eur. Court H.R., Judgment of Oct 1979, Series A No.32, at 12-14, 15-16.

[9] "In the determination of his *civil rights and obligations* or of any criminal charge against him, everyone is entitled to *a fair* and public *hearing* within a reasonable time."

> Art. 6, sec. 1, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 213 U.N.T.S. 222.

[10] In 1979, the European Court on Human Rights found the European Convention's right to a "fair hearing" in civil cases creates a right to free counsel when needed for effective access to justice,

"The [Irish] Government contend that the applicant does enjoy access to the [Irish] High Court since she is free to go before the court without the assistance of a lawyer.
The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are *practical and effective*. This is particularly so of the right to access to the courts in view of the *prominent place held in a democratic society by the right to a fair trial*….It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective in the sense of whether she would be able to present her case properly and satisfactorily. . . . The court concludes…that the possibility to appear in person before the [trial court] does not provide the applicant with an *effective* right of access….There has accordingly been a breach of Article 6 sec. 1."

Airey v. Ireland, Eur. Court H.R., Judgment of Oct 1979, Series A No.32, at 12-14.

[11] The constitutional provisions the Canadian Supreme Court was interpreting read as follows:\

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
Section 7, CANADIAN CHARTER ON HUMAN RIGHTS AND FREEDOMS

"[N]o law of Canada shall be construed or applied so as to: . .deprive a person of the *right to a fair hearing* in accordance with the principles of fundamental justice for the determination of his rights and obligations . . ."
Section 2 (e), CANADIAN BILL OF RIGHTS, enacted in 1960

In 1999, the Canadian Supreme Court applied these provisions to a case arising in New Brunswick where the provincial court had upheld the denial of counsel to a mother in a dependency case where the government sought to retain custody of her children for six additional months.

"Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. . . . A fair hearing requires that the parent has the opportunity to present her or his case *effectively*. Effective participation enhances the judge's ability to make an accurate determination. Here, the statutory scheme allows a parent to present evidence, cross-examine witnesses, and make representations but does not provide funds for an indigent parent to retain counsel. In the circumstances of this case, taking into account the seriousness of the interests at stake, the complexity of the proceedings and the capacities of J.G., the *right to a fair hearing required the government to provide counsel*...."
J.G. v New Brunswick, 1999 Carswell NB 305 (Sept. 10, 1999).

[12] In 2001, the South African Land Reform Court held that government must provide free counsel to indigents in civil cases before that court under the nation's constitutional guarantees of fair hearings and equality before the law.

"There is no logical basis for distinguishing between criminal and civil matters. The *issues in civil matters are equally complex and the laws and procedures difficult to understand. . . .*The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act, Act 62 of 1997 and the Land Reform (Labour Tenants) Act, Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have *a right to legal representation or legal aid at State expense* if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources. The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.

Nkuzi v.The Government of the Republic of South Africa and The Legal Aid Board, LCC 10/01 (July 6, 2001) at 2-3.

[13] *Steel- v. United Kingdom*, 41 Eur. Ct. H.R. 22, 414 (2005)

In the *Steel* case, the European Court on Human Rights was not persuaded by the British government's argument that the judge had frequently helped the unrepresented defendants and that those defendants also had benefited from periodic assistance from pro bono lawyers. Ultimately, the court concluded these half-measures were not sufficient to substitute for the continuance assistance of counsel. The court also introduced another factor into its analysis of whether the unrepresented party received a "fair hearing" as required by the European Convention on Human Rights and Fundamental Freedoms—whether there was a rough "equality of arms" between the parties.

"In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and *contributed to an unacceptable inequality of arms* with McDonald-'s. There has, there has been a violation of Art. 6 (1)." (*Id*. at 429-30.)

[14] "Projects shall be selected on the basis of whether in the cases proposed for service the persons to be assisted are likely to be opposed by a party who is represented by counsel. (Sec. 68651((b) (5).) This is followed by a list of other factors that also enter into the equation when deciding whether a project is entitled to a grant. *Ibid.*

[15] "We agree with the parties that a circuit court possesses inherent authority to appoint counsel for indigent litigants…and that the power of appointment 'is not tied to any constitutional right that the indigent may have to counsel.'" *Piper v Popp*, 157 Wis.2d 633, 658 1992) [citing *In the Matter of Contempt in State v. Lehman*, 137 Wis.2d 65, 76 (1987 and *Jacobson v Avestruz*, 81 Wis.2d 240, 247.

[16] For instance, a dozen Washington State trial judges filed a statement in a case before that state's Supreme Court that in part said: "Without assistance from attorneys, pro se litigants frequently fail to present critical facts and legal authorities that judges need to make correct and just ruling. Pro se litigants also frequently fail to object to inadmissible testimony or documents and to correct erroneous legal arguments. This makes it difficult for judges to fulfill the purpose of our judicial system—to make correct and just rulings". (Brief of Retired Trial Judges as Amicus Curiae, *King v King*, 162 Wash.2d 378, 174 P.3d 659 (2007).