SUPREME COURT OF WISCONSIN

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OF WISCONSIN

In re the Petition to Amend SCR 81.02
No. 17-06

STATEMENT OF PETITIONER BEN KEMPINEN[1]

Thank you for the opportunity to appear before you today. I respectfully ask this court to grant the relief requested.

1. The Impact of Inadequate Funding of Defense Services on the Legal Profession

I wish to address the impact of the failure to adequately fund indigent defense services from a perspective different from many appearing before you today – that of a long-time law professor who has seen the impact this failing has had on law students and young lawyers – the future of our justice system and the guardians of the social contract that binds us. My observations are informed by more than forty years of practice and teaching – all in Wisconsin and nearly all in the criminal justice field.

It has been an extraordinary privilege to have worked with so many bright and able young persons who have chosen our profession as a career. Invariably they arrive committed to using their talents and skills to improve our justice system, our service to those in need, and our profession. They are eager to learn and apply the core values upon which our justice system and profession are based and put this knowledge to use for the benefit of society.

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[1] Petitioner Kempinen recently retired from the clinical faculty of the University of Wisconsin Law School where, as a Clinical Professor, he taught since 1976. This statement reflects his personal views and not those of the University of Wisconsin nor the University of Wisconsin Law School.

Increasingly, the lessons learned in law school have become disconnected from the reality of practice in the courts of our state.

We encourage new lawyers to engage in public service, yet those that do cannot survive on what they are paid.[2]

We teach law students to respect the rule of law and that all are equal before the law. They quickly learn that the quality of representation matters in achieving equality and that money often determines who is well represented and who is not.

Law students study our state and federal constitutions but see inconsistent enforcement of fundamental rights – ranging from aggressive protection to benign neglect.

Many attorneys remain steadfast in their commitment to the rule of law, the ideal of equality before the law, and strive to realize these core values in their representation of clients. We all know such lawyers and gain inspiration from their example. But many become weary of the Sisyphean task before them – judges, prosecutors, and defense counsel alike. They come to accept inequality as unfortunate but immutable and pronouncements of a commitment to equality as empty words. The impact of such a state of affairs on indigents accused of wrongdoing is undeniable and unlawful. But the most worrisome consequence may our creation of a generation of attorneys whose idealism is replaced with cynicism and who come to accept that equality and fairness is unachievable.

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[2] The estimated costs of attending either of Wisconsin's law schools is more than $200,000. Even with various forms of financial aid, most students graduate with significant debt. While there are several loan forgiveness programs for public interest positions they do not apply to the population of lawyers involved in the current petition – private attorneys who accept public defender appointments in criminal cases. *See generally* https://www.lawschooltransparency.com/reform/projects/Non-Discounted-Cost/

2. The Issue Before the Court

The precise issue before this court is not complex. The law is clear – indigent defendants are entitled, by operation of both the Wisconsin[3] and United States[4] Constitutions, to the assistance of counsel at public expense when charged with a criminal offense that could result in incarceration. And, as a corollary, the assistance guaranteed must be effective, satisfying normative standards of competence.[5]

Likewise, the facts are not in dispute.

- Wisconsin is last among all states in the rate of pay for private appointed attorneys in criminal cases.[6]
- The rate of pay covers less than half of the average hourly overhead for private attorneys, resulting in involuntary pro bono service by this class of attorneys.[7]
- The current rate of pay creates a powerful disincentive to effective representation – pitting the interests of the client against the personal interests of the attorney in economic survival. This institutionalizes an unwaivable conflict in violation of SCR 20:1.7(a)(2).

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[3] *See Carpenter v. County of Dane*, 9 Wis. 274 (1859); *County of Dane v. Smith*, 13 Wis. 654 (1861). *Carpenter* imposed the financial responsibility for indigent defense on the county whereas federal law imposes the responsibility on the state. See n. 3.

[4] *See Gideon v. Wainwright,* 372 U.S. 335 (1963).

[5] *See Strickland v. Wainwright*, 466 U.S. 668 (1984)

[6] *Rationing Justice: The Underfunding of Assigned Counsel Systems*, National Association of Criminal Defense Lawyers (NACDL) (2013)

[7] This court has rejected mandatory pro bono service. SCR 20:6.1(a), (b). However, the current system of payment for private attorneys accepting public defender appointments is a *de facto* form of pro bono service – providing representation below cost which results in private attorneys subsidizing a responsibility of the state.

- A variety of studies make clear that the quality of representation matters to the fairness of the process and outcome and that adequate compensation is essential for quality representation.[8]
- Consequently, although Wisconsin may provide appointed private attorneys for most indigent defendants, its compensation structure systematically denies them effective representation in derogation of the federal and state constitutions.[9]

3. This Court Has the Authority to Grant the Relief Requested.

It would neither be fair nor accurate to place responsibility for the present situation on this court. But it is critical to acknowledge that this court does have the power to do something about it. This court has the authority to increase the rate of pay for private appointed attorneys given Wisconsin's unique system of shared powers.[10] This court has acted to protect certain constitutional rights, including the Fourth Amendment right against unreasonable searches and seizures[11] and the First Amendment rights to free speech and association.[12] There is no legal basis to suggest the right to counsel deserves lesser protection.[13]

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[8] See Chemerinsky, *Lessons from Gideon*, 122 Yale Law Journal, 2676, 2680-2684 (2013).

[9] *See* https://www.jsonline.com/story/news/local/wisconsin/2018/05/11/wisconsins-lowest-nation-pay-defense-lawyers-crisis/579026002/. There is reason to believe that in some parts of our state the public defender cannot find attorneys willing to accept appointments at all, much less for the current rate.

[10] *See State ex rel. Friedrich v. Circuit Court*, 192 Wis. 2d 1, 531 N.W. 2d 32 (1995).

[11] *See State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165 (2015).

[12] Id. n. 10; *See In the matter of amendment of the Code of Judicial Conduct's rules on recusal; In the matter of amendment of Wis. Stat. § 757.19*, Nos. 08-16, 08-25, 09-10, and 09-11 (Order, July 7, 2010). J. Roggensack.

[13] The right to counsel has been characterized as an affirmative right – one that requires the government to act rather than simply prohibiting certain government actions. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. R3ev. 864, 873 (1986). Nonetheless, there is no support in the text of the constitution or case law to distinguish the importance or enforceability of constitutional guarantees on this basis.

There is no doubt that an increase of the rate of pay for private attorneys would have fiscal consequences. This being so, it could be said the issue might best be addressed by our state legislature. However, the lack of legislative interest in or a commitment to enforcement of the constitutional right to counsel could not be clearer. Since 1995 – more than two decades – our legislature has consistently refused to address this issue even as efforts have been made on a yearly basis to seek remedial action.[14]

The time for deference to the legislature is past. The time for action is now.

This court requires all Wisconsin lawyers to take the Attorney's Oath. SCR 40.15. It states, "I will support the constitution of the United States and the constitution of the state of Wisconsin . . . [and] I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed. . ." In deciding this matter, let this court be guided by these words. And may law students and lawyers, now and in the future know that this court acted to enforce the rule of law and equality for all before the law when others stood silent.

Dated this 14th day of May, 2018.

Respectfully submitted,

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[14] *See* Exhibits 3, 4 to *Petition to Amend Supreme Court Rule 81.02.*