

2009 HOUSE JUDICIARY

HB 1497

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1497

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8577

Committee Clerk Signature

W Penrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1497.

Rep. Mike Nathe: Sponsor, support. Explained the bill, it deals with sexually dangerous individuals and legal counsel in these cases. This bill looks to transfer the defense costs from the county to the state.

Ch. DeKrey: Is this in the Governor's budget.

Rep. Nathe: No.

Rep. Koppelman: Would this treat these offenders differently from others, put them in a unique class.

Rep. Nathe: Under those circumstances, I don't know.

Chairman DeKrey: Thank you. Further testimony in support.

Cynthia Feland, Asst. Burleigh County State's Attorney: Support (attachment/amendment).

Rep. Klemin: I would like to see the amendment.

Cynthia Feland: Yes, it is a couple word change.

Rep. Klemin: I'm trying to understand the bill from the standpoint from the bottom of page 1, where it says "counsel will be compensated by the state pursuant to section 29-07-01.1. Your

amendment changes the word state to Dept. of Human Services, but still keeps in the reference to 29-07-01.1.

Cynthia Feland: That reference is to the Indigent Defense payments.

Rep. Klemin: That's the commission on indigent defense.

Cynthia Feland: Yes.

Rep. Klemin: So, regardless of whether it is a state or a state agency, 29-07-01.1 is the Commission on Legal Counsel for Indigents and I was just looking at that, and that sets out the responsibility of the Commission to select counsel and pay for the counsel, and set up public defenders, etc. Then we go to page 3, that new language and this relates to section 2 of the bill, which sets out the responsibilities of the Director of the Commission on Indigent Defense. But I don't quite understand the language; it says the director is not responsible for the administration, supervision or delivery of indigent defense services under 25-03.3 which is the chapter on commitment of sexually dangerous individuals. It looks to me that we're transferring the payment of the defense fees over to the Commission on Indigent Defense under the first part of this, but then under the second part of this, we're saying that other than paying for it, they're not responsible for anything.

Cynthia Feland: The intent was that we recognize that under the current system, that Indigent defense operates under, that they do not have the staff or the resources to take on this additional burden. There is just no way that they can do it. So the way this was drafted, made it very clear that this was not just a responsibility for the same amount of money that they are currently using to Indigent Defense counsel, to have to deal with this issue. This was basically created so that the same type of system, as far as the selection of contract attorneys, as far as how they would get new clients, for training and the responsibility would mirror that of

the Indigent Defense Commission, but that the payment responsibility then would be with the Dept. of Human Services.

Rep. Klemin: So who would select the counsel for the respondent then?

Cynthia Feland: Well, under this system it would still lie within the current system which is currently the court administrator's office to select them. The difference is that the payment and bill being sent to the county, the bill would be sent to the Dept. of Human Services.

Rep. Delmore: Do you have any statistics for other counties besides Burleigh County, how many cases in the last several years have been statewide, since this has been set up. I think we made some trade-offs when we had counties responsible for doing the defense work. I think there were some other things we looked at, whether it's a matter of record or not.

Cynthia Feland: We do have all the statistics for the state of ND. The only one that we don't have at this point for 2008 and that is because of the contractors at the State Hospital. They didn't have those total numbers yet. Sexual offenders don't tend to necessarily stay within county lines, so what happens is that these notices come out to whatever county had the sexually related offense. Burleigh County has the penitentiary here in Bismarck. If another county doesn't pick up the ball, then Burleigh County ends up doing it instead of doing nothing. One of the reasons that a small county can't pick up the ball is because they lack the knowledge and/or fiscal resources. Sometimes we do a little negotiating and agree to take on the case; and of course, they are sporadic as to when you might receive one.

Rep. Delmore: The information you just gave me was very helpful, but I need to see the statistics.

Cynthia Feland: I can certainly get some numbers to you. We didn't keep all the cases separate though by county. I went through the files last night by hand.

Rep. Delmore: Is someone going to try to walk us through the fiscal note, just so that we know if this is going to offset the state's attorney salaries, is it for staff, where is the money going?

Cynthia Feland: My understanding is that this is strictly the cost of the indigent defense; there is no state's attorney money, just what we pay to maintain the indigent defense attorney, the contract attorney that is brought in to represent the respondent. This could be for the original commitment proceedings or whether for the annual discharge hearing.

Chairman DeKrey: This bill is going to go out today. Today is the last day for the fiscal note bills to leave the committee. Any information to bring to the committee has to be done quickly, because we have to get this out today.

Rep. Koppelman: Just to clarify a question, whether or not this is in the governor's budget, did the state's attorneys approach the Dept of Human Services or the court with regard to the indigent defense counsel, anybody that can wrap this into a budget somewhere.

Cynthia Feland: Mr. Erickson got this ball rolling and has been talking with Indigent defense and the court.

Rep. Koppelman: When the indigent defense was put into place a few years ago, the Supreme Court was very passionate about what they were trying to do, and that was the concern that there was an apparent inherent conflict of interest when the state is prosecuting and defending a case. It seems to me that nothing in the bill would change with regard to the way things are handled except money would come from DHS. My question, wouldn't it make more sense, if we're going to do this, is to put it into the Office of Indigent Defense and do it like we do other types of defense issues.

Cynthia Feland: If they were given sufficient FTE's and staff, I would say yes, that there would be logic to doing it in that fashion. Like anything else, even when they developed the

indigent defense office, there were things that weren't thought of. (?) Burleigh County was one of the last counties to get set up. The smaller counties have little or no budget to handle these cases which can run into thousands of dollars and they can't afford to pay; there is no negotiation room. The smaller counties' state's attorneys are paid \$28,000 which is the cap for the annual salaries. You need to look at the fairness issue.

Rep. Koppelman: It sounds to me like we're dealing with both a "where does the money come from" and "how much" question. So it makes sense to have a cap or some sort of limitation on the bill. That's on the bill?

Cynthia Feland: It isn't, but again I don't know how we can legislate something like that, it's very similar to the Dept of Human Services and the handling of the independent medical expert in that if they sat down and looked at the bills that were coming in and said no, we can't pay that. It puts it in their parameters to determine who and what will get paid. This would have to happen here.

Rep. Koppelman: Does the Dept of Human Services have an expertise when it comes to indigent defense and criminal court cases.

Cynthia Feland: I would probably say no, I would say that it would probably make more sense to put it in the indigent defense fund because they would have the expertise. My assumption is that it is with the Dept. of Human Services because it is in that section of the code, because this isn't a criminal matter, it is a civil proceedings

Rep. Klemin: On page 1, I'm having a little trouble with the reference to section 29-07-01.1. When I read that over, there isn't anything in there about the Dept. of Human Services. It sets the duties of the state and the commission on indigent defense as a claim or the payment by the city when the city is responsible, but if we put in the Dept of Human Services, like you're proposing, that reference to section 29-07-01.1 really doesn't seem to apply.

Cynthia Feland: The intent is that it follows the style procedure. Maybe there is a better way to word that, but we were looking at trying to use existing parameters to flow the most smoothly.

Rep. Klemin: Well, there isn't any actual procedure in there, all it says is expenses as necessary for the defense of the indigent person prosecuted in district court and approved by the Commission must be paid by the State. That's really all it refers to. If we say Dept. of Human Services, there really isn't.....I could see if we put Dept of Human Services on page 1. That's the end of the bill. Because then you wouldn't need section 2 at all, because the commission on indigent defense has nothing to do with it.

Cynthia Feland: If the committee is comfortable, I don't have any problems with that. The intent here is that this is a burden that has been placed on the counties that we need to have it addressed because this is an unfunded mandate. And for a county to try to deal with this issue is a significant burden and the smaller counties it's become almost an impossibility to try and figure it out.

Rep. Griffin: Have you ever had an individual from Burleigh County that has been released?

Cynthia Feland: No.

Rep. Griffin: Each year, and you did five this year, you may have to pay for everyone who's ever been committed plus the five additional new ones.

Cynthia Feland: That's exactly the problem, and I can tell you that after the first one asks for a review, everyone wants a review. Sometimes it is immediately prior to a hearing, but mind you they've already gotten an attorney. Their independent evaluation will come back indicating that they agree that they're not ready to be released and in some of those cases they delay the hearing. We still have the expenses of an indigent representation up to that point, and they would need to be reimbursed. I can think of two in the last three years that haven't.

Rep. Dahl: You used the term it's almost becoming an impossibility for some counties doing this that is pretty alarming. So, is there a real possibility that some of these individuals may not be pursued for commitment proceedings. Is that what you're saying.

Cynthia Feland: The realities of it are you have state's attorney that are paid by the county commission and state's attorneys are ultimately are the ones who decide whether or not you go for commitment. Basically the information comes in one of two ways to our office, either it comes through the DOCR sends us information to our office saying that they intend to seek commitment so that we have an opportunity to take care of the paperwork, have a hearing, etc. prior to the time of their release so that there is no additional deprivation. In those cases, we will request the records, look through the records and make a determination. We also get sent appear notices where some of the counties are seeking to abdicate that responsibility. For some of the counties, I can't help but think that this might be a significant financial issue, because I know what Burleigh County pays out and it fluctuates. I can't tell you realistically what we paid in 2008 because some of the expenses are paid out in the next biennium that was incurred in the previous biennium. For budgetary issues it's a real problem and it's a significant burden for counties. At some point, the smaller counties are going to have to choose as to what they want to do. Granted there are liability issues for the county if an individual should have been committed and something happens. Several of these individuals that are committed are extremely high risk offenders and are dangerous.

Rep. Wolf: Of those committed none were released in 2007, how many now have been released.

Cynthia Feland: Approximately five have been released.

Alex Schweitzer, Superintendent of ND State Hospital: Six people have been released plus two are in the process of being released, so a total of 8.

Cynthia Feland: When I called yesterday, those were the most recent numbers they could give me. The good news is that these people have been treated to the point where they are released into less restrictive custody.

Rep. Koppelman: I suspect that most of these folks that are indigent when they are judged are truly that, they don't have a lot of assets. How carefully is that currently investigated. I know that in current law there is a procedure where a county can go after their assets, I assume, or whatever they have available to pay back. How is indigency determined.

Cynthia Feland: A vast majority come from the State Penitentiary when they get out. Some, but very few hire their own private counsel.

Chairman DeKrey: Thank you. Further testimony in support.

Peter Welte, State's Attorney for Grand Forks County: Support (attached). This is a state issue, not a county issue. In some cases, the smaller counties can't afford to pick up the costs for these types of cases; which includes the original trial and annual reviews. We don't want these cases to be dropped and not pursued.

Rep. Delmore: One of the things we have to take into consideration with the commitment scenario, was that they are still human beings with some rights. I understand how that complicates that every year they may request a review, but there are good reasons for doing that, even with some of them are dangerous people. Is the annual review of that as extensive for the counties to do versus the original trial.

Peter Welte: No there aren't as extensive; but are still time consuming for smaller counties that don't have the resources to put on the hearings.

Chairman DeKrey: Thank you. Further testimony in support.

Ron Krebsbach, President of Association of Counties: Support. This past year, McLean County has had four investigations, and three of them from out of the county and some from

out of state. This is just another mandate that the county has to cover. I strongly encourage a Do Pass on this bill.

Rep. Wolf: Do you know what McLean County has paid out for the last year, or earlier.

Mr. Krebsbach: Unfortunately, I don't. Our State's Attorney had a court case this morning so he wasn't able to be here.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

H. Jean Delaney, Deputy Director, ND Commission on Legal Counsel for Indigents:
Opposed (attachment).

Chairman DeKrey: How many attorneys would we be looking at in the Indigent Defense Commission.

H. Jean Delaney: I don't know how many attorneys across the state handle these cases. I don't know; I would assume that some attorneys that handle indigent defense contracts also do these cases.

Rep. Wolf: When a person is committed to Jamestown, is the annual review held in that county or in the county that the person resided when the trial was held.

Cynthia Feland: Yes, back to the originating county.

Chairman DeKrey: Thank you. Further testimony in opposition.

Alex Schweitzer, State Hospital: Not opposed, but I do have concerns. First of all, in regard to the fiscal note, as indicated, there wasn't one. When we talking about the Dept. of Human Services at the State Hospital, they have very tight budgets, with 90% occupancy in the hospital. It concerns me that this bill was brought forward and we weren't visited with about this bill in advance and prior to session. Then we could have put this in the budget, it would have made a big difference, because the problem probably shouldn't have been brought forward to even discuss this. Also confusing in this bill, is the language about the attorneys.

We need to have the language cleaned up so we can understand exactly what we have to do.

As indicated on the mandate, it is an unfunded mandate for us too. I wanted to bring those concerns to the committee. We know the number of cases that will require an annual review of the individuals, so the dollar amounts are figured the best we could.

Rep. Griffin: How many individuals have been released.

Alex Schweitzer: Six with an additional two being prepared for release.

Rep. Griffin: Were those six individuals committed or not?

Alex Schweitzer: Several individuals were released after evaluation because they don't meet criteria. These particular individuals that we're talking about, are individuals that have been released by the court after they have attended a treatment program. They were committed, treated and released. At least half of them we recommended on a clinical basis; the others were released by the court for various reasons.

Chairman DeKrey: Thank you. Further testimony on HB 1497. We will close the hearing.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1497

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8687

Committee Clerk Signature: *Phenrose*

Minutes:

Chairman DeKrey: We will look at HB 1497. What have you found out?

Rep. Dahl: Explained the amendment. I move the amendment.

Rep. Klemin: Second. I did discuss this with Ms. Feland and she was okay with the study.

Chairman DeKrey: Further discussion. Motion carried.

Rep. Zaiser: I move a Do Pass as amended.

Rep. Wolf: Second.

13 YES 0 NO 0 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Zaiser

FISCAL NOTE
 Requested by Legislative Council
 02/06/2009

Amendment to: HB 1497

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill provides for a Legislative Council study of the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

There is no fiscal impact relating to this bill.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	Allen H. Knudson	Agency:	Legislative Council
Phone Number:	328-2916	Date Prepared:	02/06/2009

FISCAL NOTE
Requested by Legislative Council
01/22/2009

Bill/Resolution No.: HB 1497

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$581,834		\$610,910	
Appropriations			\$581,834		\$610,910	

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
			(\$581,834)			(\$610,910)		

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This Bill transfers the payment of attorney fees, for indigent individuals, from the county to the Department of Human Services for cases involving the commitment of sexually dangerous individuals.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the Bill would require the Department of Human Services, instead of the county of residence, to pay attorney fees for indigent individuals in cases involving the commitment of sexually dangerous individuals.

It is presumed there would be 50 new cases a biennium and that each case would require 85 hours of legal consultation at a rate of \$96.65 per hour. In addition, each of the existing 59 case receives an annual review which is estimated to use 15 hours of legal consultation per year.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The expenditures reflect the estimated cost of legal fees for the 50 new cases a biennium with each case using 85 hours of legal consultation at a rate of \$96.65 per hour. In addition, each of the existing 59 cases is estimated to use 15 hours of legal consultation per year.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The Department's budget (HB 1012) does not include funding for these expenditures and would therefore need a general fund appropriation of \$581,834.

Name:	Brenda M. Weisz	Agency:	DHS
Phone Number:	328-2397	Date Prepared:	01/28/2009

YK
2/4/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1497

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - SEXUALLY DANGEROUS INDIVIDUAL COMMITMENT LEGAL COUNSEL COSTS. During the 2009-10 interim, the legislative council shall consider studying the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals under chapter 25-03.3. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Renumber accordingly

Date: 2/4/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1497

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Zaiser Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 0

Floor Carrier: Rep. Zaiser

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1497: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1497 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - SEXUALLY DANGEROUS INDIVIDUAL COMMITMENT LEGAL COUNSEL COSTS. During the 2009-10 interim, the legislative council shall consider studying the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals under chapter 25-03.3. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Renumber accordingly

2009 SENATE JUDICIARY

HB 1497

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1497

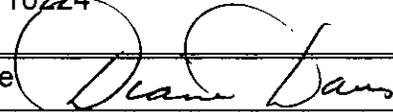
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/4/09

Recorder Job Number: 10224

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

To provide for a legislative council study of the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals.

Representative Mike Nathe – Introduces the bill.

Aaron Birst – Association Counties – In support of. Would like to see this study done. Asking the state to pick up mental health commitments. The question is on who should pick up the indigent defense costs. Should it be the indigent defense counsel which handles the criminal side but they do not do civil commitment. Should it be the Dept. of Human Services?

Senator Fiebiger – How many of these commitments are done annually.

Birst – Currently there are 53 sexual offenders at the State Hospital. They all had to go through the commitment process. All fifty three get an annual review. They fall on the back of Indigent Defense.

Senator Schneider – How do other states handle this.

Birst – Replies, a number of states do not use county prosecutors, they may have gone to a DA system.

Michael Mullen – Assistant Attorney General – He says the Dept of Human Services and the State Hospital also the Indigent Defense Council are in support of this bill. He believes a study would be appropriate.

Close the hearing on 1497

Senator Lyson moves do pass

Senator Fiebiger seconds

Vote 6-0

Senator Olafson will carry

REPORT OF STANDING COMMITTEE (410)
March 4, 2009 1:26 p.m.

Module No: SR-38-4040
Carrier: Olafson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1497, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1497 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1497

BURLEIGH COUNTY STATE'S ATTORNEY

RICHARD J. RIHA
STATE'S ATTORNEY

ASSISTANT STATE'S ATTORNEYS:
CYNTHIA M. FELAND
LLOYD C. SUHR
JULIE LAWYER
TYRONE J. TURNER
JUSTIN J. SCHWARZ
PAMELA A. NESVIG
JEFFREY R. UBBEN
BRYAN D. DENHAM

Mr. Chairman, members of the House Judiciary Committee, my name is Cynthia Feland and I am an assistant with the Burleigh County State's Attorney's office and a member of the North Dakota State's Attorney's legislative committee were I assist in the coordination of legislative action and issues. I stand before you in support of House Bill 1497.

The costs of the system of justice in our state are a shared burden between the counties and various state agencies. The state is responsible for the monetary costs of maintaining a safe, secure and adequate penitentiary, the North Dakota State crime lab and forensic medical examiners offices, highway patrol, judges, criminal defense attorneys for the indigent, and other inherently state functions.

The counties duties and burdens are found in Title 11. Within the criminal justice system, those duties include funding safe and secure courthouses and jails; investigating and prosecuting violations of state law; and transporting and housing prisoners before sentencing and those with sentences less than 1 year.

In practice, the interplay between the functions funded by the state and the counties works harmoniously. However, discord occurs where counties pay for expenses that are not found within the legal duties contained in Title 11; where counties are burdened with "unfunded mandates" or state costs transferred to the counties by a particular statute or program.

The subject of HB1497 deals with costs from an unfunded mandate that the counties have been paying for since 1997 when the state first created a program for the commitment of sexually dangerous individuals (SDI). This particular unfunded mandate places on to the counties the burden of paying for court appointed attorneys for each person indigent person sought to be committed under the SDI program.

Many state's attorney's worked on and supported the bills that created the SDI program. Based on the anticipated scope of the program at the time, the placement of the defense costs on the counties was not given much consideration or discussion.

SDI cases generally come to a state's attorney's office in one of two ways: (1) prior to an individual's release from custody, the North Dakota Department of Corrections, based upon pre-established criteria, refers the case to the state's attorney's office(s) to consider for commitment; or (2) While on supervised probation, the individual commits further acts that make the individual eligible for commitment.

1 Once the State recommends commitment and the state's attorney's office files a petition, the
2 individual to be committed is provided notice of the commencement of the SDI action and his
3 right to an attorney if indigent. A state court administrator's office then selects a private attorney
4 to represent the individual the state seeks to commit as a sexually dangerous individual.

5 SDI proceedings include a preliminary hearing to determine whether there is probable cause that
6 the individual sought to be committed is sexually dangerous. If probable cause is established,
7 the individual is sent to the State Hospital for an examination to determine whether that
8 individual meets the four criteria necessary for commitment under N.D.C.C. 25-03.3. Once the
9 report is completed, the individual to be committed may request an independent examination, the
10 cost for which is paid by the Department of Human Services under criteria which sets a cap as to
11 the amount which can be reimbursed. Upon completion of both the state's and independent
12 examinations, a commitment hearing is held for the district court to determine whether
13 commitment is warranted. If the judge orders commitment, the committed person has a right to
14 appeal, and an attorney to represent them in that appeal.

15 **Each year** thereafter, the committed person can file a petition for discharge and request a hearing
16 on the same. If at the hearing on the petition for discharge the district court determined that
17 commitment should continue, the committed individual again has the right to an appeal. The
18 committed person again has the right to assistance by an attorney through each of these phases at
19 county expense.

20 Upon completion of the original commitment case and following each annual petition for
21 discharge, private indigent counsel send a bill to a state court administrator's office where the
22 judge signs off on the attorney's fees requested and forwards the bill to the county auditor's
23 office for payment.

24 Under current law, there is no preset criteria for the amount that can be charged by indigent
25 defense counsel in handling these cases. The county is not a party and has no standing to either
26 agree or dispute the bill. We just have to pay it.

27 When the SDI program was passed in 1997, it was envisioned that there would be only a handful of
28 people subject to commitment. However, since its inception, there has been a dramatic increase in
the number of individuals sought to be committed. The increase is evidenced by the attached fiscal
note.

According to statistical information from the North Dakota State Hospital, there were an average of
60 reviews for SDI commitment per year with 35 letters being sent to states attorneys for
consideration for commitment for the period of time between 1999 and 2003. Between January 1,
2004 and December 31, 2007, the number of cases reviewed for commitment has grown to over 100
per year. While the final numbers for 2008 were not yet available from the State Hospital, state's
attorney's offices have not noted a decrease in the numbers being referred by DOC for commitment.

1 As of February 3, 2009, there are 59 sexually dangerous individuals committed under Title 25-
2 03.3. In addition, there are 2 that commitment is recommended but a commitment hearing has
3 not yet been held and 2 that are currently being evaluated. Of the 59 committed individuals 45
4 requested and had discharge hearings in 2008. I also have four more cases in my office that we
are preparing for commitment.

5 Based on these figures, it is clear that the current procedures and scope of the SDI program
6 differs dramatically from what was envisioned at its inception. We support this bill because the
7 cost of indigent representation in SDI cases is no longer an incidental state cost picked up by the
counties, but a major budget item.

8 In Burleigh County, we handled one SDI commitment each year from 1998 to 2003. In 2004, we
9 handled 3 SDI commitments. In 2005, SDI commitments increased to 7. We saw an additional
10 increase in 2006, with a total of 8 commitments. In 2007, we handled 5 new SDI commitments,
11 and in 2008, we handled 4 SDI commitments. In addition, we handle on average 12 annual
discharge petitions.

12 For larger state's attorney offices, 2 or 3 contested SDI cases a year can be have a huge impact
13 on the budget, let alone the fluctuation Burleigh County has seen of up to 7 and 8 contested cases
14 per year. For the small part-time state's attorney's office's, a bill from a defense attorney for
thousands of dollars in one SDI case is a budget buster especially when you consider that some
part-time state's attorney's only make the \$28,000 annual salary set forth in current law.

15 Under the current system, judges through the court administrator appoint the indigent attorneys.
16 This bill does not change that. We also recognize that indigent criminal defense attorney's are
17 underpaid and over worked under their current criminal case loads. This bill does not place the
18 burden of handling SDI cases on the current indigent defense offices; rather it would involve the
19 use of contract attorneys identical to the current system. Effectively, all this bill does is shift the
responsibility for payment of indigent costs from the county to the state.

20 Thank you for your consideration and support on HB 1497.
21
22
23
24
25
26
27
28

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1497

Page 1, line 24, replace "state" with "Department of Human Services"

Renumber accordingly

February 4, 2009

My name is Peter D. Welte, and I am the State's Attorney in Grand Forks County. I am here, representing myself, with the support of my County Commission.

Mr. Chair, Mr. Vice-Chair, Ladies and Gentlemen of the House Judiciary Committee, Good Morning. Thank you for the opportunity to present testimony to you regarding House Bill 1497.

This bill is a simple one. It removes from the counties the financial burden of paying for defense counsel on cases involving the civil commitment of sexually dangerous individuals, and places that payment obligation where it belongs; with the State of North Dakota.

Presently, local property taxes go toward paying defense attorneys in these cases. These attorneys are directly appointed by the District Court, with minimal supervision, & minimal specific guidance or direction regarding appropriate amounts to charge for these services. I submit to this committee that this was not what the framers of our State's Constitution had in mind when contemplating where property taxes would be spent.

In the past two years, my county—Grand Forks County—has averaged an expenditure of \$25,000 annually on defense costs for committing sexually dangerous individuals. This amount will only increase, since each SDI case involves not only an initial trial but also an annual review of the matter.

Under the present system, where the counties are responsible for paying for defense attorneys in SDI cases, the counties that aren't as financially fortunate as Grand Forks County—for example—are faced with a dangerous choice. Since they don't have the resources to proceed on these cases, they must either decline to prosecute such a case, or they must prosecute the case and have the county taxpayers foot a bill for a case that—out of fundamental fairness—is really a State—and not a county—matter. Some of these small counties may actually decline to prosecute these cases due to lack of financial resources. That shouldn't happen. These sex offenders are not just dangerous, they are diabolical, and they shouldn't be able to “forum shop” just to possibly avoid civil commitment.

The present system of committing sexually dangerous individuals is state-oriented. From the Governor's committee on down, it is a State issue. It involves the NDDOC, the ND Dept of P&P, the DHS, the State Hospital, and more. It only makes sense to relieve the counties of this financial burden, and to place that burden where it fairly belongs, with the State of North Dakota.

Thank you for the opportunity to be here today. I stand available to answer any questions or entertain any comments you may have.

HB 1497
North Dakota Commission on Legal Counsel for Indigents
Testimony presented by H. Jean Delaney

~~Senate~~ Judiciary Committee
House February 4, 2009

House Bill 1497 deals with providing legal counsel to respondents in cases brought under Chapter 25-03.3 - those cases involving the commitment of sexually dangerous individuals. There are several concerns with the language of the proposed changes.

The bill provides that “[i]f the court determines that the respondent is indigent, the court shall appoint counsel and order that appointed counsel be compensated by the state pursuant to section 29-07-01.1.” The “state” is not defined. Depending on which entity is the “state,” there is a concern with the language that the “court shall appoint counsel,” because the agency with the responsibility for paying for counsel wouldn’t necessarily have control over the attorney that can be assigned (which attorneys have contracts, what training they should have, what are they paid, etc.). This language could be construed as giving a duty to an agency to pay for something without giving the agency any right to have control over the costs.

This bill references 29-07-01.1. An area of concern with this reference is that Chapter 25-03.3 is a civil, not a criminal, procedure. Title 29 of the Century Code deals with criminal procedure.

The reference to 29-07-01.1 must be referring to subsection (1), as others subsections do not deal with compensation of counsel. Subsection (1) provides that “[l]awyers provided to represent indigent persons must be compensated at a reasonable rate to be determined by the commission on legal counsel for indigents.” However, unless the term “state” were to

mean the commission, and the commission is dealing with these types of cases and the attorneys on them on a regular basis, the commission would not have a reasonable basis for setting this rate.

Section 25-03.3-09 (4) is deleted under this bill, possibly because 29-07-01.1 (3) authorizes the civil recovery of amounts expended on the defendant's behalf. However, 29-07-01.1 (3) refers to "defendants" and "offenses," which are terms inapplicable to a sex offender civil commitment. It is likely that this bill would remove a right to seek civil recovery of sums expended on behalf of a respondent.

There is also a concern with the Amendment to the section 54-61-03. While we appreciate the effort of the drafter of the bill's attempt to exclude the commission from the responsibility for these sex offender civil commitment cases, it may not go far enough to do what is intended, as separate sections detail the commission's responsibilities.

Finally, there is no effective date on this bill. Thus, agency determined to be the "state" would be required to assume responsibility for payment for sex offender civil commitments on August 1 of this year. If the agency were to be responsible for providing these services and not just payment of costs, there would be only a few short months to determine how to organize this new program, hire and train admin staff, enter into contracts with attorneys to cover these cases in all the counties of this state, organize training for these attorneys, and set standards for these cases.