

2011 SENATE JUDICIARY

SB 2105

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2105
January 12, 2011
12799

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to providing state-funded legal services in criminal cases; relating to responsibilities of the commission on legal counsel for indigents.

Minutes:

SEE ATTACHED TESTIMONY

Chairman Senator Dave Nething opened the hearing on SB 2105; Fiscal Note required.

Gerald W. Vandewalle, Chief Justice of the North Dakota Supreme Court appeared in favor of the bill. (see testimony #1)

The U.S. Supreme Court several years ago said that criminal defendants have the right to represent themselves if they are competent. However, in a subsequent case they said that if they are not competent to represent themselves, (competent to stand trial, but not competent to represent themselves) the court has a continuing obligation to make sure they are adequately represented. North Dakota has had a couple of situations in which the defendant has been found competent to stand trial, has sufficient money to hire an attorney but refuses to hire one, yet is not competent to represent himself. The standards of competency to stand trial and the standards to represent oneself are not the same. Judges are caught in between; must make sure defendant is adequately represented and yet the defendant refuses to hire counsel. Indigent Defense Commission rightfully says under our current law we cannot represent someone that is not indigent. This bill would authorize the Indigent Defense Commission to represent those people and seek payment; we've only seen two or three cases like this.

The issue came up whether the judges should appoint counsel. We just got out of the business of judges appointing counsel, and it's even worse when the judge appoints counsel for someone that does not want counsel yet is not competent to represent themselves. This bill provides for the Indigent Defense Commission to seek compensation from the defendant that is able to pay. The problem is the people come before the court and have to be represented immediately and there is no real time for the judge to set it aside and try to find out what is going on as far as the resources are concerned. Authorize the Indigent Defense Commission to do that. Didn't take this step lightly and have researched this issue. Would be happy to see another group take this on but doesn't want

it to be the court because they just got rid of appointment of counsel by judges because of the conflict of interest.

Senator Lyson: Are we opening a can of worms that we don't want to open? Are we going to start something that will have potential to expand?

Judge Vandewalle: The bill is limited to those instances where they are constitutionally required to have counsel.

Senator Lyson: Putting another burden onto the Indigent Defense team that they can legally go after them to get the money. They are already strapped for the amount of people they have, and now are going to have to go into the civil process of trying to collect money.

Judge Vandewalle: We could just say they would be appointed without any recoupment at all. There out to be some type of recoupment measure in here.

Senator Lyson: All respect, but the courts have got to take some responsibilities here, and I don't want to push something onto Indigent Defense that is not indigent. I think the courts need to take the responsibility of appointing these people.

Judge Vandewalle: The reason Indigent Defense was created, the Constitution requires these people be represented. Otherwise we wouldn't have the commission and they wouldn't have to be represented. Looking at line 10 of the bill (for indigents and other criminal defendants which are required under the Constitution of North Dakota and United States) so not attempting to broaden it beyond those that are constitutionally required. Understand your concerns, but the conflict of interest here is greater than with the indigent that says I want counsel but I can't afford it. You have a mentally disability that can afford it but refuses to hire counsel, and now the court is forcing someone on them—huge conflict of interest.

Senator Nething: The reimbursement provisions on lines 10 & 11, page 2 references 2907-1.1; what is that?

Judge Vandewalle: That is the current provision for recoupment by indigent defense.

Senator Nething: Who has that responsibility?

Judge Vandewalle: Indigent Defense Commission

Senator Nelson: Regarding the fiscal note of \$70,500—where is it coming from?

Judge Vandewalle: It would come out of Indigent Defense Commission.

Senator Nelson: They don't have it, so where is it going to come from?

Judge Vandewalle: That is an estimate; we don't have it in our budget either. We have no money for appointment of counsel because we aren't supposed to be doing it. Don't know the state of their budget, but let them know ahead of time about this bill.

Senator Nething: We could put money there it can be put in with an amendment.

Senator Sitte: Is it unconstitutional to require them to pay back the money? Are we violating their rights by requiring them to pay for something they don't want to have?

Judge Vandewalle: The U.S. Supreme Court said you have a responsibility to appoint counsel for people that aren't competent themselves but have the money and don't want to hire counsel. We collect from indigents when they do have the money.

Bill Neuman, Executive Director, North Dakota Bar Association, testified in support of the bill. They helped create the Indigent Defense System and very protective of it. Problem in this case is the need here and can't think of anybody else that's appropriate to meet the need. Sounds like there are a number of things people are trying to put on Indigent Defense, but the commission was created because it is unfair for the courts to pick out lawyers for one side of a lawsuit. If it is unfair for indigents, it is at least as unfair for those that are not competent to defend themselves. Maybe you want to create a Mental Health Defense Commission so someone else has these responsibilities, but I don't think you do! We support it because we don't feel there is another choice.

Senator Lyson: When is this going to end? Seems like since the Indigent Defense was created we find new ways to burden them.

Bill Neuman: You are right, but we need it. The work is not yet done.

Senator Lyson: This is not new, correct? What wasn't all of this brought in at the time the Indigent Defense Commission was created?

Bill Neuman: I don't know how new it is; you'd have to ask the Chief when the US Supreme Court issued that opinion (2008). It is distressing to see these unmet needs and to realize the only appropriate entity to handle these kinds of things is the Indigent Defense Commission.

Senator Nething: Part of it is that they are doing such a good job—price you pay for success.

Bill Neuman: You are right; they do a wonderful job. North Dakota has one of the best indigent defense counsel systems in the country.

No further testimony in favor of SB 2105.

Opposition:

H. Jean Delaney, Deputy Director, Commission on Legal Counsel for Indigents, testified in opposition to SB 2105 (testimony #2). Under the Supreme Court case of *Indiana vs Edwards*, a majority of the Supreme Court determined that the constitution permits but does not require states to insist on representation by counsel for those that are competent enough to stand trial but who suffer from severe mental illness. It is not required in the Constitution.

Senator Nething: You did not say you do not have the funds to do this.

H. Jean Delaney: We would need additional funds in order to do this.

Senator Nething: What options do we have; what do we do with these people that have behavior problems, have the funds, but create a dilemma in providing adequate representation? Do you know what other states do on this?

H. Jean Delaney: It is difficult to deal with these people. That person has the constitutional right to represent themselves. Supreme Court said the constitution permits the court to decide that we will require these people to be represented but it doesn't **require** that. Other federal courts have found that the ruling caps the trial courts ability to force counsel upon the unwilling, severe mental illness appears to be a condition precedent. (gives an example of one person forced to have counsel when not wanted)

Senator Nething: Question still is—what do we do about them? When the judge has made the determination that they don't have the ability to represent themselves?

H. Jean Delaney: There are people who have been found competent to stand trial, and then the trial court makes the determination that in the courts opinion they are not competent to represent themselves at trial? There would be two groups: those people that are indigent and those people who are not.

Senator Nething: I'm talking about those who are not indigent.

H. Jean Delaney: The U.S. Supreme Court has said the court "may" require them to have counsel, but does not have to require them to have counsel. They DO want to represent themselves. Why should we take that right away from them?

Senator Olafson: Listening to both sides being represented; would you walk us through the logistics from the beginning. What is your workload?

H. Jean Delaney: The commission handles approximately 9500 cases per year across the state of North Dakota. She goes through all of the steps the commission goes through once they start a case. Involved by hiring the public defenders, contracting with the attorneys, have a case reporting system, pay bills, resolve conflict, etc.

Senator Nething: Purely administrative then?

H. Jean Delaney: Yes

Senator Olafson: With 9500 cases per year, how much added workload do you estimate roughly 10 new cases per year would add?

H. Jean Delaney: Not a great increase in the Valley City administrative offices work. These would be probably labor intensive cases for the attorney as they are dealing with a

client who does not wish to have them. Would expect they would go through more attorneys than the average person. Not a great number, no.

Senator Olafson: Is it safe to say your objection to the bill is more philosophical than workload related?

H. Jean Delaney: If funded for it, yes.

Senator Sitte: What will happen if we don't pass this bill?

H. Jean Delaney: They are not required to have an attorney; if the bill is not passed there would be no constitutional violation of any defendant's rights. The biggest difficulty would be for the trial court judge.

Robin Husby: Just wanted to note that they do not collect any fees; the court administration, application fee, or then recoupment of attorney fees are collected by the clerk of courts. Makes a suggestion how to get the additional funds. Why couldn't it be that any recoupment thereof be put into our Indigent Defense administration fee?

Rebuttal:

Judge Vandewalle: There will fallout in the constitutional issue; North Dakota does require it be done. We will see cases that say the judge should never have let them represent themselves if they lose the case. Have already had those cases. Also pointed out that the only difference is the defendant can pay. Safe to say that there is a love/hate relationship between counsel and the indigent defense.

Senator Sitte: If they appeal do they pay for it themselves?

Judge Vandewalle: No, they get another indigent defense attorney; also have a post conviction procedure they come back on. It's a litany of some that come back.

Senator Sitte: Are we just talking about these cases where they do have the money to pay but don't want attorney representation, then they appeal and are taking responsibility?

Judge Vandewalle: We have had very few of those cases, so can't tell what they're going to do. One case this year that prompted this situation, and we ended up paying for counsel. No objection; always felt there should be some kind of revolving fund such as was suggested. Have no problem with recoupment going back into their fund. Think it all comes to the idea of them being able to pay or not.

Senator Sorvaag: If we provide the mechanism will this make it easier for them?

Judge Vandewalle: My concern is that our judges will not discipline themselves enough to say this is a difficult defendant and I'd rather they have a lawyer than not. Occasionally, but rarely, have a defendant do a good job of defending themselves.

No further testimony; hearing was closed on SB 2105.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2105
1/26/11
Job #13497

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to providing state-funded legal services in criminal cases, relating to responsibilities of the commission on legal counsel for indigents.

Minutes:

Senator Nething – Chairman

Committee Work

Senator Lyson moves for a do not pass
Senator Sitte seconds

Discussion

Senator Lyson disagrees with the Association of Counties. He thinks there is too much that has been put on the state. This would create another arm of Indigent Defense. Senator Nething asks if the money was taken out and it was just defending these people would that make a difference. Senator Lyson agrees with the people being defended. They are right now and the county's paying for it. Senator Sitte agrees with Senator Lyson. She reads from the Indigent Defense Study from 2005. She said the 6th amendment guarantees the right to counsel but not that you must have counsel. People have a right to refuse counsel. Senator Nething said these people are mentally in need of someone to make decisions for them. That is the Judge's discretion. He goes on to say that is asking a lot of a Judge that is only trained to be a lawyer and later on to be a judge but never trained to be a psychologist or psychiatrist. He doesn't think a study would do much. Senator Nelson asks if this passes on the floor if it would go to appropriations. She agrees that this is not what the Indigent Defense was set up to do. The committee discusses what the fiscal note would be used for. Senator Olafson mentions testimony that said this would add 5 cases per year to their workload. Senator Sorvaag says there isn't that many so the county should continue to pay for it. The committee decides to move the amendment.

Senator Lyson withdraws the motion for a do not pass
Senator Site agrees with a second

Senator Olafson – moves to adopt the amendment

Senator Nelson – seconds

Verbal vote on the amendment – all yes

Motion carried

Senator Lyson motions for a do not pass as amended

Senator Site seconds

Roll call vote – 6 yes, 0 no

Senator Lyson will carry

FISCAL NOTE

Requested by Legislative Council
12/22/2010

Bill/Resolution No.: SB 2105

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.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$70,500		\$70,500	
Appropriations			\$70,500		\$70,500	

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

2009-2011 Biennium			2011-2013 Biennium			2013-2015 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 requires the commission to provide legal counsel services to persons who refuse to retain their own counsel, if the court has determined that they are incompetent to represent themselves.

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 2 of the bill requires the commission to provide these legal counsel services.

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.*

It is anticipated that it will cost approximately \$70,500 to provide these services per biennium. This is the anticipated cost for ten jury trials and related support services, and ten appeals. It is not anticipated that any FTE positions will be 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.*

We are not currently appropriated any funds to provide these services.

Name:	H. Jean Delaney	Agency:	Commission on Legal Counsel for Indigents
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Phone Number: 701-845-8632

Date Prepared: 12/29/2010

January 26, 2011

JB
1-27-11

PROPOSED AMENDMENTS TO SENATE BILL NO. 2105

Page 1, line 2, remove "and"

Page 1, line 4, after "indigents" insert "; and to provide an appropriation"

Page 1, line 19, after the boldfaced underscored period insert:

"1."

Page 2, line 1, replace "1." with "a."

Page 2, line 2, replace "2." with "b."

Page 2, line 3, replace "3." with "c."

Page 2, line 5, replace "4." with "d."

Page 2, line 7, replace "5." with "e."

Page 2, line 9, replace "6." with "f."

Page 2, after line 9, insert:

"2."

Page 2, after line 11, insert:

"SECTION 3. APPROPRIATION. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of \$70,500, or so much of the sum as may be necessary, to the commission on legal counsel for indigents for the purpose of providing legal counsel services to persons who refuse to retain their own counsel, if the court has determined that they are incompetent to represent themselves, for the biennium beginning July 1, 2011, and ending June 30, 2013."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2105: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2105 was placed on the Sixth order on the calendar.

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Renumber accordingly

2011 TESTIMONY

SB 2105

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2011 Senate Bill 2105

**Testimony
by
Chief Justice Gerald W. Vandewalle**

Good morning Mister Chairman and Committee members. I am Jerry VandeWalle, Chief Justice of the North Dakota Supreme Court, and I appear in support of Senate Bill 2105

Senate Bill 2105, introduced at the request of the Supreme Court, would address an unusual but compelling situation that our trial courts have had occasion to experience. You are all familiar with the right of a defendant in a criminal case to have counsel appointed at public expense if the defendant can't afford private counsel. You may also be aware that the U.S. Supreme Court has long held that a person is constitutionally entitled to refuse to obtain counsel and proceed *pro se*, that is, to represent themselves in the criminal proceeding. Senate Bill 2105 addresses a third, unusual circumstance in which a defendant can afford to obtain private counsel but refuses to do so and is determined by the court to be *incompetent* for purposes of self-representation.

Our Court has held, as have many others, that a defendant in a criminal case who elects to proceed without legal representation is held to the same standards as a lawyer with respect to following applicable rules and procedures. Nevertheless, defendants who represent themselves pose significant issues for trial judges. These issues are magnified if the defendant is not competent to even adequately present a defense. The U.S Supreme Court recently held in *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), that it is constitutionally permissible for a state to require a defendant to be represented by counsel, even if the defendant demands to represent himself or herself, if the defendant is incompetent to conduct the trial proceedings. The Court considered several factors in reaching it's holding, including basic recognition of the defendant's dignity and, more importantly, the integrity of the

criminal justice process itself. While a competent *pro se* defendant may be left to his or her own devices in conducting a defense, it arguably cuts to the heart of the notion of a fair trial if an *incompetent* defendant without a basic understanding of the proceedings or an ability to adequately communicate is allowed to present a defense. More recently, our own Court in *State v. Dahl*, 2009 ND 204, Paragraph 26, 776 N.W.2d 37, observed that *Edwards* “indicates the district court has a continuing responsibility during trial to determine whether a self-represented defendant is competent to present his or her own defense” and a “continuing responsibility to ensure the defendant is afforded a fair trial”.

One option may be to simply allow the trial court to appoint counsel in these situations. I understand the concern on the part of the Commission on Legal Counsel for Indigents in being asked to assume this additional responsibility. Some of you will remember that indigent defense services were once provided through the judicial system. One basic and very important reason for establishing the Commission and removing this responsibility from the judiciary was the conflict of interest posed when the court both appoints counsel and presides over the trial in which counsel participates. In the situations addressed by Senate Bill 2105, this conflict is even more significant. If the judiciary were responsible for providing counsel in these situations, we would be faced with a situation in which a judge must first determine that the defendant is *incompetent* for purposes of self-representation, must then appoint counsel to represent the defendant, and then must preside over that very case. This would be an unsatisfactory situation by any measure.

The fiscal note accompanying Senate Bill 2105 indicates the possibility of ten jury trials and ten appeals per biennium. I cannot say whether that is right or wrong. These are very unusual cases and thankfully it has been our experience that they do not arise too often. But they do arise and it is prudent that we have a mechanism in place to address them.

Senate Bill 2105 would place responsibility for providing counsel services in these cases with the Commission on Legal Counsel for Indigents. Section 1 of the bill amends the statutory language governing the Commission’s responsibilities to include modifying

language recognizing that a defendant for whom state-funded legal services is provided may not be "indigent". Section 2 of the bill then sets out the procedure to be followed by the trial court in determining whether a defendant is incompetent for purposes of self-representation. The concluding paragraph of Section 2 clearly sets out the defendant's responsibility to reimburse amounts expended on the defendant's behalf.

The situations addressed by Senate Bill 2105 are exceptional and it is our hope, if the bill is enacted, that they will not represent an undue burden on the services provided by the Commission. The issue does, however, require our attention.

Thank you Mister Chairman and Committee members. I will try to answer any questions you may have.

SENATE BILL 2105
Testimony by Commission on Legal Counsel for Indigents
Senate Judiciary Committee, January 12, 2011

Senate Bill 2105 requires the Commission on Legal Counsel for Indigents to provide legal counsel services to criminal defendants who are not indigent, if they have been found by the court to be incompetent to represent themselves, but refuse to hire their own attorneys. The Commission opposes this bill and has several concerns with it.

First, as the Commission has indicated on several occasions, it does not desire to expand its scope and breadth. The agency is young, and only became fully staffed in 2009. We have just settled into the rhythm of providing indigent defense services as currently required by our governing statute. It is a real concern that this bill is just one of several that are or will attempt to shift responsibilities to our agency that were not contemplated when the agency was formed by the Legislature in 2005.

The Commission was established to provide services to persons who cannot afford to pay for their own legal representation - to indigents. The Commission's statutorily defined responsibilities deal with the delivery of and the providing of indigent defense services - not with providing these services for persons who don't want to hire their own attorney or pay their own expenses. This bill requires the Commission on Legal Counsel for Indigents to provide "legal counsel services" to persons who are not indigent.

What is included in "legal counsel services?" This term includes more than just attorney fees. Criminal cases can involve various other expenses, such as private investigative fees, evaluations, depositions, and witness expenses. Is it a good use of state funds to pay for legal counsel services for persons who can afford to pay for their own, and either don't want to pay these expenses, or want to represent themselves? If the Commission were to provide services to persons who can afford to hire their own attorneys, it takes this agency's limited resources of time and money away from indigent persons.

At what point do non-indigent "criminal defendants" qualify for representation at state expense under this bill? Is it just at the trial level? At the appellate level? In post-

conviction proceedings? Can competency to self-represent be reassessed? And how would that be done?

The Commission submitted a fiscal note on this bill. It is based on the assumption that there will be five of these cases at the trial court level, and five at the appellate level each year. However, this is purely a guess. It may be significantly more. The Court, accordingly to our information, has no firm number of how many of these cases would occur in a year's time.

Finally, there are significant constitutional issues with this bill. With limited exceptions, a criminal defendant has a right to represent himself/herself at trial. This bill authorizes the forcing of an attorney on a person who doesn't want one and who wants to represent himself or herself, and can be read to authorize this for defendants who the court may perceive as simply being "difficult" but not significantly mentally ill or mentally impaired.

For these reasons, the Commission is opposed to this bill.

However, due to the significant constitutional issues, and the limited fiscal data available, the Commission respectfully requests the Committee consider a study resolution.

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