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TO: Honorable W. Brian White, Chairman of House Ways and Means Committee
Honorable F. Gregory Delleney Jr., Chairman of House Judiciary Committee
Honorable Hugh K. Leatherman Sr., Chairman of Senate Finance Committee
Honorable Luke A. Rankin, Chairman of Senate Judiciary Committee
Commissioners, SC Commission on Indigent Defense

FROM: Office of Indigent Defense (SCCID)

RE: Indigency Screening, Proviso 117.142

Date: November 15, 2017

BACKGROUND

SCCID began to hear concerns from some members of the General Assembly, prior to the start of the 2017 Legislative Session, regarding whether defendants were being adequately screened to assess their financial status for appointed counsel. It was determined this issue should be studied and budget proviso 117.142 was adopted. It states:

117.142. (GP: Indigent Defense Screening Review) The Commission on Indigent Defense and the Judicial Department Court Administration Program shall consult with the Summary Court Judges' Association and Clerks of Court Association on issues regarding the screening of applicants for indigent defense representation. The Commission on Indigent Defense and Court Administration shall make recommendations to the Chairman of the House Ways and Means Committee, the Chairman of the House Judiciary Committee, the Chairman of the Senate Finance Committee, and the Chairman of the Senate Judiciary Committee no later than December 1, 2017 regarding: requirements for applicants to verify their financial status, supporting documentation that should be required of all applicants; who should conduct the screening, what resources are necessary to properly screen applicants and any other recommendations that will assist in ensuring only those applicants that are truly indigent qualify for the services of a public defender or other appointed counsel

ACTIONS TAKEN

In accordance with proviso 117.142, SCCID has commenced an extensive process of researching, meeting with, interviewing, etc. those involved in the screening process and judicial system as a whole. Among those with which meetings, teleconferences, etc. have been held include but are not limited to the following:

- Chief Justice Don Beatty
- Representative Mike Pitts
- Representative Murrell Smith
- Court Administration
- Clerks of Court/ Registrar of Deeds Advisory Committee
- Chairman of Summary Court Judges Association, Judge Phil Newsom
- 16 Circuit Public Defenders
- Judge Ava Bryant (Magistrate Berkeley County)
- Judge Nancy Devine (Magistrate Anderson County)
- Greenville County Office of Indigent Defense
- DSS General Counsel Tony Catone
- DSS Child Support Enforcement (regarding databases available to assess individual's financial status)
- The Clerk of Court or staff member from all 46 Clerk of Court offices
- A Magistrate or Magistrate Court personnel from all 46 counties
- Other state indigent defense systems

INITIAL FINDINGS

Our initial findings confirm data from our most recent Circuit Defender HR survey, that screening is currently being conducted by either the bond court judge (summary court), Clerk of Court or Public Defender Office. Based on the information we have received, the breakdown of what entity screens is as follows:

Clerk of Court Office:	21
Summary Court:	14
Public Defender Office:	10
(3 additional PD offices presume jail cases are indigent and the PD accepts the case)	

***Greenville County has their own screening office (Greenville Indigent Defense). This office also conducts the screening for Pickens County jail cases while the Clerk screens non-jail cases.

In several counties the summary court judge may do an initial screening but the clerk of court office may rescreen someone if there is still a question of indigency or they “reapply”. Also in accordance with Rule 602, SCACR, if “that officer” is unable to make a determination of whether the accused is indigent the determination shall be made by the court in which the matter is to be heard.

Rule 602 addresses many of the steps in the appointment of counsel (screening) process as follows:

RULE 602 DEFENSE OF INDIGENTS

Rules promulgated under the Defense of Indigents Act (Act No. 309) passed by the General Assembly and approved by the Governor on June 17, 1969, were adopted by this Court on January 1, 1970. By Order of this Court dated September 20, 1972, the Rules were amended and now read as

follows:

- (a)** Every person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions, every juvenile to be brought before any court on any charge for which he may be imprisoned, and every person charged with the violation of a probationary sentence shall be taken as soon as practicable before the Clerk of the Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel.

In cases involving criminal charges within the jurisdiction of magistrates' courts, municipal courts, or other courts with like jurisdiction, if a prison sentence is likely to be imposed following any conviction, the presiding judge of the court in which the matter is to be determined shall inform the accused as provided in Rule 2 when the case is called for disposition. The procedures concerning juveniles, as provided in Rule 1 and Rule 2 hereof, shall continue to be followed.

- (b)** The officer before whom the arrested person is taken shall:

- (1)** Inform the accused of the charges against him and of the nature of the charges.
- (2)** Advise the accused of his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel.
- (3)** If the accused represents that he is financially unable to employ counsel, take his application for the appointment of counsel or for the services of the Public Defender where the latter is available in the county.

Upon examination of a completed Affidavit of Indigency (Form II), the officer designated to make a determination of indigency shall determine if the accused is indigent. If that officer is unable to make this determination, the final determination whether the accused is indigent shall be made by a judge of the court in which the matter is to be heard.

For purposes of this rule, a person is indigent if that person is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition should be considered including income, debts, assets and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

- (b)** If application for counsel is approved for the accused, the Clerk of Court or other officer shall immediately notify the Office of Public Defender,

if one exists in the county, and the Public Defender shall immediately thereafter enter upon the representation of the accused. If there is no Public Defender for the county, then the Clerk of Court or other officer shall immediately notify the court, or such person as the resident judge may designate, of the request for counsel and appointment of counsel shall be made immediately with prompt notification thereof to the accused and counsel so appointed.

The initial designation of the Public Defender of appointment of counsel to represent an accused shall be subject to review by the court if it subsequently appears that the accused is in fact financially able to employ counsel, has obtained counsel of his own, or for other good cause shown.

CURRENT SCREENING ISSUES

In almost all circumstances the only requirement for screening is for the defendant to fill out the Affidavit of Indigency form (PD application) without any requirement for supporting documentation. Nearly all of the screening entities assert they check the information provided against the poverty guidelines, referenced in Rule 602. All screening entities have stated it would require additional personnel to conduct an in-depth screening such as a search of property records, financial databases, etc. to verify the information provided by the applicant.

While some Public Defender Offices currently screen there are legitimate concerns about such an arrangement. To ensure the legitimacy of the screening process, it is essential that screeners be free of any conflict of interest or other potential ethical pitfalls. The screening process should not overly empower the solicitor nor cast doubt on the public defender's loyalty to the client or on the presiding judge's impartiality.

Public Defender offices also report it is not uncommon for a defendant to be screened and found ineligible for appointed counsel but then appear before the court and have an attorney appointed. Several circuit judges have acknowledged this does sometimes occur because with the PDs in the courtroom a case can often be quickly disposed of by appointing a public defender.

WHAT IS THE SCOPE OF THE ISSUE?

To state it as concisely, we do not know. There has been no statistics recorded that provides a breakdown of the number of applicants accepted or rejected. Information needs to be collected to analyze the scope of the issue. But first, as we will address later in this memo, there needs to be adequate data available for the screener to make an accurate determination of indigency. It should then be mandated that the screening entity maintain detailed records regarding the number of applications accepted or rejected. This data will allow a proper cost benefit analysis to be conducted as to the scope of this issue and the resources that might be necessary.

POSSIBLE SOLUTIONS

1. The “Greenville Model”

Who Conducts the Screening:

Greenville has its own screening entity called the Office of Indigent Defense. The office is funded by Greenville County and has 3 employees. These independent screeners screen jail cases and those that have already posted bond to determine if defendants qualify for appointed counsel.

Under this option, trained, independent screeners would be set up in each County or Circuit to conduct all screening for indigency.

Process/Requirements for Applicants:

Each person wanting to apply for appointed counsel is provided with a list of documentation that is required to submit an application. Documentation includes, but is not limited to, pay stubs, statements from employer, proof of income for others within the household that are dependents of the defendant, proof of residence and household bills, proof of child support obligations, and proof of real estate ownership.

These screeners meet with each defendant and “pre-screens” them to determine if they are likely to qualify before they complete the application and have to pay the required \$40 fee. If it is likely the person will qualify, the screener will go through the application and supporting documentation with the applicant. A qualified applicant will be assigned to the Public Defender office or conflict counsel. If the person does not pre-qualify, they are not allowed to apply and pay the \$40 fee. However, an applicant that does not qualify, may request the decision to be reviewed by the court.

Necessary Resources:

Greenville County funds this Office of Indigent Defense at around \$200,000 per year for the 3 employees. SCCID estimates a Greenville Model across the State would cost at a minimum approximately \$2.6 million. This is based on 37 screeners at a cost of \$35,000 salary and \$35,000 fringe. This does not include an overhead cost such as office space, equipment, supplies, etc. (Number of screeners in a circuit would be based on population, caseloads, etc.). There is also the issue of what entity would fund this. In Greenville, the screeners are county employees and as noted, it is funded by Greenville County. As would be expected, county officials we have spoken with raised concerns about any requirement to provide such funding.

2. Database Verified Screening

Who will Conduct Screening:

It is our position that best practices indicates that screening should take place as soon as possible after arrest thus during bond court. It is our understanding from the SC Supreme Court, that these judges (courts) should have the technology infrastructure in place to log into a verification database to conduct screening. While we understand these courts may have concerns this will slow

down the bond court process, this is the crucial time to address the issue of the appointment of counsel and would make for a more efficient process as the case moves forward.

Process/Requirements for Applicants:

Under this option, the bond court will have access to The Work Number database to verify information provided by the application to determine indigency. The Work Number is currently being used by the SC Department of Social Services. The database includes employment verification, amount and date of last pay check, amount and date of public assistance benefit or disability benefits. Not being in the database can be verification when someone reports being unemployed.

Necessary Resources:

a. The Work Number Database Access

Whoever is assigned the screening role, one thing is clear, they need the ability to actually conduct a proper screening. The Department of Social Services Child Support Enforcement Division has numerous databases to conduct a financial assessment. They have access to many federal databases such as Social Security and the IRS. They can also request information from the SC Department of Employment and Workforce and SC Department of Revenue. However, they also have a private service called the Work Number (run by Equifax) which provides the most complete picture with one search.

DSS reports they made payments to the Work Number last year of a little over \$1 million dollars for database searches. DSS had a contract for \$800,000 for 180,000 searches and then at a cost of \$4.90 per search above the 180,000 threshold, which they exceeded, thus the bill of over \$1 million.

SCCID estimates the number of searches required would be at a minimum approximately 133,000. This is based on data that the PD office open on average 52,000 cases per year (this only includes general session's cases as to avoid a double count with magistrate court numbers compiled by Court Administration) and that Magistrate Courts handle approximately 70,000 non-traffic related cases per year. This also includes screening for those that do not qualify for a PD which we will estimate as 20% of the applicants.

In discussions with the Work Number representatives they report that in only about 40% of cases does the search actually result in a "hit" in their system, as many people applying for the PD are paid in cash, have a limited financial history, etc. The Work Number only charges for searches where there is actual data (a hit) on an applicant. Thus the estimated price for an annual contract would be in the range of \$350,000 to \$430,000.

For this analysis, we have not included municipal court cases, as PD offices only handle municipal cases where they have a contract with the municipality to handle cases in those courts. This was approximately 3,000 cases in the most recent FY out of over 100,000 non-traffic related cases.

b. Pilot Program

The Agency believes the best course of action is to establish a pilot program to test this

screening process.

The pilot program would include a mixture of large, medium and small counties as well as a mixture of counties where the screening is conducted by the bond court judge, the clerk of court or the Public Defender. After discussions with the Circuit Defenders, the suggestion is to include the following counties in this pilot program:

Allendale	Chester	Clarendon	Marlboro	Laurens
Florence	Aiken	Spartanburg	Horry	Richland

SCCID estimates the cost of using The Work Number database for these counties at between \$99,000 and \$120,000. This is based on an estimated 26,433 cases with a hit rate of 40%.

3. **Enhanced Status Quo** (with mandated documentation required, modified affidavit)

If funding is not available for options 1 or 2, then a potential option would be to mandate certain documentation be provided to verify the information in the application. To put some “teeth” in this requirements would likely require an Administrative Order of the Supreme Court or statute. One recommendation would be to amend or revise the Affidavit of Indigency form to require information similar to a financial declaration required in Family Court. Documents required could include the applicant’s most recent federal and state income tax returns, W-2 forms and schedule C, if self-employed and Copies of current pay stubs or in the absence of such documentation, a written statement of income and deductions from an employer. In Tennessee, they also have a requirement that an applicant show proof they have spoken with at least two private attorneys prior to seeking appointed counsel.

Incarcerated applicants would be presumed indigent. Even upon release on bond, applicants may be prohibited from returning to places any records are stored. Unless the applicant is lawfully prohibited from accessing their records, they should be required to provide proof to the appropriate authority within a specified time from release.

SUMMARY

Indigent screening is an issue that requires constant review. The options herein present a range of possible solutions seeking to ensure that only those applicants that are truly indigent qualify for the services of a public defender or other appointed counsel.