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TESTIMONY IN SUPPORT OF SB 2226

House Judiciary Committee

March 11, 2025

The U.S. Supreme Court has held that (1) the Sixth Amendment to the U.S. Constitution affords an indigent person the right to court-appointed counsel in all criminal cases punishable by death or more than a year in jail or prison, including criminal contempt cases, Gideon v. Wainwright, 372 U.S. 335 (1963); and (2) an indigent defendant charged with any offense punishable by less than a year in jail or prison may not be incarcerated as a punishment unless the defendant was appointed or waived counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972). In subsequent Supreme Court cases, this right to counsel was expanded to other criminal proceedings deemed a “critical stage”.¹

In North Dakota, the Commission on Legal Counsel for Indigents was formed by the Legislature in 2005 to manage how such criminal defense representation is provided to indigent defendants. Such services are now provided by a combination of commission staff attorneys and contracted attorneys.

Currently, legal counsel is not consistently provided at the initial appearance stage of criminal actions. At this appearance, among other decisions, the judge can determine the conditions under which a defendant may be released from custody. Because the initial appearance occurs so early in the criminal case procedurally it can be very difficult to make a prior determination that a defendant is indigent. Consequently, many defendants are unrepresented by legal counsel at this appearance.

Litigation is currently pending in the Eighth Circuit as to whether initial appearances are a “critical stage” at which legal representation is constitutionally required.² As described more thoroughly in other testimony, this litigation led to the formation of a task force to review the current North Dakota process and recommend potential legislation, which resulted in SB 2226. Regardless of the outcome of that case, ensuring legal representation at initial appearances is an important change to protect the rights of criminal defendants and make our criminal justice system more efficient. In short, the system works better when all parties are represented by legal counsel.

¹ The Supreme Court and Eighth Circuit have held that arraignments, post-indictment interrogations, post-indictment lineups, competency hearings, plea bargain negotiations, and the entry of a guilty plea are all critical stages of a criminal proceeding.

² Farella v. District Judge A.J. Anglin et al., No. 5:2022-cv-05121 (W.D. Ark. 2024).

SB 2226 would address this issue by creating a presumption that all criminal defendants are indigent for purposes of establishing release conditions at the initial appearance stage. This presumption would not carry over to subsequent stages of litigation for which the defendant could be determined not to be indigent. My expectation is that criminal defendants who are financially able to retain their own attorneys for their initial appearance would do so, naturally limiting the application of this bill to those who are actually indigent.