

Right to Attorney not Assured for all Low-income Criminal Defendants in SC

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by Rick Brundrett - The Nerve

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Under a new city of Columbia ordinance, “extreme risk” residents who are poor might get a court-appointed lawyer – despite not facing any criminal charges – before they could be ordered by a municipal judge to turn over their guns.

But in South Carolina, the appointment of a public defender even in a criminal case isn’t a guarantee under state law and court rules.

The U.S. Supreme Court in 1963 ruled that criminal defendants who can’t afford a lawyer have a right to a state court-appointed attorney, which S.C. law recognizes. Under state law, the S.C. Supreme Court has the authority to set rules for the appointment of public defenders and court-

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The ordinance passed last week by Columbia City Council allows a city municipal court judge to appoint an attorney if the resident whose guns could be confiscated can't afford a private lawyer and meets the "income guidelines applicable to representation by a public defender in a criminal case."

Under the ordinance – commonly referred to as “red flag” laws – a person who is subject to a court-issued “extreme risk protection order” has to turn over his guns to a licensed gun dealer or city police officer. Failure to do so is a misdemeanor punishable by up to 30 days in jail and a maximum \$500 fine.

Hiring a private criminal defense attorney in the state typically isn't cheap. Longtime Columbia criminal defense lawyer Jack Swerling told The Nerve this week that in his experience, criminal attorneys usually charge flat fees based on the type and complexity of the case, ranging, for example, from \$3,500-\$5,000 for drunken driving charges to at least \$25,000 for a murder case. Hourly rates can range from \$350 to \$700, he said.

Yet many low-income defendants in municipal courts in South Carolina have not been appointed public defenders in violation of the U.S. Constitution, according to a pending federal lawsuit filed in 2017 by the American Civil Liberties Union on behalf of indigent defendants who appeared in the city of Beaufort or town of Bluffton municipal courts.

To be eligible for a public defender under state court rules, a defendant's net family income must be below or at the latest federal poverty levels, which for this year range, for example, from \$12,490 for one person to \$25,750 for a household of four, according to the U.S. Department of Health and Human Services.

Screening is done by public defender offices, clerks of court, or bond court magistrates, Herverly Young, deputy director of the S.C. Commission on Indigent Defense, said when contacted this week by The Nerve. Each of the state's 46 counties has a public defender office; there are more than 200 public defenders statewide, according to the commission's website.

A final eligibility determination, however, is based on “all factors concerning the person's financial condition,” including “income, debts, assets and family situation,” according to court rules, which require defendants to list that information on an “Affidavit of Indigency” application form. Under state law, the application fee is \$40.

“There is not a specific income level qualification to be indigent. The measuring stick is the federal poverty guidelines,” Young said in an email. “If a person's household income is equal or less than the guidelines, then they are presumed indigent. If their household income is higher, then the presumption is not there.”

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But the screeners have some latitude under court rules. Someone, for example, whose family income is slightly above the federal poverty guidelines but who has high monthly bills for a "necessary medical expense" could be eligible for a public defender, while a person whose household income is slightly below the guidelines could be denied if he has real estate holdings that can be sold, Young said.

A judge can review the decision if a defendant is denied eligibility, he said, adding the court can "uphold the denial, approve the appointment of the PD (public defender), or approve the appointment of the PD and require the defendant to pay a fee."

If a public defender office has a conflict of interest, a judge can appoint a private attorney to represent an indigent defendant under court rules, Young said, noting there are "Rule 608 contract attorneys in every county." Under state law, those attorneys are supposed to be paid a "reasonable fee" with certain caps, based on a rate of \$40 an hour for out-of-court work and \$60 an hour for in-court work.

Their fees by law are covered by the state indigent defense office. The agency's total budget this fiscal year, which started July 1, is \$46 million, budget records show.

Asked about the annual number of public defender and court-appointed attorney cases statewide, Young said counties are supposed to "report to our agency the stats on applications received, approved, and denied," adding though, "This is not done and the statute does not provide an enforcement option for failing to report this information."

Under state law, indigent defendants who are assigned attorneys can have legal claims filed against their assets in an amount "equal to the cost of representation," minus payments to the appointed lawyer, public defender office or Commission on Indigent Defense, though a judge can "order any claim or judgment waived, modified or withdrawn." That section of law is administered by the state Judicial Department, which is entitled to receive "all moneys collected."

Young and Ginny Jones, the Judicial Department's spokeswoman, didn't immediately respond Wednesday to written questions from The Nerve seeking specifics on the annual number and amount of claims statewide.

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