

June 17, 1992

Mr. James F. Fraley
Twin Falls County Commissioner
425 Shoshone Street North
Twin Falls, ID 83303-01236

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: When a Public Defender may See a Newly Incarcerated Person; How and
When a Prisoner's Indigency is Determined

Dear Commissioner Fraley:

The Attorney General has asked me to respond to your letter dated January 14, 1992, which requests an interpretation of Idaho Code § 19-852, right to counsel of a needy person, and at what point a public defender would be legally entitled to visit a recently incarcerated individual.

Idaho Code § 19-852(a) provides that "[a] needy person who is being detained by a law enforcement officer . . . or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled . . . to be represented by an attorney to the same extent as a person having his own counsel is so entitled" In addition, subsection (b) of Idaho Code § 19-852 provides that a needy person who is entitled to be represented by an attorney under this statute is entitled "to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney" In the comment to the corresponding provision in the Model Defense of Needy Persons Act, the commissioners stated: "This section does not undertake to spell out all the circumstances in which a criminal defendant is entitled to counsel. It provides only that, whenever a man of adequate means is legally entitled to counsel, the needy person is likewise entitled." Handbook of the National Conference of Commissioners on Uniform State Laws, p.327 (1966).

Simply stated, any time you would allow another prisoner who has retained counsel to meet with his attorney, you must, under those same circumstances, allow an indigent person to meet with counsel. However, no reasonable interpretation of § 19-852 would allow a public defender, or any other defense attorney for that matter, free access to criminal defendants or other people properly seized under the laws of Idaho. In other words, whatever attorney access you provide to jail inmates should be equal whether they can afford their own counsel or are indigent.

Taking this analysis one step further and to its logical conclusion, the public defender has no right under Idaho law to go into the jail handing out his card and telling inmates not to talk to the police. Once appointed, a public defender will have the right to the same access to his client as is given any other defendant who has retained his own counsel.

You also need to be aware of the requirements under Idaho Code § 19-853. This statute requires that a person who is detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under conviction of, a serious crime, and "is not represented by an attorney under the conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing . . . shall: . . . clearly inform him of his right to counsel and of the right of a needy person to be represented by an attorney at public expense; and . . . if the person detained or charged does not have an attorney, notify the public defender or trial court concerned . . . that he is not so represented." (Emphasis added.)

The Idaho Court of Appeals has directly addressed Idaho Code § 19-853 in State v. Gord, 118 Idaho 15, 794 P.2d 285 (Ct. App. 1990), *review denied*, 118 Idaho 168, 795 P.2d 867 (1990). Gord had been arrested and accused of first-degree burglary. Gord was taken to jail and, prior to questioning, the police informed him of his Miranda rights. Gord waived his Miranda rights and confessed to the police. Later the same day, Gord was formally charged with first-degree burglary. After a showing of indigency, the court appointed counsel to represent him. Gord moved to suppress his confession asserting that § 19-853(a)(2) imposed a mandatory duty on the state to inform the public defender when a suspect is in custody. The following analysis from Gord is instructive:

Gord maintains that the word "shall" imposes an affirmative duty on the police to notify the public defender upon detention of a suspect. We need not intimate any view on that subject. The statute requires the police to fulfill this obligation only when the detained individual "is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented." This language clearly and unambiguously conditions the police obligation to situations where a suspect would be entitled to legal representation. Certainly Gord was entitled to an attorney during a custodial interrogation. The statute neither attempts to enlarge nor diminish that constitutional right. The police informed Gord of that right. However, in this case, Gord waived that right when he executed a written waiver of his *Miranda* rights.

Gord, 118 Idaho at 16.

The Idaho Court of Appeals' decision in Gord is consistent with Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). In Edwards, the U.S. Supreme Court stated that when an accused has specifically invoked his right to counsel, he is not subject to further interrogation until counsel has been made available to him, unless he himself initiates further communication, exchanges or conversations with the police. Thus, there are various "critical stages" during which an accused or detained individual has a right to consult with his attorney.

Section 19-853 has been recognized as a codification of the Miranda decision. *See State v. Culbertson*, 105 Idaho 128, 666 P.2d 1139 (1983). There is, thus, nothing under the mandate of Idaho Code §§ 19-852 and 19-853 which either requires the notification of the public defender or grants permission for the public defender on his own initiative to visit with a confined individual under any circumstances except those under which any other individual would be allowed to meet with his retained counsel.

Your letter also requests clarification regarding the procedure for determining indigency.

The determination of indigency is to be made at an accused's first court appearance, and indigency may be redetermined at each subsequent proceeding. Idaho Code § 19-854(a) states that "[t]he determination of whether a person covered by § 19-852 is a needy person shall be deferred until his first appearance in court. . . . Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person." (Emphasis added.) Idaho Code § 19-851(c) defines "needy person" as "a person who at the time his need is determined is unable to provide for the full payment of an attorney and all other necessary expenses of representation."

Idaho Code § 19-853(c) provides that if a court determines that "a person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be." Idaho Code § 19-853(d) further provides that "[u]pon notification by the court or assignment under this section, the public defender or assigned attorney . . . shall represent the person with respect to whom the notification or assignment is made." It thus appears that it is the judge who determines at each and every judicial proceeding whether or not an individual is needy and merits appointment of a public defender. There is nothing in any of the statutes relating to appointment of a public defender which either requires or allows the public defender himself to make a determination of whether he is representing an individual. Yet, please note, that law enforcement officers will be precluded from further questioning of a suspect who has requested an attorney until an attorney is appropriately provided.

In summary, a needy person, who is either detained by law enforcement or under formal charge of a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel is so entitled. Further, the determination of whether a person has a right to representation by the public defender is made by the court at first appearance and with respect to each proceeding thereafter. Finally, the public defender does not have a right to access to inmates prior to his proper appointment as counsel; he most certainly does not have the right to contact an arrested individual and make his own determination of indigency.

If you have any other questions or require further clarification on these issues, please do not hesitate to contact me at any time.

Very truly yours,

KEVIN P. CASSIDY
Deputy Attorney General