National Center For Defense Management

A Project of the
National Legal Aid and
Defender Association
Washington, D.C.

SYSTEMS DEVELOPMENT STUDY

OF

INDIGENT DEFENSE DELIVERY SYSTEMS

FOR

THE STATE OF SOUTH DAKOTA

Final Report

Consultants

Linda Durand
Prescott Eaton
Bruce L. Herr, Esq.
James R. Neuhard, Esq.
John M. Thompson, Esq.

January, 1977

NATIONAL CENTER FOR DEFENSE MANAGEMENT
2100 M Street, N.W., Suite 601
Washington, D.C. 20037
(202) 452-0625

A Project of the

National Legal Aid and Defender Association

Law Enforcement Assistance Administration Contract #76-TA-99-0022

This report was prepared by the National Center for Defense Management, a project of the National Legal Aid and Defender Association, pursuant to a grant from the Law Enforcement Assistance Administration of the United States Department of Justice.

Table of Contents

Foreword

The National Center for Defense Management (NCDM) was established in 1974 by a grant from the Law Enforcement Assistance Administration (LEAA) to the National Legal Aid and Defender Association (NLADA). NCDM's objective is to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training.

Under the terms of the LEAA grant, the principal goals of the National Center for Defense Management are:

- To establish statewide appellate defender programs.
- To develop inservice training programs.
- To provide systems development studies of statewide public defender systems.
- To provide management evaluations of defense delivery programs.

This report is in the furtherance of these goals and objectives.

Preface

The National Center for Defense Management is grateful to Mr. Randolph J. Seiler, Director, Division of Law Enforcement Assistance, Department of Public Safety of South Dakota and to his Courts Specialist, Ms. Ann Elkjer, for their prodigious efforts in assisting the consultants with their site visit schedule. Without their assistance the team would not have been able to gain as much insight into indigent defense delivery systems in South Dakota.

We would also like to thank all the persons who offered their time and provided data for the consulting team; the list of persons interviewed is not included in this report in order to preserve the anonymity of those who candidly presented their views.

Thanks are also due to Staff Attorney David Rapoport and Mr. Kevin Brosch for their help in editing this report.

INTRODUCTION

Although various systems existed for providing defense services to indigent criminal defendants prior to 1963, the modern history of defender services can be dated from the decision of the United States Supreme Court in the case of Gideon v. Wainwright, 372 U.S. 335 (1963). In Gideon, the Supreme Court held that in all state felony proceedings, the Fourteenth Amendment required counsel to be appointed to represent any defendant who could not afford to hire an attorney. Prior to that decision, counsel had been constitutionally required only in very serious felonies.

Subsequent cases expanded the right to counsel to other areas including juvenile court proceedings, In re Gault, 387 U.S. 1 (1967); appeals, Douglas v. California, 372 U.S. 353 (1963); probation revocation proceedings, Mempha v. Rhay, 389 U.S. 353 (1963); misdemeanors, or any case in which the possibility of incarceration existed, Argersinger v. Hamlin, 407 U.S. 25 (1972); and to a more limited extent, parole revocation proceedings, Gagnon v. Scarpelli, 411 U.S. 778 (1973). Of these cases, the one after Gideon which had the most impact on defender services was Argersinger. Because of the large number of misdemeanor cases in which incarceration is threatened, Argersinger created a greater demand for indigent defense services and greatly increased public costs.

In addition to defining which types of cases require appointment of counsel, the Supreme Court has on occasion specified the various stages of the proceedings at which counsel is constitutionally required. Thus, the Court has held that an attorney is required before evidence of a lineup conducted after formal charges have been instituted can be

introduced against a defendant, United States v. Wade, 388 U.S. 218 (1976); that the police must advise a defendant of his right to counsel before interrogation may lawfully be undertaken, Miranda v. Arizona, 384 U.S. 436 (1966); and that a probable cause hearing may be a critical stage of the prosecution which requires representation by counsel, Coleman v. Alabama, 399 U.S. 1 (1970). These cases established the principle that a defendant is entitled to representation by counsel at every critical stage of judicial proceedings beginning shortly after the arrest, continuing through preliminary proceedings and trial, and lasting throughout the post-conviction process.

Because of these decisions there has been an explosion of interest in defender systems since 1963. At the present time varying types of public defender systems exist in nineteen of the fifty states. There are city-run operations, as in Philadelphia; county-run organizations like Los Angeles; regional systems like Vermont's Northeast Kingdom system; state-wide systems such as New Mexico's; and systems providing specialized services such as appeals, as in Illinois, or post-conviction assistance, as in Indiana.

In assessing indigent criminal defense delivery needs in South Dakota, the consultant team has oriented this report toward providing a measure of control over the delivery system. A major consideration was the maintenance of independence of counsel and client interests in order to achieve optimal flexibility. The report focuses on establishing a defender system in the next few years, providing time to compile an adequate data base and perform evaluations to expedite implementation. Decisions on the appropriate format for a defender system that adequately meets the respective needs of the state, its counties and indigent criminal defendants must be decided upon.

II

METHODOLOGY

The Conference of Presiding Court Judges of South Dakota sought assistance in fulfilling the indigent defense needs for that State by requesting outside assistance from an agency which specialized in providing solutions to such problems. In a letter dated March 23, 1976 to the LEAA Regional Office in Denver, Mr. Randy Seiler, Director, Division of Law Enforcement Assistance, South Dakota Department of Public Safety, on behalf of the Conference of Presiding Judges of South Dakota, requested assistance; the TA request specified four objectives:

- The feasibility of public defender offices in small counties and jurisdictions
- The legality of court-ordered circuit defenders
- A statewide statistical design to manage a defender system; and
- Recommendations for public defender legislation.

The request was forwarded, on March 26, 1976, to Adjudication Division, Office of Regional Operations in the LEAA National Office, Washington, D. C. It was referred on May 3, 1976, to the American University Criminal Courts Technical Assistance Project (AUCCTAP) for action; AUCCTAP in turn referred it to the National Center for Defense Management (NCDM), on April 8, 1976, for implementation.

NCDM, focusing on the four objectives specified, began planning for the provision of technical assistance; an assessment visit was conducted by NCDM staff on June 16, 1976. Interviews were conducted with key persons and the requisite data was gathered. As a result of that visit, a statement of work was transmitted to the South Dakota Law Enforcement Division, Department of Public Safety, describing the services to be

rendered. Copies of the technical assistance correspondence and the statement of work are attached at Appendix A.

A site visit was made by NCDM staff and consultants* during the period August 15 to 20, 1976; three sample areas were visited:

- Pennington County, where a court-ordered public defender office is in operation, is representative of the "West River" area.
- Sioux Falls, and Aberdeen, which have operative court-appointed systems and reflect the "East River" area of the state.
- Pierre-Huron which has the necessary sources for accomplishing legislative research and represents a small rural setting adjacent to the more urban Pierre.

In these three sample areas, key persons were interviewed and statistical data was gathered.

NCDM has reported the results of the site visit by describing the state in general and the three sample areas in greater detail; a statistical data system to manage a possible defender system was developed. Finally, NCDM prepared draft legislation which South Dakota might utilize to implement the recommendations presented in this report. This proposed legislation is attached at Appendix E.

*Consultant resumes are attached at Appendix B.

III

DESCRIPTION OF THE SYSTEM

The South Dakota statutory requirement for counsel is even broader than what is required by the federal constitution. S.D. Compiled Laws, 23-2-1 (1967) provides for court appointed counsel in "any criminal action. . .where it is satisfactorily shown that the defendant is without means and unable to employ counsel. . . ." The statutory definition of the word "crime" includes some offenses punishable only by fine. Therefore, it appears that in South Dakota, an attorney must be appointed for every criminal defendant in every criminal proceeding, regardless of whether or not incarceration may result, if the defendant cannot afford to retain his own attorney.

South Dakota has provided for individual appointment of attorneys on a case-by-case basis since 1879, when the Legislative Assembly of the Territory of Dakota allowed counsel to be appointed in all criminal cases in the territory and authorized reimbursement up to a maximum of $25 for any case. Laws of Dakota, 1879, Ch. 7; Act of February 22, 1879. The applicable maximums have been increased since then and at the present, the state employs a fee schedule which was adopted by the South Dakota Judges Association in June, 1975, at the request of the Bar Association of South Dakota.

The present fee schedule provides for reimbursement of attorneys at a rate of $20 per hour for out-of-court work and $30 for in-court work, with various maximums imposed for different kinds of cases. For example, in a case disposed of without trial, including pleas of guilty, the maximum fee is $175. In cases which go to trial, the maximums

range from $250 for a trial of one day or less to $1,000 for a trial of 5-6 days. In addition, attorneys may be reimbursed for expenses and other fees if they have obtained the prior approval of the Circuit Court judge. These maximums were adopted from the federal standards which apply for federal cases. 18 U.S.C. 3006A (1970). The maximums, however, are guidelines rather than absolute ceilings, and the fee schedule is administered inconsistently across the state, resulting in some inequities which will be discussed.

At this time, the assigned counsel system is the method used throughout the state to provide indigent criminal defense services, with the single exception of Pennington County (Rapid City). In 1973, a public defender office was established in Pennington County by the local court and County Commission. For three years, this public defender office was funded by the Law Enforcement Assistance Administration, and since February of 1976, has been financed entirely by Pennington County.

On November 7, 1972, the voters of South Dakota approved amendments to Article V of the South Dakota Constitution, creating a unified court system, which became effective January 7, 1975. Prior to this date, the courts were structured on county and city bases. Under the new unified court structure, South Dakota is divided into nine multi-county circuits. The number of circuits and the judges within each circuit are determined by South Dakota Supreme Court rule. Circuit Court judges are elected from their circuits for eight year terms.

South Dakota also has a system of law-trained and lay-trained magistrates. Almost all criminal cases originate in Magistrate Court, where a defendant is brought for his initial appearance, ordinarily

within twenty-four hours of his arrest. At the initial appearance, the defendant is advised of the charges and of his right to counsel, and bail is set. Sometime later a probable cause hearing, unless waived, is conducted before the magistrate. If probable cause is found at the preliminary hearing, the defendant is bound over to the Circuit Court and a criminal information is filed by the State's Attorney in Circuit Court. The case then proceeds through trial in the ordinary manner. A convicted defendant has the right to appeal to the South Dakota Supreme Court. There is no intermediate court of appeals.

South Dakota has also adopted a post-conviction procedure based on the Uniform Post-Conviction Hearing Act, which provides the defendant with a collateral remedy for relief of his conviction. A post-conviction petition must be filed in the Circuit Court in which the defendant was convicted. If post-conviction relief is denied, a defendant has the right to appeal that adverse decision to the South Dakota Supreme Court.

Because of the time constraints and limited resources of this project, only general information was obtained about juvenile, mental health, probation and parole proceedings. All of these proceedings, except for parole revocation hearings, fall within the jurisdiction of the Circuit Courts; parole revocation proceedings are handled administratively by the Parole Board. Even so, there exists a limited right to counsel for certain parole revocation matters.

A. Rapid City

Rapid City, the second largest city in South Dakota with approximately 100,000 people, has the only public defender system currently operating in the state. The Public Defender's office opened in 1972 after release of a preliminary report on local indigent defense by the presiding judge of the Circuit Court.

At the time, there was mixed support for a public defender system among the Circuit Court judges and some question concerning its legality. Legislation which would have created a public defender system in South Dakota had been soundly defeated shortly before and there were substantial doubts about establishing a local defender without legislative approval.

The county commissioners, in conjunction with the circuit judges, proceeded with the project anyway. The commissioners reasoned that judges who could continually reassign the same lawyer to indigent cases could also establish a public defender office and continue to reassign the attorneys in that office to handle those same cases. Using this conceptual framework, the county submitted a request for an LEAA grant. The county commissioners then passed a resolution creating the Office of the Public Defender and the judges issued an order establishing the office. The LEAA grant was finalized in November of 1972, and the office began officially accepting cases in April, 1973.

The original court order provided for two full-time attorneys, one part-time attorney, one full-time secretary, one part-time secretary, and funding for an investigator. The staff attorney salary for a defender was set $500 less than a full-time State's Attorney earned in the same county. This was done because the State's Attorney had to stand for election while the public defender did not. There was some discussion of possible

methods for selecting the Defender. It was decided that he would be appointed by the presiding judge of the circuit court, in keeping with the original conception that the office was an extension of the assigned counsel system.

The initial LEAA grant ran through February, 1976. At the end of 1975, the Public Defender asked the county commissioners to fund the office on an annual basis. The county commissioners agreed and made the Public Defender a county-funded office. The county commissioners were convinced then and still feel that the public defender is less expensive than the assigned counsel system. Even with the expansion of the demands for counsel in indigent cases, and even though they were spending more money than they had previously spent for assigned counsel, the commission felt that the public defender provided a less costly method for indigent defense.

In Rapid City there are two methods for delivering counsel to indigents. The primary resource is the public defender office. There is also an assigned counsel system that handles indigent cases when conflicts of interest arise. Four of the five circuit judges have agreed to give all indigent cases, except for conflicts, to the public defender office. However, one judge does not often assign the public defender even in eligible cases.

He can easily do this because, again, the conceptual framework for the public defender office is that of an appointed attorney. This particular judge expressed a deep animosity toward all public defenders, and particularly toward the Rapid City office.

Rapid City also has one of the two full-time State's Attorneys employed in South Dakota; the other is in Sioux Falls. The State's

Attorney's full-time status is due to a political confrontation between the former part-time State's Attorney and the County Commissioners. When the commissioners refurbished the courthouse, they asked the part-time State's Attorney to move his office into the circuit court building. He resisted, feeling that a move into the courthouse might jeopardize his private practice. The county commissioners then influenced the Legislature to require that all jurisdictions with more than a certain population and geographical area have a full-time State's Attorney. At the time, the only jurisdiction this applied to was Rapid City. Later the requirement of geographical size was dropped and Sioux Falls gained a full-time Prosecutor.

Even though the conceptual framework of the public defender office is that of an appointed attorney, during budget hearings the Public Defender presents his budget before the county commission. The circuit judges present the budget for the remainder of the assigned counsel system. Clearly, the Public Defender receives de facto recognition in that he operates an independent, criminal defense office. While there is still some concern about the Public Defender's statutory status and some opposition to his continued operation, the great majority of individuals interviewed in the Rapid City criminal justice system were satisfied with the existing arrangement.

The office itself is supervised by an advisory committee, composed of two commissioners, two lawyers, two judges and the presiding judge of the circuit. Commissioners are appointed by the county commission, the two lawyers by the President of the county bar, and the two judges by the presiding judge of the judicial circuit. The advisory committee is just that--advisory--and the defender is still appointed by the

presiding judge for an indefinite term. While the Defender can be removed for cause, there is no established policy indicating who would determine cause or who would have the power of removal. Seemingly, the presiding judge retains this power.

Currently determinations of indigency are performed almost totally by the courts. Initially, the public defender office interviewed the defendant and completed financial status forms. In cases where indigency was indicated, the Public Defender would take a request for appointment of counsel to the judge who would officially assign the public defender office. This procedure caused tremendous problems. Allegations were made by the state's attorney and by some of the circuit judges that the Public Defender was accepting more cases than he should, or that he was accepting cases without first determining and filing an application for indigency.

The Public Defender took the position that he would prefer not to be involved in the process of determining indigency. It was the Public Defender's position that frequently while attempting to determine financial status in conflict situations, he would learn the facts of the case. This often precluded him from representing either party. Still, the county commissioners, as well as the circuit court judges, wanted the defender to determine indigency. Because the defender office was funded by LEAA at the time, the Defender felt he could afford the personnel to make the determinations of indigency. This obviated the need for the county to hire additional personnel. However, after the problem arose, the Public Defender took 2,000 petitions for appointment of counsel and supporting documents to the County Clerk and dumped them on his desk. The resulting delays in appointments of counsel created

serious early entry problems. In addition, there are currently a surprisingly large number of confessions. The delay in assignment of counsel may contribute to this phenomenon.

The staff experience in the Public Defender Office is extremely limited. The lawyers in the office have criminal case experience but not trial experience. At the time of the survey, there had been fewer than four felony trials in eighteen months. Larry Zastrow, the former director of the office and the one lawyer with substantial trial experience, was recently appointed to the South Dakota Supreme Court. At this time, the office does not have many people who have developed trial expertise. The office has no training program. In fact, there are few training programs for the South Dakota bar in general.

The trial rate for the assigned counsel in Rapid City runs about the same as it does for the defender office. In both cases it is very, very low.

Court statistics show that a significant number of cases are dismissed, the rate has run as high as 50%. The State's Attorney agrees to dismiss the charges for a variety of reasons. This, coupled with the very low trial rate, raises numerous questions about the dynamics of the Rapid City criminal justice system.

The work of counsel extends into misdemeanors, ordinance violations, juvenile problems, mental health problems, felonies and appeals. However, there do not seem to be many challenges to the jury arrays and little use of counsel at identification challenges in Wade hearings.

The office is currently without an investigator. The salary was so low that the office could not attract a qualified applicant. There is some feeling that even if the salary were higher they could still

not attract a qualified investigator. The office currently has no Indian personnel on its staff nor are there any Indians on the commission that supervises the operations of the defender office.

The public defender office keeps exacting statistics on the nature of all case assignments and the amount of time and energy expended on each disposition. The public defender office consistently operates at a lower cost per case than the assigned counsel system. This factor is extremely important in the relationship the public defender office enjoys with the county commissioners, the court system and the public. Overall, the public defender system enjoys a reputation of providing quality representation at a reasonable cost.

B. Sioux Falls

Sioux Falls is the largest city in South Dakota, with a population in 1970 of 72,488 people. It is the county seat of Minnehaha County, which is one of three counties comprising the Second Judicial Circuit. The other two counties are Turner County (County seat: Parker) and Lincoln County (County seat: Canton). There are five Circuit Court judges in the Second Circuit and all five sit in Sioux Falls, making periodic scheduled trips to Turner and Lincoln Counties. Minnehaha is one of two counties in the state which has a full-time State's Attorney. However, unlike Rapid City, the other major urban area in South Dakota, Sioux Falls has no public defender system and relies entirely on an assigned counsel system for providing representation to criminal defendants. Almost all criminal cases originate in Magistrate Court, where defendants are questioned regarding their ability to retain counsel and about their general financial status.

The magistrate automatically appoints counsel in a case if the defendant's assets are below the civil exemptions applicable in South Dakota, which are $600 for a single person or $1,500 for a married person. If the defendant has assets which exceed these amounts, the magistrate measures their assets against the amount which would be necessary to retain private counsel for a similar case in the Sioux Falls area. If he determines that the defendant would not be able to raise the money required for a private attorney, he will appoint counsel. In a close case, he will continue the proceedings for several days to give the defendant the opportunity to try to obtain counsel. The magistrate refuses to appoint counsel in about 10% of the cases where counsel is requested.

If it is necessary to appoint an attorney, the magistrate makes the appointment from a list which he compiled from the telephone directory, which presently consists of about fifty names. All attorneys are on the list with the exception of senior members of law firms, who are excluded because of the prevailing attitude that it is the younger members of the bar who should do the criminal work. Also excluded from the list are attorneys for whom conflicts of interest would prevent their representing criminal defendants. Therefore, the State's Attorney and Assistant State's Attorneys are obviously excluded, as are all other members of any firms of which such state officials may be members.

For a misdemeanor or a routine felony, attorneys are appointed on a rotational basis from this list. However, when a more serious felony comes up, the magistrate uses his discretion and looks for an attorney with higher qualifications to represent the defendant.

An attorney may not refuse an appointment without good cause and simple disinterest does not constitute cause. Each attorney on the list receives approximately six appointments per year.

If the case reaches the Circuit Court level, some of the Circuit Court judges make further inquiry into the defendant's financial status. On occasion, an attorney will be appointed for a defendant by the Circuit Court after it has been denied by the Magistrate Court. After an attorney has completed his work on a case, he prepares and submits a voucher for payment to the Circuit Court Judge who heard the case. The fee schedule, patterned after the federal fee schedule, is $20 per hour for out-of-court work and $30 per hour for in-court work with various maximums, depending on the kind of case involved. A copy of the Second Circuit fee schedule and the rules regarding fees is attached at Appendix C. The maximum amounts specified on the fee schedule are viewed by the Circuit Court judges as guidelines rather than absolute ceilings. By local rule, if a fee request is submitted in excess of $1,000, it must be approved by a majority of all five judges at their weekly conference. An individual judge may approve requests of $1,000 or less. One judge who was interviewed expressed the strong belief that attorneys were undercompensated at the prevailing rates and that attorneys had no particular obligation to represent defendants at an economic loss to themselves. Therefore, this judge felt that the guidelines should be liberally construed to compensate attorneys adequately for their time.

From conversations with the judiciary and the attorneys in Sioux Falls, it is indicated that the fee schedules were construed much more liberally in Sioux Falls than they were in the Fifth Judicial Circuit,

where the guidelines were viewed as absolute.

Once the fee request has been approved by the Circuit judge, it is forwarded to the County Commission. The Minnehaha County Commission approves the request, but this is an automatic step and the judge's approval of the request is viewed as binding by the Commission and is never questioned or changed. The voucher is then forwarded to the County Auditor who pays the attorney involved.

If an appeal is taken, the schedule begins to run anew, although the schedule does not specify a maximum for appeals.

After the work on the appeal is completed, a voucher is again presented to the Circuit Court Judge who originally heard the case. Appeals are also paid for by the County Commission where the appeal originated. Although ordinarily trial counsel is appointed to handle the case on appeal, some Circuit Court judges ask the defendant if there is a reason to appoint a different attorney on appeal. If the defendant is dissatisfied with his trial counsel or if there is a possibility of an issue regarding ineffective assistance of counsel, a different attorney may be appointed on appeal.

South Dakota has a statutory lien provision for recoupment of fees expended for indigent representation (S.D. Compiled Laws Ann. 23-2-3.1-23-2-3.5, 1967), which provides that a lien is automatically created upon all property, real and personal, of any person for whom legal counsel has been appointed. As soon as the County Auditor has paid a voucher, he files a statement of claim with the Registrar of Deeds in the county. The lien is subject to a homestead exemption and personal property exemptions. The statutory provision also provides that the Circuit Court may order the defendant to pay costs, if possible , to

the court to be placed in the county general fund. Such reimbursements are credited against the lien.

It is common practice in Minnehaha County, particularly for first offenses, for the Circuit Court to order repayment as a condition of a suspended sentence or of withholding imposition of sentence. The repayment is ordinarily supervised by a probation officer as a condition of probation. One penitentiary inmate who was interviewed and who had been convicted in the county, stated that he had been required to sign over to his court-appointed attorney all of his assets, which consisted of the cash he had on hand plus the car he was driving at the time of his arrest, as well as his pet dog. There was no independent verification of this report nor any other report of such a practice.

C. Other

1. Aberdeen

Aberdeen is the county seat of Brown County and is the third largest city in the state, after Sioux Falls and Rapid City, with a 1970 census population of 26,476. Brown County operates on a pure assigned counsel system. The system in Brown County operates in substantially the same manner as in Minnehaha County. Yet four differences were noted. In Brown County, all vouchers are presented to the presiding Circuit Court Judge. Unlike Minnehaha County, where a voucher sometimes exceeds the maximums established in the fee schedule, the schedule in Brown County is considered absolute. A third difference is that Brown County no longer invokes the statutory lien recoupment provisions. The system was used in the past but is not currently. Finally, attorneys were appointed from a voluntary list of lawyers, as opposed to the list

---

[1] See Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018 (1970) and Tate v. Short, 401 U.S. 395, 91 S. Ct. 668 (1971).

compiled by the magistrate in the Second Judicial Circuit. In Brown County, as in Minnehaha County, discretion was used by the appointing judge in selecting the attorney in serious cases. The determination of indigency procedure and the voucher payment system seemed similar in all other respects.

2. Pierre

Pierre is the state capital and the largest city in the Sixth Judicial District which encompasses 15 counties in the south central part of the state.

There are three judges in the Sixth Circuit, who travel the circuit on a rotating basis. The judges tend to appoint attorneys who indicate a desire to be appointed and to refrain from appointing those who ask not to be appointed. However, court policy is to appoint more experienced attorneys to handle more serious cases such as homicides. Nevertheless, the younger attorneys in the firms of the older attorneys often end up actually trying these more serious cases.

The younger attorneys in populated areas are eager to handle assigned cases because of the assured income; for lawyers with two to three years experience defense of indigents is no longer a profitable proposition and interest in being assigned indigent clients declines rapidly. In rural counties, the few young attorneys are either State's Attorneys or are associated in practice with a State's Attorney. Consequently, assigned defense counsel often come from out of county.

There is little serious problem with payment of attorneys fees in the Sixth District. The court reduces fee claims on occasion, but chiefly for excessive research charges and generally with younger attorneys.

Compensation awards are tailored in light of funding made available by the county and the court is pressured by the board of commissioners to avoid approving vouchers over and above the amount appropriated. No standards are utilized to measure the necessity for the activities for which compensation is paid. Federal guildlines (28 U.S.C. 3006A et seq.) regarding fee schedules and maximum fees are utilized but not rigidly enforced.

The court generally does not appoint counsel when the defendant is employed or employable, or it may appoint counsel whom it instructs to attempt to arrange for compensation. The lien system is not very commonly used for recoupment; a more popular method is to exact restitution to the county as a condition of probation.

Very few appeals and post-conviction relief actions are initiated and the court has indicated that if a claim of ineffective counsel were made an issue, new counsel would be appointed. The team found no cases in which this occurred.

3. Huron

Huron is the seat of Beadle County and the largest town in the Ninth Judicial Circuit which also includes Faulk, Hand, Spink and Sanborn Counties in the east-central section of the state.

The Sixth Circuit also operates on an assigned counsel system. Indigency is determined at arraignment, always by a judge or a law-trained magistrate--never by a lay magistrate. Counsel is appointed only for those who request counsel and can establish indigency. The defendant fills out a form designed to reveal his or her assets, debts and income; the emphasis is principally on income. A person who is employed will rarely be assigned counsel, except as a means of referral.

Even an unemployed person may not be assigned counsel if he or she is considered employable. Counsel may be employed on a provisional basis, with the fees being paid partly by the defendant and partly by the county. Very rarely will the court look beyond the face of the defendant's application, since the population is so small that someone in the courtroom is likely to know the defendant well enough to spot any serious discrepancies.

Assignments are based on the judge's assessment of the attorney's abilities and the nature of the case. The older, more established attorneys are generally reluctant to take assigned cases because of the financial sacrifice involved. Counsel is appointed in about 2/3 of all felony cases and in a relatively small number of misdemeanors. The number of civil commitments has decreased drastically since the recent passage of a commitment statute which requires a showing of psychiatric cause. Attorneys are appointed upon request in juvenile cases of appropriate seriousness. Counsel is also assigned for post-conviction proceedings but ordinarily not the attorney who represented the prisoner at trial.

Fees and compensation present a problem in this circuit, and there is concern that low compensation has affected the quality of defense services, as well as bench-bar relations. Some experienced attorneys are simply unavailable because of inadequate remuneration; others are upset when the judges are forced to cut fees in response to budget pressures. It was even implied by some that not all assigned counsel contributed their best efforts to every case because of predictably inadequate compensation.

The lien recoupment system does not operate here; the court

often makes reimbursement of assigned counsel fees a condition of probation, a scheme that is reasonably successful.

Attorneys are required to submit detailed itemized statements for compensation. Areas where fees are most commonly cut are investigations and research, particularly among the younger attorneys. Although the federal fee schedule is utilized, the federal compensation ceilings are not enforced. Prior approval is required before an attorney runs up a bill over $500 in any case.

Criminal trial practice in the circuit is virtually nonexistent. One judge has held only two trials in the past two years. A similar situation exists in local civil practice where trials are equally rare. There is some question among the judges whether any local attorneys are sufficiently experienced in their work.

Plea bargaining is widespread between the Prosecutor and defense attorneys and overcharging seems a routine practice of the State's Attorney. The Prosecutor is usually assisted at trial by the Attorney General's office because it has more experienced trial lawyers and is less vulnerable politically in case the defendant is acquitted.

4. West River Rural

Mead, Haakon, Fall River and Hughes Counties all have purely assigned counsel systems. All are participating in the newly-structured assigned counsel fee system which mirrors the federal reimbursement rates operating in most parts of the country. The primary problem in these counties is the small number of attorneys and the fact that the counties must compete with the Federal District Court and courts in other counties who also assign counsel to this same small body of lawyers.

Because of the location of the federal court and the greater amount of legal businesses in the larger urban areas, attorneys have tended to gravitate toward Pierre and the larger towns along the interstate.

This phenomenon leads to assignment problems. All of the lawyers assigned in Haakon County, for example, live in either Pierre or Rapid City, a drive of ninety miles in either instance. The great distance and the resulting unavailability of lawyers to the rural courts has led to an irregular pattern of attorney assignment.

Throughout the West River area, assignments are reluctantly accepted by attorneys with a year or two of legal experience; they do not particularly want them, but they will not reject them. Older lawyers actively attempt to avoid court assignments. In some circuits there are lawyers who have not had an assignment in recent memory. In the larger cities assignments are more evenly distributed among the lawyers based upon the complexity of the case and the amount of experience a lawyer has had. However, even though the assignment might go to a senior partner of a firm, invariably the actual work is performed by a junior associate. For the most part, the younger lawyers get the brunt of the assignments.

Currently the budget for the assigned counsel system is requested by the presiding judge of the judicial circuit from the various county commissions. In some counties the amount of money required to operate the assigned counsel system is exceedingly low. In others the number of assignments has been growing and, as a result, by the end of the fiscal year there is little money. In some instances the judges tell lawyers to hold their vouchers and submit them in the new fiscal year. At other times the judges have reduced the vouchers being paid to lawyers. Even

though the lawyer actually put the time in, there simply were no funds in the assigned counsel budget. Needless to say this has created tension and animosity between the trial bar and the judges. As in many of the counties around the state, the incidence of trials are exceedingly low. This is due in part to the pressure from the county commissioners; trials increase costs not only for assigned counsel but also for court resources and court services. Often, too, the State's Attorney has no desire to go to trial, since litigation cuts into his private practice. In some of the counties there have been problems with the part-time state's attorneys' lack of trial experience. In some instances the local state's attorneys have expressed a desire not to take major cases to trial. Therefore, the Attorney General's Office will try the case. Similarly, many appeals are handled by the Attorney General.

Indigency is determined on a hit-and-miss basis. If the defendant asks for appointed counsel, he receives it based on his affidavit unless someone in the courtroom happens to know the defendant is not indigent. If at a later date it is determined that the defendant is not indigent, some judges will order the defendant to repay attorney's fees. The South Dakota lien provision is seldom used in these communities.

More frequently, as a condition of probation, the judges order that certain amounts of the assigned counsel fee be repaid to the county. There was a strong feeling that in juvenile cases many of the parents can afford attorneys, so that courts are not assigning counsel. Some of the judges indicated that they try to get the parents to hire private counsel.

IV

PERCEPTIONS OF INDIGENT REPRESENTATION SYSTEMS

A. Rapid City

It is a fair statement that the perceptions of almost all of those interviewed regarding the Rapid City public defender system were positive. There were a few notable exceptions to this but overall the county commissioners, the judiciary, the private bar, the legislators and the client community representative talked to about the public defender office were supportive of it. Those who were in support of the public defender office feel that they deliver services as good as the assigned private bar. The view was expressed that the public defender system was not only providing higher quality representation, even with their lack of experience, but also is an asset in improving the administration of the entire system. Notable exceptions to support for the public defender office consisted of one circuit judge who was very critical of the defender office, and the Indian community which also expressed some doubts.

Judiciary

The judges talked to about the public defender system can be classified in two categories. There were those judges who were not from the Rapid City area but had heard of the office. Those judges, generally, were intrigued by the concept, supportive of the idea and very interested in having a public defender office in their community. The second category of judges are those who are from Rapid City. These are the judges who had the most intimate knowledge of the office and worked on a daily basis with the defender staff. This report will concentrate on the observations and perceptions of those judges. Overall it is fair to say that all but one of the five judges inter-

viewed were supportive of the office, both in theory and in practice.

It was primarily due to the support of the judges that the public defender office began. Judge Young originally conducted a study of the defense delivery system in Rapid City back in 1972. He prepared a preliminary report which was the genesis for the ultimate application for LEAA funds and the creation of the office. At that time in the Rapid City area the necessity for funds to operate the assigned counsel system was increasing in geometric proportions every year. Also, the attorneys in Rapid City were beginning to experience growing and lucrative practices. As their practices improved, these lawyers attempted to avoid getting assignments. An increasingly greater number of cases were being borne by the younger lawyers in the community.

Each individual judge at that time kept his own list for assignments. Some judges assigned randomly on a rotating basis, others were individualizing the appointments and still others were assigning cases to those attorneys who desired appointment. The younger lawyers were bearing the brunt of the burden. After meetings with the county commissioners and the judges, LEAA grant funding was obtained and the office began to accept cases. It was true then and it is still true now that the county commissioners and the judges and the private bar are convinced that the public defender office is economically a sound proposition. They seem to believe the defender offices can handle cases less expensively and more thoroughly than the assigned counsel system.

It was the perception of the judges that the ratio of trials appear to be the same among public defenders and the private bar. It should be noted that this trial rate is exceedingly low. From January 1, 1975 to July 19, 1976, there have only been six felony trials in the Rapid City Circuit Court. When questioned as to why there were so few trials, the judges were hard pressed to come up with a clear cut position, but apparently believe that the public

defender was focusing on the cases at an earlier date, and the issues were drawn more sharply, allowing for more effective plea bargaining and case disposition.

While there was a diversity of feeling as to what general improvement the defender offered, several factors seemed predominant. The first was the view that the public defender would be an improvement on the overall system if the local lawyers do not want to take assignments. This was a growing concern in all the communities in the state and certainly was true in Rapid City when a defender office was created. The second factor was that some of the judges felt that the defender office would be an improvement because of the specialization factor. They all recognize that the private bar will refuse to accept assignments at some stage of their career, particularly after two or three years in practice, because of the cost factor.

While they recognize that there has been some savings in the administration of the overall system because of the public defender operation, the court administrator's office and the judges tend to agree that scheduling has improved dramatically since they have a defender office. Some of the judges were less committal on this point. They pointed out that more motions are filed and there is an increase in the time required to deal with them. These judges went on to point out that the motions now go more to the heart of the problem and they are better focused so that they ultimately reduce the amount of court time required. They said that the motions are not frivolous and are more oriented towards discovery than ever before. With better discovery they find cases generally resolve themselves much sooner and also are better focused if and when they do go to trial.

When asked about the possibility of either a state funded defender system or locally funded defender offices in other communities, the judges indicated that the basic conflict was between the state's rights and counties' rights.

Counties traditionally have been fighting every encrouchment into their domain and this would be one area where they would want to fight it. Even though their interest may not lie in fighting it, they have been adamant in trying to retain local control. It was their feeling, however, that the experience of the public defender in Rapid City was very favorable and that they, the judges, were very supportive of this office and the concept of a public defender in general. They know that to get a public defender office established one would have to have the support of the county commissioners, the bar and the judges.

They recognize that the county commissioners would be primarily concerned with the economics of the situation, the bar would be concerned about getting out from under the burden of taking assignments and the judges would be concerned about ongoing quality and ease of administration. All the judges acknowledged the problem with the fee schedule in South Dakota. This is one of the reasons they support the creation of a public defender. They feel constrained in the area of granting fees on cases between protecting the public monies and at the same time ensuring quality representation. Because of this latter factor they feel the public defender in the long run would be cheaper and that the quality of representation would be higher.

In discussing the impact that a state funded or local public defender would have on a parttime state's attorney, the judges acknowledge that it was a real concern. They felt that the expertise could become too great in the public defender office and overwhelm the local state's attorney. In Rapid City there is a fulltime State's Attorney, so it is not much of a concern for them. However, they are familiar with the situation in the surrounding counties. They think the real fear is that the creation of public defenders would have a domino effect in the local communities, forcing them to hire fulltime State's

Attorneys. This would result in less control, over both the Public Defender and the State's Attorney. The judges stated that a parttime or contract defender should be avoided, to prevent a situation where the defender would be competing for business with the local parttime state's attorney.

The judges also warned that South Dakota, like much of the nation, was in a period of open conservatism about defendants' rights. They know the public might view a Defender as another liberal concession to the rights of defendants. This perception would tend to erode popular support for a Public Defender. An opponent of the public defender office said that the current defender bargained away clients' rights without trying cases. He implied that the public defender office, in fact, was bargaining more of their cases away than were assigned counsel; the fact is that the private bar across the state has the same low trial rate.

This judge also criticized the present defender for soliciting clients in jail, despite the ethical duty of all attorneys to answer questions about citizens' rights. The lack of experience of defender staff is similar to that of their younger private colleagues. Loss of individuality by defenders who practice in several jurisdictions was also mentioned although private counsel also travel extensively.

This opponent of defenders cited lack of bar support for a defender office outside of Rapid City; this was not borne out in discussions with lawyers from the West River area. Lack of public desire for a defender was also alleged; limited public awareness of defender services is a contributing factor. Limited caseloads were mentioned as an obstacle to defender offices; this is the case in some areas but other clearly warrant such services. Reservations about the legality of the Rapid City office were reiterated.

These comments reflect some of the more frequently expressed reasons

for opposing defender programs. They are clearly not frivolous concerns and must be addressed directly in order to establish more effective defender services. It should be recognized, however, that the climate of opinion is not totally in opposition to defender programs in many areas of the state. Where case volume justifies it or the need for improved defense services exists, the establishment of public defender offices will not meet with uniform judicial opposition.

Legislators

Legislators expressed concern that attorneys have already gravatated to the major cities. The lawyer distribution map attached to this report at Appendix D reflects that fact.

One legislator said that the part-time State's Attorney system was at the core of many criminal justice ills in South Dakota. He felt that the current part-time state's attorneys don't go to trial mainly because they are on a salary and get the same pay whether or not they try a case or plea bargain. Specific examples were given of major murder trials or multiple defendant trials where the Attorney General had to conduct the trial due to lack of experience on the part of the local state's attorney. Examples were also offered of particularly effective part-time state's attorneys. However, in the major portion of cases it was the belief of the legislators that strong action was necessary to improve the prosecutorial as well as the defense function. It was their view that a strong defense office would force concommitant improvement in the state's attorney system and that part-time public attorneys simply do not care about their jobs but are more interested in enhancing their private practices.

There were several points of opposition to a public defender system, including loss of local control to the larger urban areas and an unnecessary shift from the status quo. However, many legislators admitted that the rural population was already dependent on the urban areas for a variety of services, especially for legal services. Even under the current system, most trial work is done by the "big city" lawyers.

Some West River legislators said that there were some counties or jurisdictions in South Dakota which could not now support a public defender system. They feel the public defender system should be established in those communities where it is now feasible. When it becomes feasible on a cost-effectiveness basis,

there could be public defender systems in the remaining communities. Most of them believe that a public defender system would provide a higher and more consistent level of representation. The legislators did not see much chance for state funding at present due to lack of general support for this approach. Most legislators think the public is unaware that ineffective state's attorney and defender systems raise the cost of legal services.

The team perceived general resentment of outsiders in the community. While it is not impossible, it is difficult to be an effective yet aggressive defender lawyer in South Dakota. It is equally difficult for a state's attorney to prosecute a popular local resident. Quite frequently the system runs aground with local informalities affecting equal treatment. The legislators expressed the feeling that full-time professional Defenders and State's Attorneys would obviate many of these problems.

Legislators recognize the system presently has no built-in controls. Except for sensational cases, no one pays attention to the operation of the criminal justice system. The state's attorney has to worry about his performance at election time. Stress is too often placed on quantity rather than quality of service. Those legislators who are aware of Rapid City's system feel that it is a tremendous improvement over other systems. Despite lack of current trial experience in the defender office, the general view was that the quality of representation is still far superior than the system that existed previously.

The Indians in Rapid City have a considerable interest in the local defender office. Their interest is, in part, generated by the high number of Indians in the local system. A member of the Indian community who had been in

prison, conducted an informal survey of the Indians who were in prison at the time he was there.[2] At that time, 28% of the 350 inmates were Indians. He found out that 90 percent of the Indians in prison had drug or alcohol-related problems in their criminal history. Seventy-five to eighty percent had court-appointed attorneys. Almost all felt they had not had fair representation or equal treatment in the court.

The Indian community believes that overcharging is a common practice in their cases putting additional pressure on a defendant to accept a plea bargain. In both large cities and smaller communities, Indians said they had little contact with their defense attorneys. Some felt local counsel had been intimidated by the press, public and judges. The very volatile nature of their cases and extreme public exposure placed pressure on local defense lawyers detrimentally affecting the Indians' defense. These impressions have been reinforced by what they characterize as "weak defenses," in some recent cases.

For example, when the Indians brought a sociologist from New York to testify on a jury survey he conducted in South Dakota, the Attorney General fought to exclude his testimony and the judge denied its submission. The local defense attorney who was in that case did not object, leading the Indian community to feel he had been intimidated. While no objection was required, some lay persons do react negatively to such non-assertiveness.

Discussions with defendants recently involved in the criminal justice system indicated that both the public defender office and the local assigned counsel office in other communities do very little effective work on sentencing. There were several examples where outside counsel were able to get probation for convicted Indians or to get sentences commuted. Indians feel that public defender offices and local assigned counsel both make insufficient efforts on sentencing alternatives.

---

[2] A copy of the survey questionnaire is attached at Appendix F.

The Indians pointed out bond problems that had recently arisen. Apparently many of the judges are concerned that if they grant bond to an Indian he will return to the reservation and extradition proceedings will have to be instituted. Therefore, many Indians receive a higher bond than they feel is justified.

Indians complained that there was a lack of doctors available in the jail on weekends. The Indians who became sick in the jail were taken to the Sioux Sanitarium, which was the only place that would treat them. Whites who had become ill in the jail were taken to the local hospitals. This unequal treatment, the Indians feel is outrageous and discriminatory.

Their impressions of the public defender office was that it was overworked and suffered from high a turnover rate. They feel defense services are acceptable in some areas, but overall are inadequate because of ineffective investigation and excessive case loads. They perceive no basic difference between the public defender and assigned counsel. They do feel that if they have the right to choose their lawyer that it might make a difference in the uitimate representation they obtain.

The Indians blame the lack of trials on the community's unwillingness to spend money. This affects the public defender office, the state's attorney office and the courts. They also felt that there is a long-standing precedent of plea bargaining with Indians which began years ago when the local police used the public intoxication ordinance as an excuse to pick up an Indian whether he was drunk or not. If the Indian pled guilty, he received a $5.00 fine; if he pled not guilty, then he had to wait in jail for trial, ultimately paying a $300 fine. It was easier to plead guilty and everyone became accustomed to the practice. They also know that the system's pressures force the public defender and assigned counsel to bargain cases out.

They pointed out that the first and only time a major challenge had been brought to the jury system in South Dakota was a result of one of the Wounded Knee cases. In that case only 3 percent of 500 people called to jury service were Indians, while 10 to 15 percent of the population of Rapid City is Indian. Jury service problems continue to exist because Indians do not register to vote. The Indians are fairly transient in the community and move from home to home and rarely keep one permanent residence. Also, there is a fear that if they register to vote, they will be assessed a property tax. In South Dakota even indigents must pay property tax. The property tax is assessed on the personal property owned by the individual. If they are forced to pay the personal property tax they are afraid it would come out of their public assistance stipend.

Indians criticized the lack of community action on the part of the public defender office or the bar association. They report having tried to set up interviews with the public defender without success. They are very aware that there are no Indian employees at the office and as a result, there is a great degree of uncertainty and skepticism about the public defender in the Indian community. There was at one time an attorney on the staff who had a high degree of credibility in the Indian community. Confidence in the public defender seems to have deteriorated over the last several years. The feeling is that there is very little access to the office. Additional problems stem from one probation officer who the Indians feel is prejudiced against them. They feel that the Public Defender has not taken this particular probation officer on as he should. Their perceptions about the public defender office seem to be indicative of their feelings toward the assigned counsel system, not only in Rapid City, but across the state.

Corrective suggestions included having a strong Indian spokesperson represent the interest of the Indians on the board of directors of the public defender office, although this had low priority. They know there are Indians in the community who would be effective members of the board of directors of the public defender organization, but doubted the county commissioners would agree to a strong Indian on the board. As a whole, they seem to perceive a great difference between the standard view of a quality legal system and an effective defense representation system for the Indians.

The Indians do not respond to proposals that improve the overall efficiency and quality of the system as measured by the people currently running it. Sympathetic attorneys with quality defense skills are the important elements for the Indian community.

Consultant Team Impressions

The consultants believe that the defender office in Rapid City was delivering competent legal services consistent with the standards in South Dakota and with those provided by the vast majority of assigned counsel. In most instances the defender delivered a higher quality of representation to the defendant. This view is supported by most of those people who currently watch the operation of the public defender system.

The team feels that the independence of the public defender office -- the ability to bring very unpopular issues and cases into court -- is essential to effective legal representation in Rapid City, as standards recognize[3]. The generally low trial rate in the public defender system necessitates organized training programs to familiarze the attorneys with trial techniques and improve their litigation skills.

---

[3] See ABA Standards for Criminal Justice Relating to Providing Defense Services §1.4; National Advisory Commission on Criminal Justice Standards and Goals, Courts §13.8.

The public defender needs to expend greater effort in public education. It would be most helpful to add Indian employees to the staff of the public defender in as many capacities as possible and to get Indian input on the board of directors for the public defender office. Furthermore, the board of directors should have a greater voice in the running of the public defender office, including selection of the Public Defender. The defender should serve for a definite term determined by the commission. The board of directors should have the power to dismiss the defender only for malfeasance or misfeasance in office, in accordance with the national standards cited above.[4]

Rapid City currently has a mixed system. Because of the assignment practices of one of the judges, the defenders do not get all the appropriate cases in the community. The statistics for the assigned counsel system and the defender system indicate some parity. The consulting team was not able to get the figures on the dismissal rate for private counsel, although again, indications are that it is almost the same as for assigned counsel.

There is an extraordinary dismissal rate in Rapid City (50%), coupled with a very low trial rate. The low trial rate creates problmes in evaluating cases in the defender office as it is presently constituted. The elevation of their senior and most experienced trial lawyer to the Supreme Court has further hindered the offices' ability to evaluate cases. Again, this problem applies to the assigned counsel panel as well.

The defender office should hire investigators to lessen the amount of attorney-time spent in this area and improve the overall quality of those investigations.

Investigators, even when not used on investigations for trial, could be very effective in developing sentencing alternatives for their clients. The defender office is ably administered and has good morale. An adequate

---

[4] ABA Standards §1.4 and NAC Standards §13.8.

training program and additional support services coupled with active effort in the client community would add significantly to the impact of the program.

B. Sioux Falls

The Second Circuit is also geographically the smallest, consisting of only three relatively small and contiguous counties. As a result, the Second Circuit is the most densely populated and urban area in the state and most able to support and benefit from a full-time defender system. The people interviewed in the Second Circuit were generally amenable to the concept of a public defender.

(i) The Judiciary

Two judges were interviewed in Sioux Falls. Although they exhibited some support for the concept of public defender offices, both thought that at least as an abstract matter, the quality of services would be better with appointed counsel than with full-time public defenders; perhaps because of low salaries which would probably be available for public defenders would not attract high-quality lawyers, or because of problems inherent in handling large numbers of indigent defense cases.

Both juges were concerned about the low fee schedules presently being paid to appointed attorneys. One judge said that a defender office would be cost-effective in Sioux Falls, and saw the defender system as a preferable alternative to increasing fees for private attorneys. The other judge interviewed feels that the fee schedule should be liberally construed, and seen as a guideline rather than as an absolute ceiling, because he knows that appointed attorneys should be adequately compensated for their services.

(ii) Private Bar

Of the three private practitioners interviewed, two were strongly in favor of a public defender office. The third was strongly opposed to a defender office and had actively opposed past legislation in that area.

Both of the private attorneys who favored a defender office were experienced attorneys who did little retained criminal work. Both were removed from economic dependence upon appointments and viewed the system with a certain amount of detachment and objectivity.

One favored a defender system primarily because he did not think it fair or legal to require attorneys to give their time at about half their ordinary rates. These two attorneys each felt that the expertise of a full-time defender was to be preferred to the inexperience of most appointed counsel and it would conserve time. One attorney expressed a preference for a full-time defender over any kind of mixed system, as well. The other pointed out that young attorneys should not gain their trial experience at the expense of indigent criminal defendants. He also knew that as an appointed attorney, he did a conscientious job for his clients, even though the reimbursement did not compensate him for his time; but he felt he might not devote the same time to the more intangible aspects of representation. such as counseling, listening and consulting, as he would with a retained case.

One of the attorneys indicated that the concern that young attorneys could not survive without appointments was a falacy. The amount involved, spread among all attorneys who received appointments, should not be of great concern, he said and would not make the difference between failure or success.

Neither attorney seemed overly concerned with the cost-effectiveness of a defender office. Both feel that a statewide system would be acceptable, although one of the attorneys said that it was essential that multi-county offices be permitted under whatever system was proposed. One attorney stated that a separate appellate office, with different counsel handling the appeal, was preferable to allowing the same attorney to handle the appeal. Both attorneys feel that the defender salaries should be at parity with prosecutors' salaries. Both also say that the judiciary should select the defender and that a term appointment was preferable to serving at the pleasure of the appointing authority. One of the attorneys felt that a commission might be useful in the appointment process. He also stated that the money for a defender office should be in the court's budget, so that the defender would not required to lobby for his own appropriation before the Legislature.

One of the attorneys estimated that of the 135 attorneys in the Second Circuit, about a dozen would strongly oppose a defender, about 15 to 20 would be mildly opposed. The vast majority could be persuaded either way and from six to twelve would favor a defender system.

(iii) Legislators and Commissioners

The third attorney interviewed was also a legislator who was actively opposed to public defender legislation in the past. Although he complemented the public defender in Pennington County, he feels that that office had not been legitimately established. He said that a full-time defender would have an unfair advantage against a part-time prosecutor; that young attorneys depended upon appointments to supplement their incomes; that a defender office

would be unable to pay enough to attract quality attorneys, and that if it could pay enough, it could not be competitive with the present assigned counsel system. He generally opposed the trend toward attorney specialization, and felt that eliminating the assigned counsel system would eliminate any incentive for young attorneys to move to the smaller towns across the state. Although he stated that if a county wanted a defender system, they should be permitted to have one, he later said that he would oppose even a local option defender bill, because local option legislation has a way of becoming mandatory. Although he certainly opposed the defender concept, he stated that if he could be assured of quality representation and competitive costs, he might support a public defender office.

A member of the Minnehaha County Commission expressed the view that the commission as a whole was interested almost exclusively in cost factors. One commissioner supported the idea of a defender office and thought a statewide system might be preferable to a local system, although he noted that sentiment for local control ran deep in South Dakota. He feels strongly that whatever the selection or funding procedure, the defender should be insulated from political influence, and should be permitted to hire and fire his own staff.

(iv) Prosecutors

A prosecutor who was interviewed said that present reimbursement rates for appointed attorneys were too low, and that his outlying county might benefit from a public defender office in Sioux Falls, which could also serve his county. He stated that there were only three attorneys in

his county who were available for appointment in criminal cases, and it was frequently necessary to appoint counsel from Sioux Falls or from another neighboring county with great difficulty in finding an available attorney. He feels a defender office would provide continuity and standardized policy. making it easier for prosecutors to negotiate pleas.

He indicated that there was strong public antipathy for appointive positions, and that although it would be better to have an appointed public defender, sentiment might favor election. If so, he feels the defender selection should be non-partisan. He foresaw that the South Dakota Supreme Court also might eventually impose a statewide defender system, which would necessitate full-time prosecutors.

This prosecutor opposed the move toward circuit-wide prosecutors. Since he felt that a full-time defender office would promote full-time prosecutors, he was reluctant to support the defender concept; he was of the opinion, however, that his county could benefit from a full-time defender office in Sioux Falls.

(v) Clients

Five inmates were interviewed at the state penitentiary, two of whom had been convicted in Minnehaha County. Two had been represented by appointed attorneys and both expressed criticism of the performances of their counsel . One indicated that appointed attorneys exerted pressure to plead guilty, and were more likely to waive preliminary hearings than retained attorneys. The other inmate also stated that his appointed attorney had advised him against going to trial, and he felt that a public defender would be preferable.

(vi) Consultant Team Conclusions

The Second Judicial Circuit can support the cost of a full-time defender office. There is some degree of support for such an office there, and if it is legislatively feasible, such an office should be established to serve the entire three-county circuit. There would be minimal problems in serving Turner and Lincoln Counties. Most of the sentiment we encountered in Sioux Falls seemed to favor a defender office, although the dissatisfaction with appointed counsel expressed by the penitentiary inmates is suspect because it was primarily result-oriented.

C. Other

Fifth Judicial District

Members of the consulting team spent half a day in Aberdeen, the county seat of Brown County, and the largest urban area in the Fifth Judicial Circuit. Although only cursory impressions could be obtained from such a short visit, it appeared to the team that almost everyone concerned with the appointed counsel system in Aberdeen thinks it is preferable to a defender system, but that the present system's fees are low, primarily because maximum payment schedules are too rigidly enforced. Brown County probably has too low an indigent criminal caseload to make a county-wide defender office feasible, but some consideration should be given to an area-wide office.

(i) Judiciary

Only one member of the judiciary was interviewed in Aberdeen.

This judge expressed the view that the young attorneys in Brown County were of exceptional quality, and that because the salaries for public defenders would surely be lower that the incomes earned by young attorneys in private practice, the quality of attorneys attracted to a public defender office would also be lower. He felt that a circuit-wide defender would not be feasible, because of the distances involved in covering the circuit, and because of the likelihood of scheduling conflicts. He thought it might be possible, however, to have a defender in Brown County, and retain an assigned counsel system in the remaining counties in the Circuit.

(ii) Private Bar

Two private practitioners were interviewed, both of whom were young attorneys with limited experience, who accept indigent criminal appointments. They disagreed concerning whether indigency standards were too low. One felt that every defendant who requested an appointed attorney got one. The other did not share this view, and told of cases where defendants had approached him for private representation, had been unable to afford his fee, but still could not qualify for appointed counsel. The two attorneys also disagreed on whether or not they had experienced any disadvantages as a result of not entering a case until after the police had already had the opportunity to question the defendant. One attorney indicated that sometimes confessions were obtained, or lineups conducted, prior to the time an attorney was appointed. The other had never experienced this, and felt that any questioning by the police before appointment of counsel tended to be perfunctory.

One of the attorneys, who had been in practice about two years, stated that the reimbursement from appointments was no longer an economic benefit to him, although the income had been important to him when he was getting started in practice. He felt the appointment system should be retained to assure the continual influx of young attorneys into Aberdeen. The other attorney, who had been practicing for about a year, felt that appointments were still of economic benefit to him, and were adding to his experience as a trial attorney. One indicated that there were subtle economic pressures to settle appointed cases, because the maximum fees were so low. Both attorneys gave the impression that although the hourly reimbursement rates were reasonable, the maximums established for various kinds of cases were not, and both complained about low fees. Neither saw any real advantage to a defender system over the present appointed counsel system.

(iii) Commissioners

The Brown County Commission seemed satisfied with the present assigned counsel system, although they thought it too costly, where a public defender system might be cheaper. Cost was their primary concern. Their figures indicated that about $12,000 had been spent for attorney fees through August 5, 1976; they projected a year-end total of approximately $22,000. The chairman of the commission exercised no control over the amounts expended, but simply ratified the judge's approval of fees.

(iv) Prosecutors

One prosecutor who was interviewed strongly favored a public defender system because he felt that appointed attorneys lacked the necessary experience and expertise, and spent unnecessary hours preparing a case in order to obtain the maximum fees. He feels that a public defender would be more aware of the strengths and weaknesses of a particular case, and would be easier to deal with.

Several factors were unanimously identified as requiring consideration in the design of any workable defender system. One was the "east-river/west-river" split, which was consistently presented to us as a major factor in any statewide political activity. The people living west of the Missouri evidently possess a strong impulse for local isolationism and it was suggested that the assigned counsel system is perceived as a means of financially maintaining local attorneys in rural areas. The second such perception is that a centralized state's attorney system must, as a matter of political necessity, accompany any kind of defender system.

One prosecutor stated that a public defender should be full-time, and should be selected either by the judiciary or the bar. Realistically, however, he felt that if a public defender system ever became operational, it would probably include selection by the county commission. In any event, he thought the public should not be involved in the selection process.

He stated that the present system was abused at both ends. Counsel was unnecessarily appointed, particularly in traffic misdemeanor cases, while attorneys padded their hours or requests for fees.

He was unfamiliar with the statutory recoupment system, and stated that he had never been requested to try to recoup amounts expended for indigent fees. He thought any attempt to obtain recoupment would probably involve more time and effort than it would be worth.

(v) Consultant Team Conclusions

Brown County cannot economically justify a full-time public defender office with its present caseload. Although the caseload of the entire Fifth Circuit might justify a defender office, the area covered is so large, and the caseload in outlying counties so small, that the Fifth Circuit would probably not be a wise selection for a model circuit-wide defender office. In addition, there is little support for changing the current system.

Although it is probably unrealistic to expect reimbursement rates higher than $20 to $30 per hour, efforts should be made to raise the maximum fees and/or allow more extensive coverage. Prior veto of extraordinary expenses by a single judge could limit defense services. Raising ceilings on fees could have several side effects: it is economically feasible for attorneys with more experience to handle appointed cases; it would reduce any existing temptation for an attorney to stop trying once he had run up hours entitling him to the maximum fee; and it would facilitate future implementation of a defender system, in the event of a statewide or county-option system being created.

(b) Huron

The respondents shared a wide range of perceptions not only of the workings of the appointed counsel system, but also of the advantages and drawbacks of a public defender system and of the political considerations to be accounted for in deciding whether a public defender system would be acceptable if recommended. Local feeling seemed to be that the low compensation rate for defense attorneys and the part-time nature of the prosecutors has created a situation where it is in the economic interest of the attorneys involved to do less than a thorough job in appointed cases. Consequently, one party or the other is frequently underrepresented. One person pointed out that the defense attorneys know what motions to go through to protect themselves from postconviction allegations of ineffectiveness, indicating that at times form prevails over substance in criminal proceedings. Judicial interest in a public defender's office is motivated by a desire to improve the representation of both the defendant and the state, on the assumption that a full-time public defender operation would complement a circuit-wide prosecutor.

Several factors were unanimously identified as requiring consideration in the design of any workable defender system. One was the "east-river/west-river" split, which was consistently presented as a major factor in any state-wide political decision. The people living west of the Missouri evidently possess a strong impulse for local isolationism and it was suggested that the assigned counsel system is perceived as a means of financially maintaining local attorneys in rural areas. The second such perception is that the centralized state's attorney system must, as a matter of political necessity, accompany any kind of defender system.

(c) West River (Rural)

(i) Judicial

The judges in the West River area agreed that they would just as soon not have to assign counsel. They felt that the aggravation and the friction caused between the private bar and the judges simply was not worth the effort of continuing the present system. They were placed in the dual bind of having to assign private counsel and at the same time having to deal with the county commissioners to get sufficient money to operate the assigned counsel system. When the assigned counsel funds ran out, they would have the responsibility to either reduce the fees paid to lawyers, knowing that the laywers were being underpaid, or tell the lawyers to hold off submitting their vouchers until the beginning of the new fiscal year. The judges were quite supportive of the local lawyers who were doing the assigned cases. However, they were clearly aware that the assignments were not being spread equally among the bar.

The judges were under the favorable impression that a public defender system should have training programs and continuing education programs that would insure that the younger lawyers would receive training in the handling of criminal cases. They felt that it would make their job of administering the court system much simpler. More importantly to them, a public defender system would relieve them of having to lobby with the county commissioners for a continued increase in the assigned counsel funds. Many of the judges emphasized that they felt it was outside the role of the judiciary and the courts to be in the business of handling budgets for assigned counsel cases. For the most part, they supported the concept of having a statewide defender system under the executive branch funded by the state legislature.

The judges also feel that they should not be in the business of running the defender office. They believe that should be handled by a committee composed of private lawyers, court administrators, state bar members or perhaps even legislators or legislative designees. They hope that the statewide program would also give the defender system the flexibility to transfer lawyers in the event there was a major crime in one of the counties in the state.

The judges agree that when they get into clashes with lawyers over meager court fees there are no winners. They admit the longer a judge is on the bench and away from the economics of private practice, the more difficult it becomes to determine which lawyers are billing properly. They felt it would be far wider for those cases that must be handled by assignments (because of conflicts or overflow in the system) to be administered by a bar committee. The form of system that judges recommended for their jurisdictions was a mixed system with 80 percent of indigent cases going to the defender system and the other 20 percent (made up of conflicts cases) handled by local attorneys to keep the private bar actively involved.

The judges felt that tradition was at the core of the resistance to state defender legislation. The smaller counties fiercely want to retain an independent identity and control over their institutions. The judges felt that the quality of representation currently being provided was adequate and the only criticism they had heard came from the American Indian Movement (A.I.M.). On the whole, they felt that quality of representation was about equal between the State's Attorney and the assigned counsel system.

The judges also said that the defender system would make the determination of indigency much easier. They felt that a methodology could be employed which would greatly improve the determination of indigency and the operation

of their current recoupment practices. They thought it would improve the record-keeping, the initial determination of indigency and give the defendants better advice as to the recoupment that might ultimately be enforced by the State of South Dakota.

The judges also said that it would improve the quality of representation to have lawyers available on short notice for potential lineups, juvenile hearings and bond hearings and to increase the ability to investigate cases in outlying areas.

The consensus of the judges was that the court should have nothing to do with the administration, supervision or budgets of a defender program. They felt it should be a committee that is composed of members of the legislative branch, judicial branch, citizens groups and the bar. The judges believed if one person was responsible for the selection of the defender, then there should be absolute tenure; if the defender was appointed by a commission, then the person should serve at the pleasure of the commission. They thought it was the responsibility of the Governor's office to submit a statewide defender program budget for legislative approval. The courts should have input on anticipated case volume in the upcoming year, and report on the volume of the circuit in the past year to aid budget estimates.

(ii) Private Bar

In the rural areas in the West River community, save for one particular county, the lawyers in general support a public defender office. The consensus was that criminal work made up a large portion of the practice for young lawyers only. There was a willingness among the bar to accept assignments, feeling that it was a professional obligation. Individuals indicated that their income from assigned counsel fees did not warrant the time they spent. Many lawyers stated that federal cases were also consuming a great amount of their time. They pointed out that in many of the cases they were having to

travel large distances in order to handle the cases effectively, particularly the federal cases. But the local attorneys pointed out that a public defenders' travel problems should be no different than those assigned counsel presently have to endure.

Many of the lawyers in the area refuse to take assignments and the judges do not force them to. They have verified the fact that in many of the firms when the senior lawyer is assigned to take a case, it is invariably given to the junior partner to try. They also pointed out that in some of the communities, particularly in the Sturgis, Lead, Belle Foche area, some of the senior lawyers will take murder trials, which consume a tremendous amount of their time for which they are not being paid.

There have been some particularly hostile confrontations between lawyers and judges over fees. In some of those cases where the matter was tried in a community where the lawyer did not live, the judge has disallowed the motel fees, telephone and xeroxing expenses incurred in handling the trial. The lawyers felt it grossly unfair and doubly so when they had to pay taxes on what they were paid. The situation exists where lawyers must work at a loss if they handle cases effectively.

Many private bar members cite the fee squabbles as the primary reason they support a public defender system. Others say that the quality of representation would improve overall, that lawyers would be better trained when they do finally enter private practice, and that defense lawyers would be prepared to go to trial. A majority of rural practice is paper work rather than court work. Few attorneys are ready to handle a major trial.

They complain that this is also true of the State's Attorney system. Many in the private bar supported the establishment of a fulltime state's

attorney position. There are vast discrepancies between the quality of state's attorneys from community to community. The lawyers feel there are a significant number of state's attorneys who won't go to trial, and that people seek to become state's attorneys because it is a parttime position. This allows them to practice law privately and, at the same time, pick up a salary and office expenses. They feel that a fulltime state's attorney system and a fulltime defender system would obviate this problem and significantly upgrade law practice.

Frequently the discussions with the private lawyers returned to the question of adequate fees. Lawyers were stating that in private practice they were spending at a minimum $15 to $20 an hour, an intolerable situation. Also, some of the lawyers expressed the opinion that many attorneys in private practice, do not understand the amount of money it costs them to continue to take assignments. Also, the local bar does not enjoy placing the judge in the impossible position of having to fight the county commissioners and the bar members as well. They fear that it might affect their ability to practice in front of that judge.

The private bar in the rural areas felt that a sole practitioner or a new practitioner has slim to no chance of providing quality representation because of inexperience in criminal law. The assigned counsel system doesn't provide any one lawyer with sufficient exposure to criminal litigation. The only way to insure quality representation is through a public defender system. Even though the attorneys may be novices, they would get much more criminal work, better training programs and more experience in a shorter time.

Some of the attorneys expressed the feeling that private lawyers in some communities of South Dakota are having a difficult time dealing with some of their clients, particularly the Indian community. They think that a defender office might be able to establish better rapport with the Indian community. They feel that defenders, by having an effective investigation capability and the independence of the office would be far more effective in terms of challenging the incredible number of confessions that are obtained from defendants and also be able to get into the jails and detention centers faster in order to competently advise clients at an early stage of the proceedings.

Those that opposed the creation of a public defender office, felt that the defendants got exceptionally good service. The reasons put forth by those opposing a public defender were as follows: (1) The services would not be as good, (2) they enjoyed the work, (3) it would not be economical because of the vast distances to be covered by the attorneys; and (4) that to some lawyers it was an economic necessity. This final reason was expressed by the newer attorneys.

They did not feel that the use of investigators would diminish the amount of travel time necessary for the attorneys or would improve the quality of practice. They opposed this idea because, (1) they had had poor experiences with investigators, ending up having to do the work all over again, and (2) they thought their Indian clients would not have as good a rapport with investigators as they would with a lawyer. They pointed out that the individual has to know the people to do quality investigation. This reflects the general view that people located in the community know best what is needed to deal with local offenders.

Regarding appeals, attorneys felt if they had heavy research to do, they would have to go to either Rapid City or Vermillion which is located on the other side of the state. There are inadequate local law libraries. Many of the local lawyers feel that an appellate defender would be of value to them, both in terms of doing research while they are in the middle of trial and also to do the appeals after the case was ended. They pointed out, however, that they had very few appeals.

The vast majority of the lawyers in rural areas supported the concept of a public defender. Many of the lawyers in private practice in the smaller communities and the smaller population centers are either now or previously were State's Attorneys. After they left office, they generally had an adequate private practice.

There was some interest expressed by the private lawyers to remain active in the practice of criminal law. However, they felt it could be well-managed by having just a few cases to do a year. This could be accomplished by having an integrated assigned counsel and defender system which would more than satisfy the needs of most of the lawyers in private practice who are not state's attorneys and currently are in practice in the rural communities. Many of the lawyers now in private practice supported the concept of a fulltime State's Attorney system and a fulltime Defender system. They felt it would remove the pressure now faced by the private bar in dealing with fee structures with the judges and would improve the overall quality and administration of the system.

(iii) State's Attorney

The state's attorneys generally have a small number of assigned cases to handle. In one of the communities the state's attorney said

that the majority of clients coming before him had retained counsel. This was due to the low Indian population in their vicinity and the general prosperity of the area. Whether a client retained counsel or had an appointed counsel, many of the attorneys came from Pierre and Rapid City.

The state's attorneys did not feel that selection was being done on a patronage basis or on a non-random basis by the judges in the assignment of appointed counsel. Their rural practice was primarily paperwork and did not involve court appearances. Some of the State's Attorneys had not tried a case in two or three years, but could not explain why so many cases ended up in guilty pleas or dismissals. They also pointed out that major trials and appeals were done by the Attorney General's office and, therefore, they did not have the need to leave the community to do extensive legal research. This, however, was not the situation with the assigned counsel.

Overall the state's attorneys felt that the quality representation being provided by the appointed bar was more than adequate. Many of the state's attorneys also accept federal appointments. This means they have to leave their community and travel to Rapid City or Pierre for appearances in federal cases.

They universally felt that there was not a sufficient volume in the more rural areas to support even a circuit-riding public defender, a situation they fear would diminish quality of services. When reminded that the lawyers currently handling the cases are coming from the larger cities, they agreed that there probably would not be much difference with having a public defender system.

Perceptions

There is a tremendous need for a well-organized assigned counsel and defender system. The parttime State's Attorney system has come under attack. However, there is a fierce independence in the West River area and the feeling that "others" would strongly oppose a public defender system. It is felt that if a public defender system were established, it would only be in the larger population centers and not in the rural communities. There is a tendency to lump the fulltime state's attorney problem with the problem of fulltime defenders, although they are not the same problem.

In some rural communities the delivery of defense services has not even met the minimal constitutional standards at this time. There were very few appointments of counsel to handle identification, lineup, or interrogation situations. Furthermore, the assignment of counsel in the misdemeanor area was done on an informal basis, and in some communities was avoided because of the cost factor. Finally, and perhaps most importantly, an attitude affected the defense, the judges and the state's attorney. That attitude was one of trying to avoid running up large costs. Each, in their own way, had their reasons for doing this. The state's attorneys and the judges had to deal with the county commissioners and the defense counsel had to make their own livelihood. The net result is a diminished number of trials. If defense services were currently operating at the level where they are consitutionally mandated, a defender sytem would no doubt be less expensive than the system currently in operation.

Indians

Two staff members of the Sioux Falls office of the United Sioux Tribes Development Corporation (a non-profit corporation which contracts with various agencies to provide services to urban area Indians and which represents all nine Sioux tribes) were interviewed about adequately representing Indian tribe members. At first, both men said that it made little difference to the Indian whether they were represented by appointed counsel or by a public defender, because the problems for Indians were much more far-reaching and endemic than that. There are few Indian attorneys in the state, and they feel the only way to really improve the criminal justice system for Indians is to involve Indians in the governmental and judicial processes.

The interviewing team was also told that defenders would probably provide better services than assigned counsel, because local assigned attorneys had too many deep, ingrained prejudices and preconceptions about Indians to provide quality services. Defenders, one of the staff members indicated ideally should be either Indian attorneys, or attorneys from out-of-state who did not share these local prejudices and preconceptions. When asked specifically about Sioux Falls Indians, neither man felt that Indian sentences were disproportionate or that there was any overt discrimination against Indians by the judiciary.

Two Indian inmates at the penitentiary were also interviewed. One inmate had been represented by an inexperienced appointed attorney, who the inmate felt had persuaded him to enter a plea of guilty to a murder charge. This resulted in a death sentence subsequently commuted to life imprisonment by the Governor.

The second Indian inmate also expressed displeasure with an appointed attorney who had refused to raise two defenses based on Indian law because, according to the inmate, he was inexperienced and did not understand the issues. This inmate claimed that his attorney was negotiating for appointment as a prosecutor at the same time he was representing the inmate, and in fact received the appointment immediately after the trial in the case.

The strongest criticism of the assigned counsel system is from the American Indian Movement, whose members have categorically refused to be defended by local assigned counsel. South Dakota bar officials and AIM members disagree whether these matters are criminal or "cause" cases.

V. STATISTICAL DATA SYSTEM FOR STATEWIDE INDIGENT DEFENSE SERVICES

While the statistical requirements for proper management of an indigent defense delivery system are routinely described in terms of caseload, court appointments, dispositions and resulting attorney fees, the records kept by a court system are often not detailed or comprehensive enough to lend themselves to analyses which result in the prediction of future resource requirements. It is common, therefore, to encounter procedures which use the case load standards established by the National Advisory Commission[1] for computation of attorney requirements for the provision of indigent defense services. In any event, the resulting data provides the basis for a budget estimate detailing the dollars required to provide these services. Once the attorney requirements have been derived, investigator requirements can be computed by estimating that an office will need one investigator for each three to four attorneys and will need a secretary for each one and one-half attorney/investigator combination. By adding the necessary fringe benefit package, the personnel line item of a budget is derived. The remainder of the budget--travel, transportation and subsistence, equipment, and supplies and other operating expendables--are added as the necessary fixed overhead to support the people providing the services.

An alternative approach to providing reasonably precise data keyed to a particular judicial district would be to determine the management data elements necessary to insure such precision. A procedure to accomplish this could be described as follows:

1. Determine the case load by type of case; normally caseload can be described as felonies, misdemeanors, juvenile cases and mental health cases.

2. Identify the number of court appointments, again, by type of case.

[1]NAC Criminal Justice Standards and Goals Standard 13.12, Workload of Public Defenders, 1973

3. Dividing the total number of indigent cases into the combined caseload totals, the indigency rate is determined.

4. In order to estimate the person hours required to deliver these services, the net indigent caseload for a reporting period (usually one year) must be used as a starting point. A useful way of determining this quantity would be to add the indigent cases pending at the beginning of a reporting period to the cases filed during the reporting period and subtracting those cases pending at the close of the reporting period.

5. Not only is it necessary to identify the number of indigent cases which will require the delivery of legal services, but it should prove useful to break that figure out into the steps which are required to process them. One approach to this would be to determine what steps in the court's component of the criminal justice system usually require a significant amount of time for accomplishment. This then leads to the listing of the following steps:

    a. Arrest/booking
    b. Initial interview
    c. Bond hearing
    d. Pretrial motions
    e. Investigation and research
    f. Arraignment
    g. Trial/post-trial motions
    h. Sentencing
    i. Appeals (may count as a new case)

6. Having identified principal steps or stages in the court's component of the criminal justice system, one could then estimate the workload that will occur at each stage. An approach to this would be to ask, if the net indigent caseload is the figure to be estimated at the arrest-booking stage, what percentage of that figure can be expected to carry forward into the next stage (initial interview). After deriving that answer and going through the necessary computations, one can derive the actual caseload for the next stage. The next question is, considering that this figure (initial interview) is 100% of the caseload, what percentage of that caseload can be expected to carry forward to the next stage (bond hearing). Converting that percentage to a concrete figure and inserting it into the next stage (bond hearing) would provide a methodology which can be carried forward, step by step, for determining the actual caseload to be estimated at each stage of the court's component of the criminal justice system.

7. The next step is to identify the estimated amount of time required

to process each type of case at each stage; this is the most difficult part of the data-gathering system. By multiplying process time per stage by the number of cases at that stage, the total attorney-minutes required to process that stage can be determined.

8. Once the minutes per stage are identified, they can be multiplied by the projected workload of indigent cases at each stage to determine the total minutes per process stage; this can be divided by 60 to derive the total hours and that figure can be divided by six, the number of effective attorney hours in a given day to determine the number of working days required. The result, finally, can be divided by 210 effective working days per year, excluding holidays and weekends. The net result is the number of attorney "person-years" required to deliver these services. This can be the basis for deriving the remaining personnel needs which in turn allows the calculation of the fixed overhead necessary to support the people delivering the services. In this manner, one can determine the data required to formulate a budget for an office providing these services.

It is apparent that the weakness in this application is the derivation of an accurate estimate of the number of minutes required to process a case through the various stages of the court's component of the criminal justice system. Nevertheless, it provides the necessary data management framework for tabulating the critical elements required to more precisely estimate staffing requirements for the future. In the interim, the current standard of the National Advisory Commission workload guidelines[2] can be used to routinely derive staffing requirements while the data collection system described above, is in process. Normally, one should expect to compile approximately three years of historical data in order to use the foregoing system for estimating staffing requirements. As an adjunct to this effort it would be useful to insert a column between the listing of the criminal justice stages and the caseload projections for each stage for entry of the date that each case reached each stage. This would allow the office compiling the data to develop historical trends as to the extent of early representation occurring in the system and to identify possible bottlenecks in what should be a smooth-running case management system.

While the system presented should be useful for a zero-based budgeting

[2] NAC, Courts Standard 13.12, Workload of Public Defenders.

approach to defense services for indigents, allowing a funding source to evaluate the need for and the magnitude of the delivery of such services in the next budget year, an interim method must be devised for determining the productivity of the existing system in the absense of a zero-based budgeting system. Such an interim system would record such information as:

1. The date that counsel was retained or appointed
2. The date of arrest
3. The charge (by chapter of the criminal code)
4. The date of arraignment
5. The nature and number of court appearances
6. The number of motions filed
7. The number of cases disposed by plea
8. The number of cases taken to trial (bench/jury)
9. The disposition of cases taken to trial before a jury
10. The disposition of cases taken to trial before a judge
11. The date of disposition
12. The fee that private assigned counsel received

For purposes of uniformity, the unit of measure should be one "case", meaning one person. If is data is accurately maintained,[3] it should provide the funding source with a means for evaluating the productivity of those offices or persons providing legal services to indigents.

Finally, there are quantitative procedures for more sophisticated ways to accurately estimate caseload. These procedures should be considered when the suggested system has been implemented and passed the test of time. The National Center for Defense Management has such mathematical forecasting systems in its inventory and will, upon request, provide them with explanatory annotation to the South Dakota Law Enforcement Commission.

[3] A model form for this purpose appears below as Exhibit A. NCDM's Case File Documentation and Management Handbook will be sent under separate cover.

EXHIBIT A--Defender Staffing Application Indigent Criminal Cases				
1	2	3	4	5
criminal justice stage	projected workload	minutes per process stage	total minutes per process stage	total hours per process stage
1. Arrest to Booking				
2. Informal Arraignment				
3. Initial Interview				
4. Formal Arraignment				
5. Investigation, Research & Discovery				
6. Motions				
7. Pretrial Hearings				
8. Trial				
9. Sentencing				
10. Appeals				
TOTAL WORKLOAD				

VI.

LEGAL IMPLICATIONS

A. Legality of the Pennington County Defender's Office

The Pennington County Public Defender's Office was established through the joint efforts of the Pennington County Commissioners and the local circuit and district courts. The Pennington County Board of Commissioners on December 7, 1972 passed a resolution which committed the Board to provide adequate funding, in conjunction with LEAA, for a public defender's office for the county for the 1973 calendar year. The resolution was made contingent on approval by the South Dakota Crime Commission for LEAA funding of the proposed office. The Commissioners also resolved "that the Public Defender shall be appointed by the Senior Circuit Judge of the Eighth Judicial Circuit, the District Court Judge and the Municipal Judge of the City of Rapid City." An advisory committee was established to furnish the Board with a proposed budget for the office.

In response to this resolution, Judges Parker and Bottum of the Circuit Court, and Judge Young of the District Court, issued a joint order on April 2, 1973 establishing a public defender's office effective February 15, 1973. The order set forth the staff complement to be employed, specified the manner in which their compensation would be made (salary), established an advisory committee, designated its membership and defined its powers and duties, and named the initial staff and their salaries. In addition, the order directed the Board of County Commissioners to pay the salaries and expenses of the defender staff "upon vouchers approved by one of the undersigned judges," and authorized the advisory

committee to permit the defenders to represent indigent misdemeanants in Rapid City municipal court. Finally, the order provided that the office be appointed to represent all defendants (including minors) who were found indigent, entitled to counsel and who desired counsel.

The Pennington County Public Defender Office has, since its establishment, functioned continuously in the manner contemplated by the county commissioners and the courts. When the unified court system was implemented in January, 1975 the public defender office was continued in operation by the presiding circuit court judge of the newly created Eighth Judicial Circuit. Orders entered by that court on March 31, 1975, March 5, 1976 and July 20, 1976 have reaffirmed the establishment of the defender office, authorized staff and salary changes in the defender office and adjusted the membership of its advisory committee. The office was initially funded principally by the LEAA through the South Dakota Crime Commission, but the financial burden was gradually transferred entirely to Pennington County, which in February 1976 assumed sole financial responsibility for the office.

Thus it is accurate to characterize the Pennington County Public Defender Office as having been established and continued through the coordinated efforts and cooperation of the county commissioners and the local judiciary. An assessment of whether this office rests on a sound legal foundation requires consideration of two related issues: (1) whether the means used to create and maintain the office violate any legal prohibition and (2) whether the bodies which created and are maintaining the office have authority to do so.

The principal limitation in South Dakota law on joint action by bodies from two different governmental branches is Article II of the South Dakota Constitution:

> The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.

Article III, section 1 vests the legislative power of the state in the legislature; Article IV, section 1 vests the executive power in the governor; and Article V, section 1 vests the judicial power in the unified court system.[1/]

The South Dakota courts have developed two more or less parallel doctrines from these constitutional provisions. In the first instance, the nature of powers to be exercised by courts has been viewed narrowly, and in the second, the power of the legislature to delegate its powers to other governmental branches has been strictly limited. Cf. State v. Johnson, 173 N.W.2d 894 (S.D. 1968). The doctrine restricting legislative delegation is not really applicable here, since we are dealing, not with an explicit delegation, but rather with coordinated actions by agencies of two different branches of government.[2/] The action of the Board of Commissioners is authorized by

---

1 As amended November 7, 1972.

2 It is noteworthy that South Dakota statutes attempt to foster cooperation between municipalities and counties.

Section 7-8-20(7)(SDC 1967) which empowers the Board to "superintend the fiscal concerns of the county and secure their management in the best possible manner." Unquestionably the establishment of the Public Defender Office in Pennington County was principally an effort to maximize the efficiency of resources spent on providing legal representation for the indigent. Present Chapter 7-18A even more explicitly authorizes the Board to act on this matter.

The action of the local courts in Pennington County was not directly authorized by statute, though statutory powers are clearly implicated. The action taken, according to best information, was in response to and coordinated with the resolution of the Pennington County Board of Commissioners. The order establishing the public defender office in Pennington County did two things: it provided for a continuous appointment of counsel, and it required provision of support services for those appointed counsel. Positive authority for these actions can arguably be distilled from several sources. Determining whether the state constitutional prohibition against the exercise of non-judicial powers by courts is more difficult.

The doctrine prohibiting the judiciary from excercising nonjudicial powers is rooted in cases such as Marbury v. Madison, 5 U.S. 137 (1803) and in South Dakota, Champion v. Board of County Commissioners, 41 N.W. 739 (S.D. Territory, 1889):

> The legislature has no power to confer a strictly executive and administrative or legislative power upon the judiciary, and whenever it has sought to do so the courts have declared it void. * * * The courts hold,

> and must continue to hold, that they cannot and will not exercise other than judicial power."

This strong language is found in a case involving, like Marbury v. Madison, a legislative attempt to impose administrative duties on the courts, in this instance by granting them broad powers to review and correct administrative judgments by the Board of Commissioners. However, the South Dakota court has not invalidated every measure which involved the judiciary in the legislative process. The involvement of circuit judges in approving voters' petitions for establishment of a power district was upheld in In re Heartland Consumer's Power District, 180 N.W.2d 398 (1970). The validity of the act is to be determined by analyzing the nature of the function served by the judiciary. Champion, supra. In cases involving judicial review of administrative action the question of whether the function exercised by the court is a judicial one is determined by examining the nature of the court's powers of review. The function is judicial if the court is limited to passing on whether the administrative act was authorized; it is administrative if the court is permitted to exercise its judgment regarding the wisdom of the administrative action. Holmes v. Miller, 23 N.W.2d 794 (1946). If these principles are applied analogously, it would appear that the establishment of a public defender's office is a nonjudicial act. But the principles to be applied to limiting judicial review of the actions of a governmental agency from a different branch lose much of their relevance when it is remembered that the courts themselves must of necessity exercise powers of an administrative nature in the course of conducting their own affairs.

It is widely acknowledged that the powers of the courts are not strictly limited to adjudication of legal disputes. The proper discharge of judicial responsibilities requires that courts possess some ancillary power to exercise legislative and executive functions. These inherent powers are judicial only in the sense that they are a necessary concommitant to the judicial power:

> The inherent power of the court is non-adjudicatory. It does not deal with justiciable powers. It relates to the administration of the business of the Court.

Judges for Third Judicial Circuit v. County of Wayne, 172 N.W.2d 436, 440 (Mich. 1969).

This administrative aspect of the judicial function is recognized in Article V, Section 11 of the South Dakota Constitution:

> The chief justice is the administrative head of the unified judicial system. * * * The Supreme Court shall appoint such court personnel as it deems necessary to serve at its pleasure.

The legislation enacted to effectuate this provision relates to the appointment of clerks and other court personnel necessary to perform the ordinary "house-keeping" functions of courts. See Title 16, SDC. Present legislation detailing the administrative powers of the courts does not contemplate the creation of a public defender office by court order. However, the statutorily defined administrative powers of courts are not exhaustive. Courts in a number of states have declared their inherent powers to act administratively, even against the wishes of the legislative branch:

> "(T)he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to

> administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation.

Commonwealth ex rel. Carroll v. Tate, 272 A.2d 193, 197 (Pa.1971). See also, Judges For Third Judicial Circuit v. County of Wayne, 172 N.W.2d 436 (Mich. 1969); on rehearing, 190 N.E.2d 228 (Mich. 1971); State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. 1970); Noble City Council v. State ex rel. Fifer, 125 N.E.2d 709 (Ind. 1955). In each of the above cases, the courts were found to have inherent power to appoint employees such as clerks, judicial assistants, marriage counselors, and probation officers, and enforce the payment of their salaries.

The appointment of the Public Defender in Pennington County was accomplished under authority of Section 23-2-1, SDC. That is, the order specified that in all cases where appointment was appropriate under that section (excepting conflicts of interest), the Public Defender would be appointed. The portion of the order dealing with assistant public defenders, secretarial staff and investigators might also be arguably authorized by Section 23-2-2, which provides that the county must pay "a reasonable and just compensation" for the services rendered and "for necessary expenses and costs incident to the proceedings in an amount to be fixed by the judge . . . . ." It is not unreasonable to argue that, as is the case with any other attorney, the employment of the Public Defender reasonably and necessarily entails the employment of his or her secretarial staff and associates. If this viewpoint is adopted, that portion of the court's

order providing for employment of support staff can be regarded as surplusage. The statute clearly authorizes the employment of an investigator where necessary. Although the legislature apparently intended that the attorney be paid on a case by case basis ("after the disposition of said cause"), it also authorized the county board of commissioners to act to handle its own fiscal affairs (Ch. 7-8-20) and the Pennington County Board by resolution agreed that a public defender office would be the most economical way to discharge its Chapter 23-2 responsibilities.

The inherent powers of the court alluded to above bolster its authority to establish the public defender support staff by court order. The responsibilities of the judicial branch with respect to assuring effective legal representation of indigent criminal defendants, juvenile defendants and persons threatened with civil commitment are derived from Federal constitutional guarantees. The right to appointed counsel guaranteed by the Sixth and Fourteenth Amendments means the right to effective assistance of counsel. Cf. Powell v. Alabama, 287 U.S. 45; Johnson v. Zerbst, 304 U.S. 458. Appointed counsel in a criminal case has an obligation to fully investigate the facts of the case and research relevant points of law. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); ABA Project on Standards for Criminal Justice, "Standards Relating to the Prosecution Function and the Defense Function," 34.1. The courts have an obligation to insure, to the best of their ability, that the Sixth Amendment rights of indigent defendants are protected. The state has an obligation to provide defense counsel with both the time and tools to properly represent his

or her indigent client:

> An essential ingredient to an attorney effectively representing a defendant in a criminal case, when it comes to determining whether that attorney has had an "opportunity" to investigate and prepare the case, is funds to pay the necessary and essential expenses of interviewing the material witnesses and in viewing the scene of the alleged crime.

State v. Williams, 215 N.W.2d 98, 104 (Iowa 1973); United States v. Germany, 32 F.R.D. 421, 423 (M.D. Ala. 1963). Given the central role which courts must of necessity assume in assuring that defendants are provided with effective assistance of counsel, it is reasonable to regard the order providing for support personnel for the Pennington County Public Defender as an exercise of the Courts' "inherent power . . . to carry out its mandated responsibilities, and its powers and duties to administer Justice . . . ." Commonwealth ex rel. Carroll v. Tate, 274 A.2d at 197.

Given the favorable attitude of the present Board of Commissioners toward the Pennington County Public Defender, the question of the enforceability of the Courts' orders is a somewhat remote, but not altogether irrelevant problem. Relevant statutory provisions dealing with the budgeting and allocation of funds for other county activities appear to govern the budgeting and allocation of funds by counties for representation of indigent persons entitled to appointed counsel. Chapter 7-21, SDC provides generally that a budget be prepared and published for each fiscal year by the Board of County Commissioners, who are also charged with responsibility for appropriating available funds. Chapter 7-22 provides generally, inter alia, that claims against a county are to be paid only by warrant, and that warrants

shall be issued only upon allowance of the Board of Commissioners, except where a warrant is "authorized to be allowed by some other person or tribunal." Section 7-22-2. Section 23-2-2 appears to authorize "the judge of the circuit court or the magistrate" to certify an allowance of "reasonable and just compensation" for "services and for necessary expenses and costs incident to the proceedings in an amount to be fixed by the judge . . . .or the magistrate." Such a certificate of allowance apparently authorizes and compels the county auditor to issue a warrant for payment of the claim. Section 7-22-2. Thus these statutes appear to authorize court enforcement of its compensation orders without regard to the wishes of the Board of Commissioners, and without resort to exercise of its inherent powers.

B. Proposed Defender Legislation

Various aspects of the Public Defender legislation proposed by the South Dakota Bar Association will be commented upon because of some weaknesses in the proposal. NCDM's draft legislation is appended.*

Section 2. The advisory committee, it is proposed, will be chaired by the presiding judge of the circuit court. This appears to infringe on the ability of the public defender to exercise his or her professional judgement independently. The rationale seems to be that the judge can act as a buffer between the public defender and the board of supervisors. This merits some consideration.

First, the defender might have less conflict with the board (or any other funding source) if there is direct contact between them.

* See Appendix E.

Second, the presiding circuit judges are presently in a position to play that buffer role with respect to defense attorneys. Yet, rather than insulate the defense attorneys from budgetary pressure from the commissioners, the judges have tended to transmit it directly to defense attorneys by means of their compensation practices. Realistically, the defender's proposed relationship to the presiding circuit judge could easily destroy the defender's credibility in the legal and lay communities.

Section 5. Two aspects of this provision are troublesome in principle although they may be desirable from a practical standpoint. Given the defender's constitutional duty to thoroughly investigate every case, cf., McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974) and the state's obligation to furnish defense counsel with the tools necessary to adequately represent an indigent defendant, the commissioners should be required to employ a reasonable staff of assistants, clerks, investigators and stenographers. As is the case in any other law office, public or private, the attorney responsible for management of the offices must have sole responsibility for hiring and firing all staff personnel, including assistant public defenders. This is an essential factor in maintaining independence.

Section 7. There is some ambiguity created by the interplay of the two paragraphs of this section. Present South Dakota law provides a right to counsel for indigents that is broader than the Sixth Amendment has been interpreted to require. Section 7 appears to be designed to insure that indigents are not provided services greater than those received by persons who hire private counsel. There is little

factual basis, so far as the team is aware, for the apprehension which apparently motivated this precaution.

The two limiting phrases in the second paragraph of this section are worthy of comment. The phrase "beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney. . . ." is really no limitation at all, since there are very few restrictions, in the course of criminal proceedings--whether pre-indictment or post-conviction--when a person is not entitled to representation by retained counsel. On the other hand, serious problems lurk beneath the surface of the limiting phrase: "unless the court in which the proceeding is brought shall determine that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense."

The judgment called for is one that cannot be made in any reliable manner. The statute spells out no clear standards to be applied in making this crucial determination. On the other hand, attorneys have an affirmative obligation to screen their own cases and may not pursue frivolous claims. DR 7-102(A)(2). The U.S. Supreme Court has approved a method, which has been implemented by many state courts, whereby an attorney can alert the court to the frivolity of a client's claim and still discharge his or her Sixth Amendment obligation to the client. Anders v. California, 386 U.S. 738 (1965). Cf. Rule 16, Iowa Supreme Court Rules. This is clearly a more constitutionally palatable procedure.

Section 8. A remark about word usage in this section is necessary. When a defendant who is qualified as an indigent cannot be represented

by the public defender, that person is clearly entitled to appointed counsel. Accordingly, the statute should read "the court concerned must (or shall) assign a substitute . . . ." The second paragraph, which deals with substitute attorneys, should, for purposes of consistency and completeness, specify that the substitute "has the same functions and duties" to the client as the public defender would have.

Section 13. Due process of law may require that the public defender record time spent on individual indigent clients if the defender's costs are to be imposed on the client by means of a lien. This problem is more fully discussed in the section dealing with the lien recoupment system.

Section 14. This section may, depending upon conditions on which we have no information, be impermissively restrictive. The Sixth Amendment has been held to require states to provide, at a minimum, either the services of counsel or adequate law library facilities to facilitate prisoners' right to free access to courts. See, Bryan v. Werner, 516 F2d 233 (3rd Cir. 1975). State plans designed to meet this requirement, and which prohibit use of the facilities or attorneys to sue state officials or employees under 42 U.S.C. 1983 have been stricken as impermissibly restrictive of prisoners' Sixth Amendment rights. Accordingly, if no adequate law library facilities or legal counsel other than public defenders are provided to state prisoners, this section is in all likelihood unconstitutionally restrictive.

C. The Lien Recoupment Statute

To complement its proposed public defender bill, the Bar Association has drafted amendments to the existing lien recoupment provision of the Code, sections 23-2-3.1 through 23-2-3.5. However, this entire statutory scheme is constitutionally questionable in several respects.

1. The Lien Recoupment Procedure

This section would amend present section 23-2-3.1 of the Code. It creates a lien against all real and personal property of a recipient of the public defender's services or assigned counsel. The amount of the lien in either case is to be determined by the presiding circuit judge. Where assigned counsel is involved, the amount of the attorneys compensation is "such sum as may be reasonable and just for the services rendered and for necessary expenses and costs incident to the proceedings." (Section 23-2-3). This is also the amount of the lien. (Section 23-2-3.1). For services rendered by the public defender, the size of the lien "shall be set by the presiding judge of the circuit court at a reasonable amount for the services rendered." (Section 23-2-3.1).

This apparently does not contemplate that the public defender account for the precise cost of each case. It seems quite likely that one who is represented by a public defender may become indebted to the county for an amount equal to the average cost per case in the public defender's office for the county (or possibly even for several counties or a circuit). It goes without saying that actual costs per case vary widely depending on the type of case, the particular facts of the case

and the efficiency of the attorney. No opportunity or forum is provided in which a recipient can contest the reasonableness of the amount at which the lien is fixed.

Liens may be enforced in South Dakota against either real estate or personal property by summary procedure (Chapter 21-48; 21-54); or by court action. Enforcement by summary procedure may be accomplished by mail and either publication or posting. This type of notice meets minimum due process standards. Cf., Mullane v. Central Hanover Trust, 339 U.S. 306 (1950). However, in a summary proceeding, the respondent will have a hearing only on the filing of a demand which contains an affidavit of defense, and he or she must pay the costs of the hearing if he or she loses. Cf., 21-54-3.

The lien attaches immediately upon payment by the county of the appointed attorney's fees, or upon the setting by the court of the public defender's lien. Homestead and other statutory exemptions apply,[4/] and the county commissioners have the discretionary authority to enforce, compromise or discharge, etc., any such lien.

2. Constitutional Difficulties in the Lien Recoupment System.

There are constitutional difficulties both in the manner in which the lien is created and in the provisions for its enforcement. The lien is created and becomes enforceable by means which afford the recipient of services no opportunity to contest the reasonableness of the

---

4/ This is a constitutional requirement. James V. Strange, 407 U.S. 128 (1972).

amount. It is entirely reasonable to foresee at least five potential grounds which might be asserted as either partial or total defenses to the imposition of a lien: (1) mistaken identity of the recipient (recognized and provided for after a fashion in section 23-2-3.3 as amended in Section 6); (2) unreasonableness of the amount claimed by appointed counsel, or fixed by the court for the public defender's services; (3) part payment of the fees; (4) fraud by the attorney (it is not unknown for unscrupulous counsel to extract a fee from the client while also submitting a claim for compensation pursuant to court appointment); and (5) ineffective assistance of counsel--no valuable services received.

Where an enforceable legal obligation is created without providing the obligee notice and an opportunity to contest it, due process requirements are not met. Cf., Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973). When the statutory means for creating the lien are considered together with the available lien enforcement provisions, constitutional problems are aggravated rather than ameliorated.

The constitutional prerequisites to a pre-judgment seizure are analogously instructive here. Although the creation of the lien may not constitute a "taking" of property, given the enforcement measures available under South Dakota law, it may be the initial step in an uninterrupted chain of events which may result in the deprivation of a recipient's property without any meaningful procedural protections. There is no requirement that any factual basis for the lien be established before a judicial officer (especially in the instance of a public defender's lien). And there is a clear possibility that a recipient could have meaningful defenses to the lien which will (or may) not be

asserted (particularly where the recipient continues to be indigent). The presence of these three factors has been the focus of the U.S. Supreme Court's inquiries into the due process validity of pre-judgment seizures. Cf., North Georgia Finishing, Inc. v. Di-Chem Co., 95 S.Ct. 719 (1975); Mitchell v. W.T. Grant, 416 U.S. 600, 623 (1974). The combined lien creation and enforcement statutory scheme in South Dakota is particularly vulnerable to the type of analysis underlying the decision in Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2nd Cir. 1973), which invalidated summary enforcement of a voluntarily created lien (UCC 7-210).

Although the lien recoupment statute is not unquestionably unconstitutional, it has great potential for abuse and inequitable results if it is ever enforced. Both of these considerations lead to the suggestion that the recoupment system which passed constitutional muster in Fuller v. Oregon, 94 S.Ct. 2116 (1974), be considered.

3. Proposed Recoupment Statute

The U.S. Supreme Court in 1974 upheld a statutory recoupment statute against attacks based on the equal protection clause of the Fourteenth Amendment and the Sixth Amendment. In addition to upholding the scheme on constitutional grounds, the Court spoke approvingly of certain provisions which may not be constitutionally required. However, as Justice Douglas pointed out in his concurrence, a certain amount of judicial gloss narrowly construing the statute was vital to the finding of constitutional validity. The approved statutory scheme is set forth below accompanied by minimal footnote commentary:

A. Section 1. Costs (Oregon Rev. Stat. 161.665):

(a) The court may require a convicted defendant to pay costs.

(b) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

(c) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. (The Oregon courts had construed this section to permit imposition of counsel fees as costs "only if and when [the defendant] is no longer indigent.")

(d) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for the remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under (the suspended sentence statute).

B. Section 2. Suspension and Probation (Oregon Rev. Stat. 161.675):

(a) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified installments. If no such permission is included in the sentence, the fine shall be payable forthwith.

(b) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence.

Revocation of probation/suspension is proper only if:

(1) the defendant has present financial ability to pay either in whole or by installments without hardship to self or family and

(2) the failure to pay is an intentional, contumacious default.

C. Section 3. Contempt and Execution (Oregon Rev. Stat. 161.685):

(a) When a defendant sentenced to pay a fine (or costs) defaults in the payment thereof or of any installment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(b) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

(c) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed 1 day for each $25 of the fine, 30 days if the fine was imposed upon conviction of a violation of a misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for non-payment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

(d) If it appears to the satisfaction of the court that the default of the payment of the fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment or revoking the fine or the unpaid portion thereof in whole or in part.

(e) A default in the payment of a fine or costs or any installment thereof may be collected by any means authorized by law for the enforcement of a judgement. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected.

This recoupment system applies only to convicted indigent defendants and does not provide for recoupment against those acquitted. Although Justice Powell indicates that the Court would find no constitutional problem in a recoupment statute applied to acquitted indigent defendants, he also clearly states the Court's approval of this aspect of the Oregon scheme. It is recommended as desireable policy rather than as a constitutional requirement.

VII

RECOMMENDATIONS

The National Center for Defense Management recommends that South Dakota adope a county-option public defender system for delivery of quality indigent criminal defense services in accordance with appropriate national standards.[1]

A. System Features

1. THE STATE OF SOUTH DAKOTA SHOULD ADOPT A STATE-WIDE PUBLIC DEFENDER SYSTEM WHICH PROVIDES FOR OPTIONAL IMPLEMENTATION BY EACH COUNTY IN THE STATE. THE SYSTEM SHOULD BE MANAGED BY A STATE DEFENDER.

2. A PUBLIC DEFENDER STRUCTURE SHOULD BE ORGANIZED ALONG MULTI-COUNTY CIRCUIT LINES DISREGARDING, IF NECESSARY, COUNTY BORDERS OR PRESENTLY EXISTING JUDICIAL DISTRICTS. FOR EXAMPLE, A PUBLIC DEFENDER OFFICE MIGHT PROVIDE SERVICES TO AN AREA ALONG INTERSTATE 94 IN THE VICINITY OF LEAD, BELLE FOURCHE, STURGIS AND DEADWOOD.

3. THE EXISTING COURT-ORDERED DEFENDER SYSTEM IN PENNINGTON COUNTY SHOULD BE CONVERTED TO A STATUTORY PUBLIC DEFENDER SYSTEM UNDER THE PROVISIONS OF THE SUGGESTED LEGISLATION.

4. A STATUTORY PUBLIC DEFENDER SYSTEM SHOULD BE CREATED IN SIOUX FALLS TO PROVIDE SERVICE TO THE SECOND JUDICIAL DISTRICT.

5. A SMALL STATE APPELLATE DEFENDER OFFICE STAFFED BY TWO ATTORNEYS SHOULD BE CREATED IN PIERRE TO PROVIDE APPELLATE DEFENSE SERVICES FOR THE ENTIRE STATE.

6. CONSIDERATION SHOULD BE GIVEN TO THE CREATION OF A SMALL TRIAL DEFENDER OFFICE TO BE LOCATED ALONG WITH THE STATE APPELLATE AND STATE DEFENDER OFFICES IN PIERRE.

7. THE STATE SHOULD CONSIDER CREATING ADDITIONAL DEFENDERS IN OTHER AREAS OF THE STATE WHERE THE CASELOAD AND COSTS INDICATE A NEED FOR CENTRALLY-MANAGED CRIMINAL DEFENSE SERVICES.

The foregoing system features have been incorporated into draft legislation prepared by the consultant team and attached at Appendix E.

[1] ABA, NAC (supra) and NLADA's Standards for Defender Services (1976).

B. Legality of a Court-Ordered System

The Pennington County Public Defender office was established by resolution of the Board of County Commissioners and a joint order of the District and County courts (later ratified by the Circuit Court in 1975). The resolution of the Board of Commissioners was a proper exercise of its statutory powers and did not, strictly speaking, constitute a delegation of power to the local courts. The court order did not encroach on legislative prerogatives and was a proper exercise of judicial powers derived from the following sources: (1) Chapter 23-2, SDC; (2) inherent judicial administrative powers; and (3) inherent judicial powers deriving from the courts' obligation to protect the rights of indigent defendants to "effective assistance of counsel" under the Sixth Amendment to the United States Constitution and Article VI, section 7 of the South Dakota Constitution.

Should the enthusiasm of the county board of commissioners for the public defender office diminish, the court possesses both statutory and inherent powers to compel payment by the county of attorney fees and necessary costs and expenses for representation of indigent defendants by the public defender.

C. Rationale for a Statewide Appellate Defender Office.

The statistics available from the Supreme Court indicate that approximately 30 appeals are handled each year by assigned counsel. Because of the value of specialized expertise in appeals, an Appellate Defender would deliver higher quality representation in appeals than is currently provided. The current number of appeals warrants 2-3 attorneys to perfect applications for leave. A staff of three attorneys could not only perfect appeals to the Supreme Court, but could also perform back-up work for assigned counsel

or defenders in trial. They could constitute a skeletal organization for the collecting of data and coordinating current and future defense programs. The office located in Pierre would represent indigents on appeal throughout the entire state. These attorneys, independent of the local community pressures, could raise issues that might be sensitive for local counsel to effectively pursue.

CONTINUED

1 OF 2

APPENDIX A

Technical Assistance Correspondence

and

Statement of Work

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO : Greg Brady, ORO
National Priority Programs

DATE: March 26, 1976

FROM : Larry Backus
Courts Specialist, Region VIII

SUBJECT: TA Request; Feasibility Study on Public Defender Services in South Dakota

The attached letter from South Dakota SPA Director Randolph Seiler clearly sets forth a request for technical assistance which this office supports.

As you know, the National Center for Defense Management recently completed a study of the feasibility of establishing an appellate defender office in North Dakota. We have been informed that the North Dakota SPA may soon request a similar analysis of the feasibility of a statewide, trial level public defender system.

We hope that you will process the attached request now but keep us informed so that if an official request from North Dakota does come through, consideration can be given to coordinating the two efforts.

Attachment

cc: Tom Raybon, LEAA State Rep. - SD
William Higham, NCDM
Anne Elkjer, SD SPA Court Specialist
Barbara Gletne, ND SPA Court Specialist
Ellis Pettegrew, SD Supreme Court Administrator

Department of Public Safety
DIVISION OF LAW ENFORCEMENT ASSISTANCE
200 W. Pleasant Drive
Pierre, South Dakota 57501
(605) 224-3665

SD-B-76-0
05

March 23, 1976

RECEIVED
MAR 25 1976
REGION VIII
LEAA

Joseph L. Mulvey
Regional Administrator
United States Department of Justice
Law Enforcement Assistance Administration
6324 Federal Building
Denver, Colorado 80202

Attention: Larry Backus

Dear Joe:

The Conference of Presiding Circuit Court Judges of the South Dakota Supreme Court has asked me to submit a request for technical assistance from the Law Enforcement Assistance Administration. They would like to have a consultant agency under contract with LEAA conduct a study on several aspects of a public defender system. Some of the items they would like the study to accomplish include:

1) The feasibility of public defender offices in smaller counties or jurisdictions;

2) An examination of legislation to determine the legality of using a court order to establish the public defender office on a circuit basis;

3) To establish statewide statistical information on defense services; and

4) Compile recommendations on public defender legislation.

It might be helpful to give you some background on the situation of public defender in South Dakota. As you know, the Division of Law Enforcement Assistance has funded the Pennington County Public Defender Office for three years. The project has been very successful both in terms of cost benefits and services provided to the client. The authority for this project was established through the use of a court order made by the presiding circuit court judge.

For the past two years, enabling legislation for public defender has failed in the South Dakota Legislature despite favorable testimony from many segments of the criminal justice system and local government officials. The biggest arguments against public defender legislation stem from the feeling that small counties will lose their lawyers who are now subsidizing their practices through court appointments. Others believe that services to the client will suffer because they believe it is easier for a public defender to plea bargain with the prosecutor.

The lack of enabling legislation has affected the replication of the public defender project elsewhere in the State. The use of a court order is not the best method to insure the continuity of the project after it has been implemented. The judges have also voiced the concern about the legality of using a court order to establish a project on a circuit basis which might be the only feasible method for many jurisdictions within South Dakota.

The presiding judges are concerned about the situation and have asked to have a study performed which addresses these concerns. I believe the National Center for Defense Management or another appropriate consultant agency have the expertise to conduct a study to clarify some of the issues surrounding the concept of public defender and also establish a valid statewide data base to present to the Legislature with future attempts for public defender legislation.

Your consideration of this request will be appreciated. If you have any questions or would like additional information, please feel free to contact me.

Sincerely,

Randolph J. Seiler

Randolph J. Seiler
Director
Division of Law Enforcement Assistance

RJS:AME:na

cc: S.D. Supreme Court Administrator

July 1, 1976

Ms. Ann Elkjer
Court Specialist
South Dakota Department of Public Safety
Division of Law Enforcement Assistance
200 W. Pleasant Drive
Pierre, South Dakota 57501

Dear Ms. Elkjer:

I want to thank you for arranging matters in Pierre on such short notice concerning your technical assistance request for a feasibility study on public defender services in South Dakota. The information provided was most helpful in assisting us to plan the manner in which we are going to fulfill your service request.

Pursuant to the conversations conducted, please find enclosed a copy of the Statement of Work which identifies what we expect to accomplish during our site visit and culminating in a work product in the form of a report and possible subsequent assistance, should you request follow-up services. Should you have any comments prior to our performing the site visit in South Dakota, please feel free to call me collect at (202) 452-0625.

Hoping the above and enclosed will be informative and responsive, I remain

Yours sincerely,

Gustav Goldberger
Acting Director

cc: Director, Defender Services, NLADA

Mr. Bert Hoff, Criminal Courts Technical Assistance Project, American University

Project Monitor

STATEMENT OF WORK

Introduction

Technical Assistance was requested for the Division of Law Enforcement Assistance of the Department of Public Safety of the State of South Dakota by Mr. Randolph J. Seiler in coordination with the South Dakota Supreme Court Administrator on March 23, 1976, relating to a feasibility study on public defender services in South Dakota. The request was relayed through the Office of Regional Operations, LEAA, on March 26, 1976. It was referred to the National Center for Defense Management through the American University Criminal Courts Technical Assistance Project.

Objectives

The purpose of this technical assistance is to respond to the aforementioned request through the provision of consulting services to accomplish the following tasks:

- An analysis of the feasibility of establishing public defender representation in jurisdictions with limited caseloads in the State of South Dakota.
- Research to determine the legality of court-ordered appointments of counsel for indigent criminal defendants in South Dakota.
- Recommendations on the feasibility of creating a statewide statistical system to assist in establishing and maintaining a statewide defender system.
- Development of legislation to accomplish the above.

Task Requirements

Task 1: The National Center for Defense Management (NCDM) will examine the feasibility of establishing public defender systems at the county, multi-county or circuit level for representation of indigent criminal defendants in the State of South Dakota. Such analysis will include the examination of proposed legislation sponsored by the State Bar; the feasibility of creating a State Defender General (comparable to the State Attorney General) for monitoring such a system and providing appellate representation. A study of performance data relating to the quality of existing representation by assigned counsel in the state's courts in sample jurisdictions will also be conducted.

Task 2: NCDM will perform research to determine the legality of the current court-ordered appointment system, for representation of indigent criminal defendants.

Task 3: NCDM will recommend a statewide data-gathering system designed to provide appropriate statistics relating to the establishment and maintenance of a statewide defender system; the data system will be formulated to facilitate criminal defense management decisions

considering the types of criminal cases processed--felonies, misdemeanors, juvenile and mental health cases--, the indigency rate, and the cost of required personnel and supporting resources.

Task 4: NCDM will develop legislation to implement the foregoing.

APPENDIX B

Consultant Resumes

RESUME OF PROFESSIONAL QUALIFICATIONS

Linda Herrera Durand

1255 New Hampshire Avenue, N.W., Apt. 624...Washington, D.C. 20036...(202)223-8269

Career Objectives

Desire position as Administrator/Associate Director for Administration with a social services organization or Project Director/Deputy Director of a social services related grant.

Career History

Management Consultant, July 1, 1976 to present, $100 per day

Provide social services organizations with expertise in the areas of program administration, office management and fund raising.

National Legal Aid and Defender Association (NLADA), Washington, D. C., July 1, 1974 to June 30, 1976

Deputy Director, Management Assistance Project (MAP), $18,900 per annum

Responsible for the implementation of the MAP grant's objective to provide technical assistance in the areas of program administration and office management to civil legal services programs. Designed, developed and directed MAP's fund raising component which searched for funding support for legal services programs; disseminated this information to the legal services community and increased funding skills within that community. Supervised 5 professional staff (2 research analysts, 1 attorney, 1 writer) and 2 supportive staff (1 administrative assistant, 1 secretary).

Management Analyst, MAP, $15,000 per annum

Provided direct management assistance to individual legal services programs and coordinated the activities of consultants working in this area of the grant.

Colorado Rural Legal Services, Inc., Boulder, Colorado, September 1969 to January 1972

Administrator, $11,000 per annum

Responsible for the administration of a state-wide legal services program consisting of 7 offices and 74 employees, with a budget of approximately $600,000. This responsibility included: the establishment and implementation of program/personnel policies and procedures; the supervision of all phases of fiscal management; the position of Assistant Secretary of the Board of Directors; the establishment of regional offices and the involvement of the various segments of the community; the preparation of reports required by the federal and state governments as well as those requested by private organizations and individuals; the, the coordination of the GAO audit, the CPA audit, and the grantor evaluation of the program; the training of 21 non-attorney staff; and the direct supervision of 1 accountant, 1 personnel clerk, 1 property clerk, 1 receptionist and 1 secretary.

Computer Applications, Inc. (CAI), New York City, New York, September 1967 to May 1969

Assistant to the Vice President, Policy Management Systems, Inc., a subsidiary of CAI, New York City, New York, $8,500 per annum

Responsible for the coordination of the training programs of a national community planning contract with VISTA, Office of Economic Opportunity (OEO).

Assistant to the Regional Director, CAI, Austin, Texas, $7,000 per annum

Responsible for the overall management of this newly established regional office. Assisted in the development of new contracts and continued to participate in the OEO contracts described on the preceding page and below.

Conference Coordinator, Policy Management Systems, Washington, D.C., $7,000 per annum

Responsible for all phases of conference design, development and implementation. The conferences were held throughout the country as part of a national planning contract with the Community Action Program of OEO. This responsibility included site selection, logistical preparations, consultant/participant briefings, and the preparation of activities reports.

Office of Economic Opportunity, Austin, Texas, August 1965 to August 1967

Administrative Assistant, VISTA, $5,600 per annum

Participated in the regionalization of the VISTA program which included the hiring of staff and the development of program activities. Additional responsibilities included the administrative support of approximately 300 VISTA Volunteers.

Administrative Assistant, Community Action Program, $5,200 per annum

Participated in the regionalization of the Community Action Program which included the hiring of staff and the development of program activities. Reviewed community project proposals, researched congressional activities and voting records, prepared statistics pertaining to states and cities' social services activities, and prepared divisional personnel and financial reports.

Federal Government, San Antonio and Austin, Texas, August 1960 to July 1965

Secretary, $3,800 to $4,500 per annum

Responsible for general secretarial work which included the preparation of various statistical reports and the processing of classified Top Secret documents.

Education

Graduated from Jefferson High School, San Antonio, Texas in 1960.
Attended the University of Texas in Austin and the University of Colorado in Boulder.

Papers Written

Have written management papers for national distribution to legal services programs on the following subjects; tickler systems, accounting procedures, administrative files, trust fund accounts, personnel/program policies and procedures, and a briefs, pleadings and forms bank.

Personal

... Born November 3, 1942 ... Health is excellent ... Willing to travel ...
..Interests include cooking and the appreciation of fine wines..

References

Alfred H. Corbett, Director, Office of Program Planning, Legal Services Corporation, Suite 700 733 Fifteenth Street, N.W., Washington, D.C. 20005, (202) 376-5100

John Groves, ABA Standing Committee on Legal Aid and Indigents, P.O. Box 40, Grand Junction, Colorado 81501, (303) 242-4903

Ivonel Jones, Director, Legal Aid Society of Cleveland, 2108 Payne Avenue, Suite 728, Cleveland

PERSONAL RESUME

PRESCOTT [illegible]

6/18/75

Personal Biography

Born January 29, 1930, in Seattle Washington. Lived in Seattle, Washington to age 23. Entered U.S. Army October 2, 1953 and served until voluntary retirement June 1, 1975 as a Lieutenant Colonel. Served in positions of responsibility at military installations throughout the United States, in Greenland, Europe, Vietnam and Laos.

Education

High School: Shawnigan Lake, British Columbia (graduated 1949)

College: Washington State College (1949-1951)
University of Washington (1951-1953)
Bachelor of Arts in Anthropology
Eastern Washington State College (1965-1967)
Master of Science in Psychology

Relevant Positions Held

Associate Director, Management Programs, National Center for Defense Management, 2100 M Street, N.W., Washington, D.C. (4/21/75 to present)

Assistant Comptroller, Military District of Washington, Washington, D.C. (June 7, 1974 to April 20, 1975)

Executive Officer, Support Element, Defense Attache Office, Vientiane, Laos (January 16, 1974 to June 6, 1974)

Executive Assistant (Secretary of the General Staff), Commander, U.S. Army Criminal Investigation Command (April 15, 1973 to December 15, 1973)

Graduate Faculty Member, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas (June 6, 1970 to May 15, 1972)

Professional Training

Automatic Data Processing Theory/Applications (Jan-June, 1970/October, 1970)

Operations Research/Systems Analysis Executive Course (November - December, 197

Professional Training cont'd.

Application of Behavioral Science Models for Management, U.S. Department of Agriculture Graduate School (October, 1974)

Organizational Memberships

American Psychological Association (APA)
Division of Industrial - Organizational Psychology (Division 14), APA
American Society of Military Comptrollers
Association of Legal Administrators
Psi Chi (Psychology Honorary)
American Society of Association Executives
Association for Systems Management

Awards

Legion of Merit, Bronze Star
Meritoricus Service Medal, Air
Medal, Army Commendation Medal (three awards)

RESUME

NAME — Bruce L. Herr

ADRESS

Home:
214 Sereno Drive
Santa Fe, New Mexico 87501
(505) 983-3157

Office:
215 West San Francisco Street
Santa Fe, New Mexico 87501
(505) 827-5242

BORN — August 12, 1943 in Chicago, Illinois

MARRIED — Married the former Ellen Louise Epstein
February 22, 1968

FAMILY — Two daughters, Sarah, born April 24, 1970, and
Rachel, born April 11, 1972.

EDUCATION

Preparatory:

Carl Schurz High School; Chicago, Illinois
Attended 1957-1961

College:

Harvard College; Cambridge, Massachusetts
Attended 1961-1965
Course -- Liberal Arts, Concentration in American Government. A.B. degree.
Honors -- Cum Laude in General Studies
Harvard College Scholarship (honorary)
Activities -- Harvard University Band (Manager)
Pit orchestras for various musicals
Phillips Brooks House (service organization)

Graduate:

Harvard Law School; Cambridge, Massachusetts
Attended 1965-1968
Standing -- B average
Course -- As prescribed, with the following electives:

Second year -- Trusts, Public International Law, Comparison of Soviet-American Law, and Psychoanalytical Theory and the Law.

Third year -- Commercial Transactions, Criminal Process, Evidence, Estate Planning, Family Law, Administrative Law, Trial Practice, and Civil Rights: Problems of Minorities and the Poor (seminar).

Degree -- L.L.B., June, 1968. Subsequently changed to J.D.
Activities -- Ames Competition (moot court)
Community Legal Assistance Office

WORK EXPERIENCE

Summer, 1962

E. J. Brach's & Sons
Chicago, Illinois
factory worker

Summer, 1965

Public School Teachers' Pension and Retirement Fund of Chicago
228 North LaSalle Street
Chicago, Illinois
Office Assistant

Summer, 1966

United States Army Artillery Board
Fort Sill, Oklahoma
Mail Clerk

Summer, 1967

Dinebeiina Nahiilna Be Agaditahe, Inc. Legal Services Program
Window Rock, Arizona
Law Clerk

July, 1968 - July, 1970

Dinebeiina Nahiilna Be Agaditahe, Inc. Legal Services Program
Shiprock, New Mexico
Law Clerk, Attorney

July, 1970 - June 1973

Illinois Defender Project
312 South Fourth Street
Springfield, Illinois 62701
Staff Attorney

July, 1973 - August, 1973

Office of the State Appellate Defender of Illinois
200 East Monroe Street
Springfield, Illinois 62701
Legal Director

September, 1973 - present

New Mexico Public Defender Department
215 West San Francisco Street
Santa Fe, New Mexico 87501
Appellate Defender

ADMITTED TO PRACTICE	State Bar of New Mexico (1969) U.S. District Court, District of New Mexico (1969) Illinois State Courts (1970) U.S. District Court, Southern District of Illinois (1972) U.S. Court of Appeals, Seventh Circuit (1972) U.S. Supreme Court (1973)
PROFESSIONAL ORGANIZATIONS	State Bar of New Mexico American Bar Association Illinois State Bar Association New Mexico Criminal Defense Lawyers' Association (Secretary-Treasurer)
OTHER ACTIVITIES AND INTERESTS	Criminal Procedure Committee This is a standing committee of the New Mexico Supreme Court, and is responsible for development of the New Mexico Rules of Criminal Procedure and is currently drafting Uniform Criminal Jury Instructions. Criminal Appellate Procedure Committee This was a special committee of the New Mexico Supreme Court, appointed to draft rules of appellate procedure for criminal cases. I served as a member of this committee throughout its existence, filing a minority dissenting report from the rules which were recommended by the committee and subsequently adopted by the Supreme Court. Task Force on Juvenile Officers' Information File I served as a member of this task force in Illinois in 1973, studying this police clearinghouse of arrest information. Within the task force, I concentrated my attention on the legal and civil liberties problems created by such juvenile record-keeping. American Civil Liberties Union I was active in A.C.L.U. activities in Illinois, serving as Chairman of the Springfield Area A.C.L.U. and as a member of the Illinois State Board, but have not been active since my return to New Mexico. College Courses During the past several years I have taken several courses in Spanish grammar, Spanish literature, and conversational Spanish, both by correspondence and in person, in a seemingly futile attempt to learn the language.

NATIONAL CENTER FOR DEFENSE MANAGEMENT

CONSULTANT INFORMATION FORM

(Return to us at: 2100 M Street, N.W., Suite 601, Washington DC 20037.) (N.B., in completing this form, please use continuation sheets keyed to numerical sections of this form where appropriate. It is not necessary that information entered onto this form be typed if it is otherwise legible. Information furnished in one part of this form need not be repeated elsewhere.)

I. PERSONAL DATA

A. Name: JAMES R NUMHARD

B. Address: 6200 6TH AVE APT 1FL NO TWR
DETROIT, MICH. 48226

C. Telephone Numbers (Include area codes and any "best" times to call. Give your time zone.)

1. Office: 256-2814 ac 313
2. Home: 559-6847

II. AVAILABILITY

A. Number of consecutive days away from your home and office area you can provide for each consultancy: 3-4 days

B. Amount of advance notice required by you for same: Hours

C. Do you have a valid motor vehicle license? (NCDM uses rental cars at times.) Yes ☒ No ☐

D. Are there any reasons why you could or would not travel to any community in any part of the United States?

Yes ☐ No ☒ Please specify: _____

III. PROFESSIONAL OR OCCUPATIONAL DATA

A. What, in specific terms, is (or are) your profession(s) and/or occupations? Attorney, Director Michigan's State Appellate Defender Office

B. What licenses and/or bar admissions and/or special accreditations do you hold or possess? Admitted Michigan Bar, U.S. Supreme Court, Sixth Circuit Ct of Appeals, Eastern District of Michigan.

C. Please list any professional memberships not covered by or implicit in III B., above: N.L.A.D.A., National Lawyers Guild

IV. EXPERIENCE

A. General Work History:

Please list all full-time employment or self-employment you have had in the last ten years other than consultancies. Please show current or most recent work first and least recent last (inverse chronological order). Where you have held different positions in the same organization, please show these specifically. Where you have what might be relevant experience from more than ten years ago, or what might be relevant part-time experience, please list this, too:

	DATES	TITLES OR POSITIONS AND SUMMARY OF FUNCTIONS	REASONS FOR LEAVING
1.	From: 1972 To: —	Director, State Appellate Defender of Michigan	
2.	From: 1971 To: 1972	Staff Attorney, Mich. App. Defenders	To assume Directorship & Office
3.	From: 1969 To: 1971	Law Clerk, Michigan Supreme Court	End of term is 2 years
4.	From: To:		
5.	From: To:		
6.	From: To:		
7.	From: To:		
8.	From: To:		
9.	From: To:		
10.	From: To:		

V. EDUCATION

A. Courses of Study (last first):

Please list all higher education or special studies undertaken by you.

DATES	UNIVERSITY, SCHOOL &/OR INSTITUTION	MAJORS, MINORS, GENERAL & SPECIAL AREAS OF STUDY OR RESEARCH	DEGREES, CERTIFICATES &/OR HONORS
1. From: To:	Name: U. of NOTRE DAME Address: SOUTH BEND IND	GREAT BOOKS HONOR PROGRAM, (NO MAJOR REQUIRED)	A. S.
2. From: To:	Name: MICH LAW SCHOOL Address: ANN ARBOR MICH	LAW SCHOOL	J. D.
3. From: To:	Name: Address:		
4. From: To:	Name: Address:		
5. From: To:	Name: Address:		
6. From: To:	Name: Address:		

B. Titles and Synopsis of Subject Matter of Any Papers, Theses or Dissertations Written Pursuant to V A., Above:

(Identify same with particular course of study)

_____

_____

_____

_____

_____

_____

_____

VI. NAMES OF AND FULL BIBLIOGRAPHIC DATA REGARDING ANY BOOKS, ARTICLES, OR OTHER SIGNIFICANT WRITINGS AUTHORED BY YOU.

(N.B., we would like to read or review any and all significant non-confidential writings authored by you; your assistance in making this possible would be appreciated. Please indicate co-authorship.)

"ESCAPED PRISONERS: A STATISTICAL ANALYSIS OF THEIR CONSTITUTIONAL RIGHT TO JURY TRIAL" 50 U of D JOURNAL OF URBAN LAW 199, (Nov 1972) CO-AUTHOR WITH HARISH L. VERMA AND DAVID A HUETTNER [Computer analysis of sentencing factors]

VII. PLEASE LIST ANY OFFICES HELD, RELEVANT ACTIVITIES, ORGANIZATIONAL WORK, HONORS, AND/OR AWARDS NOT PREVIOUSLY INDICATED.

CHAIRPERSON, NLADA APPELLATE DEFENDER COUNSEL
" , MICHIGAN BAR COMMITTEE ON DEFENDER SYSTEMS & SERVICES
EXECUTIVE BOARD - NLADA
COMMISSIONER, NATIONAL TASK FORCE ON DEF. SERVICES
MEMBER, DET BAR CRIMINAL JURISPRUDENCE COMMITTEE
[ALSO HAVE ORGANIZED AND SUPERVISED A COURSE OUR OFFICE RUNS AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL IN CRIMINAL APPEALS SO HAVE UTILIZED HEAVILY STUDENTS AS VOLUNTEERS, FOR CREDIT AND AS MANY AS 10 PAID/SEMES

VIII. SPECIAL QUALIFICATIONS

A. Languages:

NAME OF LANGUAGE	NATIONAL VARIANT OR DIALECT	DEGREE OF FLUENCY
1.		a. Speak (how well?) b. Write (how well?)
2.		a. Speak (how well?) b. Write (how well?)
3.		a. Speak (how well?) b. Write (how well?)
4.		a. Speak (how well?) b. Write (how well?)
5.		a. Speak (how well?) b. Write (how well?)

B. Community Relations:

Describe any particular skills or abilities you have in terms of establishing rapport with disadvantaged or minority groups within the United States.

Have a amount of work with prison inmates and educational programs inside prisons. Also have direct contact with client community in the past also worked on various national defense of prisoners e.g. Attica. Also

IX. REFERENCES

Please read our cover letter and the enclosed brochure and list the names, addresses and telephone numbers of only those references who have specific knowledge of your capabilities in areas in which, based on the above and the information in this form, you might be qualified to do consultive work for this project:

MARSHALL HARTMAN - NLADA
CHIEF JUSTICE, THOMAS GILES KAVANAGH
MICHIGAN SUPREME COURT, LANSING, MICH
WILLIAM WALSH, CHAIRPERSON MICH. APPELLATE
DEFENDER COMMISSION,
307 MICH. NAT'L BANK BLDG.
PORT HURON, MICH. - 48060

X. ANYTHING ELSE WE SHOULD KNOW ABOUT YOU?

I have done a lot of work in the area of systems for determining case loads of staff attorneys and in office systems. Appeals has obviously been my area of expertise. I have also organized and taught courses in Criminal Appeals at the Univ of Michigan Law School.

THANK YOU!

RESUME

JOHN M. THOMPSON, 469-54-1513 Age: 28

1470 Grand Avenue, Iowa City, Iowa. Office telephone: 319/353-3606
353-6786

PRESENT POSITION: Clinical Instructor and Administrator,
University of Iowa College of Law

EDUCATIONAL BACKGROUND: B.S. United States Air Force Academy (International Affairs, 1970)
M.A. Fletcher School of International Law and Diplomacy, Tufts University (1971)
J.D. University of Iowa College of Law (1974)

EMPLOYMENT BACKGROUND: United States Air Force, 1966-1972
Associate, William F. Olinger Law Office, Suite 220, Higley Building, Cedar Rapids, Iowa 1974-1975. A general practice with emphasis on court-appointed criminal defense, postconviction relief and appeals.

MEMBERSHIPS: Member of the Bar and admitted to practice before the Supreme Court of Iowa, the United States District Courts for the Northern and Southern Districts of Iowa, and the Eighth Circuit Court of Appeals; active practice in all of above courts.

PROFESSIONAL ACTIVITIES: Iowa City Consultant, National Center for Defense Management (NLADA), 1975-76

Participant, Iowa Crime Commission Conferences on Goals and Standards for Corrections and Courts, 1976

REFERENCES FURNISHED ON REQUEST

APPENDIX C

Second Circuit Fee Schedule and Rules

TO: All Attorneys in the Second Judicial Circuit

FROM: Judges of the Second Judicial Circuit

RE: Appointment and Compensation for Indigent Defendants in Criminal Cases

The South Dakota Judges' Association, at its annual meeting in June, 1975, at the request of the Bar Association has decided to modify its schedule for payment of counsel representing indigents in criminal cases to conform to the schedule used in Federal Court. The Second Judicial Circuit has delayed implementation of the schedule for payment because of a concern for the impact upon the budgets of the counties in the Circuit. Provision was made for implementation in budget recommendations to the counties for 1976. Therefore, the following guidelines are effective for work performed after December 31, 1975. The guidelines are not inflexible, however, the judges will generally follow the same and will make exceptions only when appropriate in extraordinary situations.

DUTIES OF APPOINTED COUNSEL

1.

Counsel in the representation of indigent defendants in criminal cases do so in fulfillment of their professional responsibility, as officers of the court, and the limited amount of compensation does not diminish such responsibility.

2.

Counsel appointed shall continue to serve until the representation is terminated as specified by law or by court order.

Appointed counsel shall report any change in the persons financial status coming to his attention to the court where the person appears to be able to finance all or a part of his representation.,

VOUCHER FOR COUNSELS SERVICES

The standard voucher for services of counsel representing indigent defendants should be prepared in duplicate and delivered to the court promptly and not later than 45 days from the termination of the case.

In the event counsel claims mileage for travel in a private vehicle, the same will be reimbursed at the rate of 15 cents per mile.

Claims for other expenses over $500 must be itemized.

TERMINATION OF APPOINTMENT OF COUNSEL

1.

Appointed counsel in a criminal case involving a plea other than "not guilty" shall cease to serve when the court imposes sentence.

2.

In the event that a defendant is convicted following trial, counsel appointed shall advise defendant of his right of appeal and of his right to counsel on appeal. If requested to do so by the defendant, counsel shall file a timely notice of appeal and shall continue to represent the defendant unless or until he is relieved by the court. If not so requested by the defendant, counsel shall file a statement that he has informed the defendant of his right to appeal and that the defendant has advised him that he does not desire to appeal, and thereupon his appointment will terminate.

3.

Representation by appointed counsel in other proceedings shall terminate when the purpose of the appointment is accomplished or when terminated by order of the court.

COMPENSATION FOR SERVICES OF APPOINTED COUNSEL

The maximum allowance is $30 per hour for time actually spent in court and $20 per hour for other time.

The guidelines as to maximum compensation that the court may allow is as follows:

1. In cases disposed of without trial - $175.
2. In cases disposed of by trial:
   a. Trial of one day or less - $250;

b. Trial of more than one day, but not to exceed two days - $400;

c. Trial of more than two, but not to exceed three days - $550;

d. Trial of more than three days, but not to exceed four days - $700;

e. Trial of more than four days, but not to exceed five days - $950;

f. Trial of more than five days, but not to exceed six days - $1,000.

The South Dakota Judges' Association adopted the guidelines established by the Judicial Conference of the United States which provides:

> "The hourly rates of compensation fixed by the amended Act are designated and intended to be maximum rates and should be treated as such... They are not intended to change the basic and underlying philosophy of the Act that the Bar of the Nation owes a responsibility to represent persons financially unable to retain counsel and that the compensation provided is not intended to equate private counsel fees."

MAXIMUM ALLOWANCES UNDER SECTION 3006A, TITLE 18 U.S.C.

FELONY...$1,000

MISDEMEANORS...$400

PROBATION REVOCATION...$250

MOTION TO VACATE JUDGMENT...$250

HABEAS CORPUS...$250

PAROLE VIOLATION HEARING...$250

AUTHORIZATION FOR EXPERT OR OTHER SERVICES

Prior court authorization is required before obtaining services or incurring any expense such as reporter transcript, interpreter, investigator, psychiatrist or other expert services. The maximum amount allowed thereunder will be $300.

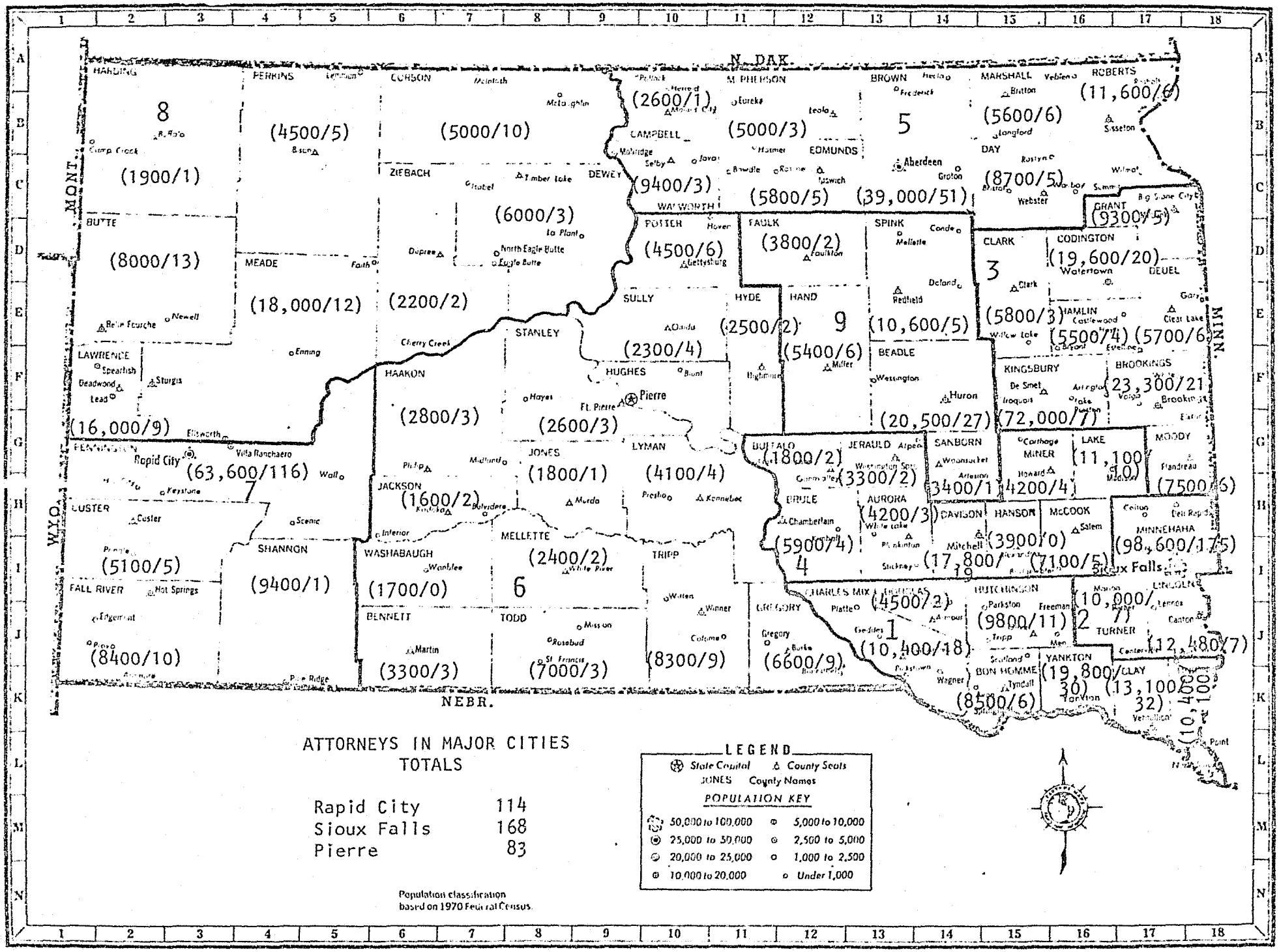
AUTHORIZATION FOR WITNESS FEES

Prior court approval must be obtained before the county will pay for service of subpeonas and fees for witnesses called by an indigent defendant. It is a responsibility of counsel appointed to submit to the court, prior to trial, a motion and affidavit of the defendant, in forma pauperas, requesting an order for the service of subpeonas and payment of witness fees at county expense. The motion and order must specify the names and addresses of all the witnesses required by the defendant. Upon filing such an order, the Clerk of Courts will issue the required subpeonas and deliver the same to the Sheriff for service.

APPENDIX D

Attorney Distribution Map

POPULATION AND ATTORNEY TOTALS (POP/ATT'Y) FOR THE JUDICIAL DISTRICTS OF THE STATE OF SOUTH DAKOTA



ATTORNEYS IN MAJOR CITIES TOTALS

Rapid City	114
Sioux Falls	168
Pierre	83

Population classification based on 1970 Federal Census.

LEGEND

State Capital · County Seats · JONES County Names

POPULATION KEY

50,000 to 100,000	5,000 to 10,000
25,000 to 50,000	2,500 to 5,000
20,000 to 25,000	1,000 to 2,500
10,000 to 20,000	Under 1,000

APPENDIX E

Draft Legislation

1. LEGISIATIVE DECIARATION OF POLICY AND INTENT. It is hereby declared to be the policy of the State of South Dakota to provide for the fulfillment of the constitutional guarantees, both state and federal, of effective counsel in the representation of indigents, including necessary support services and facilities, in criminal, juvenile and involuntary civil commitment proceedings within this state; to assure effective assistance and continuity of counsel to indigents suspected, accused or taken into custody and to indigent defendants and convicts in criminal, juvenile and collateral proceedings before the courts of this state; and to authorize the Office of the Public Defender to administer and assure enforcement of the provisions of this chapter in accordance with its terms, intent and purposes.

2. OFFICE OF THE STATE PUBLIC DEFENDER. The Office of the South Dakota Public Defender is hereby created and established as an agency in the executive branch of the state government, under the control and supervision of state public defender.

(A). Qualifications and Term of Office.

(1) The State Defender shall be a member of the bar of this state. However, the State Defender may be a member of the bar of another state if the Board of Governors of the State Bar Association approves. He or she shall be selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contri-

butions, or other irrelevant criteria.

(2) The State Public Defender's term of office shall be four years, subject to renewal by the State Defender Commission. The State Public Defender may not be fired except by the State Defender Commission for good cause shown.

(B). Personnel. The State Public Defender is authorized to appoint adequate administrative and legal staff personnel to efficiently perform the duties of his or her office as defined in this chapter. Compensation of staff attorneys and administrators shall be comparable to that of equivalent staff members of the Attorney General's office.

(C). Centralized State-Wide Administration.

Delivery of defense services shall be organized at the state level in order to ensure uniformity and equality of the legal representation and support services provided in participating jurisdictions, and to guarantee the professional independence of each individual defender. Nothing in this section shall be construed to deny the right of each county to elect whether to establish a public defender office; however, no county or other governmental unit shall establish a defender office outside the state defender system.

(1) The board of county commissioners of a county may, by resolution, establish and maintain a public defender office to fulfill the requirements of S. 23-2-2. If it elects to establish and maintain a public defender office, the board of county commissioners of a county may join with the board of county commissioners of any one or more contiguous counties, whether within the same judicial district or within two or more judicial districts,

to establish and maintain a joint public defender office. In that case the participating counties shall for the purposes of this act be treated as one county.

(a) Each county public defender's office, whether established singly or jointly, shall immediately become a part of the State Public Defender's Office to be staffed and administered as provided for in §§. 2(C) through (E) of this chapter.

(b) The governing body of any municipality within a county in which a public defender office has been established may enter into a written contract with the Board of County Commissioners authorizing the public defender to represent all indigent defendants who are subject before the courts of the municipality to proceedings of the nature described in §.5. The contract shall specify the contribution to be made by the municipality toward the cost of operation of the county public defender office.

(2) Except in the case of pre-existing defender agencies, the planning and creation of defender offices in jurisdictions which opt to participate in the public defender system shall be undertaken by the Office of the South Dakota Public Defender, which shall be responsible for coordinating all defender services throughout the state and providing appellate and post-conviction or habeas corpus representation independent of all trial level defender offices.

(3) The State Defender shall appoint Deputy Defenders to head the local and joint offices and shall set general policy and guidelines regarding the operation of such offices and the handling of cases. The daily administration of the office and handling of individual cases shall be

the responsibility of the deputy defenders. The State Defender may remove any Deputy Defender for cause. Procedures for removal consistent with due process requirements shall be promulgated by the State Defender with the approval of the State Defender Commission. Cause for removal of a Deputy Defender shall be only (a) for inadequate performance either as an attorney or as an administrator; or (b) the commission of fraudulent or dishonest acts.

(4) The Office of the State Defender shall ensure that on-site evaluations of each defender office and of each jurisdiction or region which has retained its own defender or coordinated assigned counsel program be conducted not less than once a year.

(5) The State Defender shall make monitoring visits to offices around the state on a frequent basis.

(6) The Office of the State Defender shall provide initial training for all new defender staff attorneys and shall conduct seminars for continuing education for the staff of all defender offices and coordinated assigned counsel programs in the state.

(7) The State Defender, with the assistance of his or her administrative personnel, shall engage in detailed resource planning. Such planning shall include, at a minimum, detailed records on the flow of cases through the criminal justice process and on the resources expended at each step in the process. The legislature shall take this into account in considering requests for the employment of additional personnel.

(8) Whenever the State Defender, on the basis of resource planning and established workload standards, determines that the assumption of additional cases might reasonably result in inadequate representation for

some or all the clients in a given local or regional office, the local or regional office shall assign appointed counsel to handle the overflow or, in the event that that is not feasible, decline any additional cases until the situation is altered.

(9) The attorneys in the state defender system shall be subject to judicial control and supervision only to the same extent as are attorneys in private practice.

(D). Pre-Existing Defender Agencies.

Pre-existing defender agencies shall be made part of the state public defender system and shall assume the same relationship to the Office of the South Dakota Public Defender as is defined in this chapter for county or district defender offices established pursuant hereto.

(E). Assigned Counsel Panel.

In those jurisdictions in which a public defender office is in operation, the defender office shall be appointed in all eligible cases except overload cases and those involving a conflict of interest on the defender's part, provided that, where (1) the private bar has a pool of attorneys interested in trying criminal cases and (2) the local deputy defender is satisfied that private attorneys will receive adequate training and regulation, members of the pool shall receive a percentage of cases, to be determined by the director of the local defender office, in addition to overload and conflict cases.

(1(In such jurisdictions, the percentage of cases, other than overload and conflict cases, to be handled by local pool attorneys shall depend upon (1) the number of qualified attorneys volunteering for the pool; (2) the size of the local defender office; (3) the number of cases the

local defender determines it can effectively handle; and (4) the abilities and enthusiasm of the local bar. Unless the above factors intervene, this percentage shall not be less than twenty percent.

(2) The Deputy Defender in each office shall, whenever an overload determination is made either by the State Defender or by the Deputy Defender in charge of the office involved, assign counsel from the pool of local attorneys to represent indigents on a case basis. Assignments shall be distributed among pool attorneys on an impartial basis designed to assure adequate representation for each indigent; the indigent's eligibility may be challenged in the manner prescribed in Section 4(E) of this Act.

(3) Assigned counsel shall utilize the support services of the defender system except in a case involving conflicts of interest. In such cases, assigned counsel is authorized to engage the equivalent services of private agencies or individuals, who shall be compensated by the State Defender according to a schedule to be fixed by the State Defender.

(4) The State Defender shall prepare and publish a schedule of hourly in-court and out-of-court rates for assigned counsel fees designed to compensate assigned counsel in accordance with effort, skill and time actually, properly, and necessarily expended. Assigned counsel shall be compensated from the budget of the Office of the State Defender in an amount to be determined by the State Defender in accordance with the above schedule. Payment shall be made only upon submission of a detailed affidavit itemizing the time expended, costs incurred and services rendered by the attorney. The State Defender's determination of the appropriate compensation shall constitute a final agency deicision in a contested cases for

purposes of establishing the attorney's right to judicial review pursuant to section 1-26-30, SDCL (1976).

3. THE STATE DEFENDER COMMISSION. There is hereby created a State Defender Commission which shall appoint the State Public Defender and advise the State Public Defender on broad policy matters. No other state agency shall perform these functions.

(A). The Commission shall consist of ten members, selected in compliance with the criteria set forth in subsection (B) below, who shall serve staggered terms. Members of the Commission shall be selected as follows:

(1) The governor shall appoint three members who are not attorneys at law, only one of which may be a member of the same political party as the governor. To the extent possible, the governor's appointees shall represent the three largest identifiable ethnic or socio-economic groups making up the State Defender's community of clients.

(2) The senate shall appoint two members, no more than one from each major party, and only one of whom shall be an attorney at law. Neither shall be a member of the senate.

(3) The house shall appoint two members, no more than one from each major party, and only one of whom shall be an attorney at law. Neither shall be a member of the house.

(4) The bar association of the State of South Dakota shall elect three members from their number in a manner to be prescribed by the Supreme Court.

(5) The members selected pursuant to subsections (1) and (4)

above shall initially serve terms of 3 years; members selected pursuant to subsections (2) and (3) shall initially serve terms of two years. Subsequent terms for all members shall be two years.

(B). Commission members shall be selected in conformity with the following considerations and criteria:

(1) The primary consideration in making up the composition of the State Defender Commission shall be that of ensuring the independence of the State Defender.

(2) The members of the Commission shall represent a diversity of factions in order to ensure insulation from partisan politics.

(3) No single branch of government may have a majority of votes on the Commission.

(4) To the extent possible, the membership of the committee shall reflect the major demographic characteristics of the client community.

(5) A majority of the Commission shall consist of practicing attorneys.

(6) The members of the Commission may not include judges or prosecutors.

(C). The Commission shall discharge the following duties:

(1) The primary function of the State Defender Commission is to select the State Defender.

(2) The Commission shall assist the State Defender in drawing up procedures for the selection and removal of assistants or deputies.

(3) The Commission shall receive possible client complaints, initiate statistical studies of case dispositions, and monitor the performance of the State Defender.

(4) The Commission may not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases.

(5) The Commission shall prepare an annual report of the operations of the Office of the State Defender.

(D). Meetings and Procedures. The Commission shall meet semi-annually and shall be presided over by a chairperson elected by the members. A majority of the members shall constitute a quorum, and any resolution, policy adoption or motion shall require the vote of a majority of the membership or two-thirds of those members present, whichever is less. However, selection and firing of the State Public Defender shall require the vote of seven members. There shall be no voting by proxy. The time and place of each meeting shall be designated by the chairperson, who shall notify each member at least 14 days in advance.

(E). Expenses.

The Commission shall serve without pay except that members shall receive compensation of $25.00 per day for those days during which the Commission is actually meeting, and shall be reimbursed for travel, meals and accommodation expenses necessarily incurred as a result of membership, at a rate not to exceed that allowed for circuit court judges.

4. ELIGIBILITY FOR REPRESENTATION - STANDARD AND METHOD OF DETERMINATION.

(A). A person shall be deemed financially eligible for legal representation at public expense if the person's liquid assets, after subtracting any amount needed for the payment of current obligations and for the support

of the person or his family, are not sufficient to cover the anticipated cost of legal representation.

(B). Liquid assets include cash, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from legal process, shall not be included.

(C). The determination of eligibility shall in no case be based in whole or in part on whether the person has been released on bond, nor shall consideration be given to the assets or resources of a spouse or any person who is not legally responsible for the applicant's debts; provided, however, that assets transferred after the occurrence of the latest event giving rise to the applicant's need for representation may be considered if the determiner of eligibility finds that the transfer was made for the purpose of creating eligibility for representation, where eligibility would not otherwise have been found.

(D). The eligibility determiner shall, in determining the anticipated cost of legal representation, include the estimated cost of a private attorney and the estimated cost of any ancillary services such as investigators and expert witnesses which appear to be necessary in order to afford effective representation.

(E). The financial eligibility of a person seeking legal representation at public expense shall be determined, by a staff attorney member of the county public defender office. A determination of eligibility shall be approved by the court and the defender's office or assigned counsel (as the case may be) shall be appointed to represent the indigent; provided that

a determination of eligibility may be challenged by the state's attorney on written motion. Such motion must be filed within 24 hours of the filing of determination of eligibility, except that motions alleging fraudulent and material misstatements of fact in the application must be filed within 24 hours of the time when the misstatements are brought to the attention of the state's attorney. Upon the filing of a motion for review of a determination of eligibility, the court shall conduct a review in accordance with Sections 4(E)(3)(b) and 4(E)(4) below.

(1) The determination shall be based upon the affidavit of the applicant setting forth the information necessary to meet the standards set out in §§. 4(A) and (B). The State Public Defender shall prescribe a form affidavit to be used for this purpose. Each applicant shall be informed, both verbally and in writing, of the provisions of Section 6 of this Act.

(2) The affidavit and information set forth in it shall be protected by the attorney-client privilege and shall not be used for any purpose other than determining eligibility.

(3) Each person determined to be ineligible must be promptly informed of the right to have the determination reviewed by a judicial officer, provided that the person shall be informed that a request for such review shall constitute a waiver of the attorney-client privilege as to the contents of the affidavit previously executed.

(a) Such review shall be upon the affidavit and any other information considered by the defender or presented by the applicant.

(b) Such review shall be held as expeditiously as possible and may be by informal proceeding, provided that, if the applicant has been

charged with an offense, the review must be made on the record of the pending proceeding, and within two working days of the determination of ineligibility.

(4) The circuit court's determination of an appeal regarding eligibility for representation shall be made in writing within the time provided and shall consist of specific findings of fact and conclusions of setting forth clearly the basis for the determination made.

(a) That order shall be reviewable by an appeal made pursuant to Section 15-26-1(6), SDCL (1976), except that the notice required by Sections 15-26-9 and 10 must be filed within 7 days of the entry of the circuit court's order on review.

(b) The appeal shall proceed in the manner provided for intermediate appeals, except that (1) it shall be submitted to the Supreme Court within 14 days of the filing of the notice of appeal and (2) the proceedings underlying the application for representation shall be stayed pending the determination of the appeal, unless the Supreme Court directs otherwise.

(c) The circuit court shall inform the losing party of the right to appeal and if desired, the clerk of the court shall prepare the record on appeal. The record shall include all evidence presented to the court on the issue of eligiblity, and the judge's findings of fact and conclusions of law.

(d) In cases where the defender has denied eligibility, the appealing applicant shall at all stages be represented by counsel assigned pursuant to Section 2(E)(2) of this Act. In all cases where the defender has determined an applicant to be eligible, the defender shall represent

the applicant in all proceedings in which the applicant's eligibility is challenged, until the issue of eligibility is finally determined.

(5) The term "defender" as used in this statute includes an attorney under an assigned counsel system for providing legal services.

5. SCOPE AND STAGES OF REPRESENTATION.

(A). Effective representation shall be provided to every eligible person in every proceeding the purpose of which is to establish the culpability of or status of such person, pursuant to a factfinding process, as a prerequisite to intrusions of the government in order to:

(1) Impose sanctions resulting in a loss of liberty or other penalty; or

(2) Impose other legal disabilities.

(B). Effective representation shall be provided to every eligible person who is subject to loss of liberty or legal disability imposed by government, and who seeks to redress the deprivation by government of any right, privilege or immunity guaranteed by law.

(C). Representation shall continue during trial court proceedings and shall include all collateral proceedings up to and including the filing of a notice of appeal, where appropriate.

(D). This Act applies only to representation in the courts of this state, except that a defender or appointed attorney may represent an indigent person in an action in the federal court in this state, if:

(1) The matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of this state;

(2) The representation is pursuant to a plan of the United States District Court as required by 18 U.S.C. Section 3006A and is approved by the State Public Defender;

(3) The matter arises out of or is related to an action pending in the juvenile courts of this state; or

(4) The matter arises out of or is related to an action pending for the involuntary commitment of the client to the state mental hospital.

Any compensation paid or costs reimbursed by a federal court of the United States shall be paid directly to the State Public Defender's Account.

(E). Effective representation for every eligible person shall be available either when:

(1) The individual is arrested;

(2) The person believes he is under suspicion of having committed or of participating in a crime; or

(3) The person believes that a process will commence resulting in a loss of liberty of the imposition of a legal disability, whichever occurs earliest.

(F). Legal representation shall be available to every eligible person who:

(1) Is arrested;

(2) Believes that he is under suspicion of a crime; or

(3) Believes that a process will commence resulting in a loss of liberty or the imposition of a legal disability.

(G). Where a publicly provided attorney interviews an accused and if it appears that the accused is financially ineligible for public defender services, the attorney shall assist the accused in obtaining competent private counsel and shall continue to render all necessary defense services until private counsel assumes full responsibility for the case.

(H). The defender office of assigned counsel program shall provide sufficient personnel or communication facilities to enable it to provide emergency representation on a 24 hour basis.

(I). The defender office or assigned counsel program shall implement systematic procedures, including daily jail checks, to ensure that prompt representation is available to all persons eligible for defender services.

(J). The defender office or assigned counsel program shall provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release.

(K). Upon initial contact with a prospective client, the defender or assigned counsel shall, where appropriate:

(1) Offer specific advice as to all relevant constitutional and statutory rights;

(2) Elicit matters of defense and direct investigators to commence fact investigations;

(3) Collect information relative to pre-trial release; and

(4) Make preliminary determination of eligibility for publicly

provided defense services.

(L). The defender office or assigned counsel program shall prepare and distribute an informational brochure describing in simple, cogent language or languages:

(1) The rights of any person who may require the services of the defender;

(2) The nature and availability of such services; and

(3) The means for securing the services, including the phone number and address of the local defender office.

(M). The defender office is authorized to make this information available to all persons who may require the services of the defender. This authorization includes, but is not limited to, the placing of the brochure or other informational device such as posters in the receiving or booking areas of all law enforcement agencies located within the jurisdiction of the public defender.

(N). The procedures utilized in assuring early representation shall, where necessary, be permitted as a limited exception to the procedure of providing continuous representation by a single attorney throughout the trial and sentencing. However, the defender office or assigned counsel program shall implement systematic procedures for early case assignment and for informing the client of the name of the attorney who will represent him after the initial period.

6. RECOUPMENT OF COSTS OF REPRESENTATION.

(A). At the conclusion of criminal proceedings, the sentencing judge

may, upon application of the state's attorney, require a convicted defendant to reimburse the county for the cost of legal services rendered to the defendant at public expense; provided that no reimbursement shall be ordered unless the defender at the time eligibility is determined notifies the defendant of the potential obligation which may be imposed pursuant to this statute.

(1) The sentencing judge may, at the time of sentencing, order that reimbursement be made a condition of probation if such condition is imposed in accordance with the other provisions of this section; provided that the probation of a convicted defendant shall not in any case be revoked solely for failure to make reimbursement except on a showing by the states attorney that (a) the defendant has a present financial ability to make the reimbursement either in whole or in installments without hardship to self or immediate family, and (b) the defendant's failure to make reimbursement is an intentional, contumacious default.

(2) In the event a defendant's probation is revoked pursuant to §(1) above for failure to make reimbursement and a sentence of incarceration is imposed, the defendant may not thereafter be required to make further reimbursement for the costs of representation.

(B). Should the defendant obtain legal representation at state or county expense in connection with a criminal appeal, or in a matter ancillary to a criminal prosecution such as a probation or parole revocation proceeding, or a habeas corpus proceeding, the state or county may seek to obtain reimbursement from the defendant through application to a judge of the court of original jurisdiction.

(C). The application for reimbursement by the state or county prosecution shall be made to the court no later than thirty days following termination of the proceedings in issue. Following the application, the defendant's attorney shall file a statement of the costs of legal representation at public expense and the defendant shall file a declaration of his financial status, all of which are to be utilized by the court in making the determination regarding reimbursement.

(D). The court shall not require such reimbursement unless at the conclusion of the proceedings it determines that convicted defendant has the present ability to pay all or a portion of the costs of legal representation incurred in that proceeding without manifest hardship to the defendant or the defendant's immediate family.

(1) In determining the amount of payment to be made and the method of payment the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. The resources of a spouse, relatives and other persons shall not be considered in making this determination.

(2) The court may order the payment in installments, or in any manner which it believes reasonable and compatible with the defendant's financial ability; in no event shall the time for payment exceed two years.

(3) The fact that the defendant has been sentenced to a period of incarceration greater than 30 days shall create a presumption, rebuttable by clear and convincing evidence to the contrary, that the defendant lacks the present ability to make reimbursement.

(E). The defendant shall have the right to obtain a modification or termination of the reimbursement order at any time while it has force and effect on the basis that the order works manifest hardship to the defendant or his family brought about by circumstances which have changed since the order for reimbursement was entered.

(F). The state or county may recover any sums for which reimbursement has been ordered and which have not been paid in the same manner and subject to the same exemptions that are applicable to civil actions. The judgment shall not be enforced by contempt.

(G). Amounts recovered under this section shall be paid into the general fund of the state or county or other contributing agency.

(H). If it is determined that the defendant made material false and misleading statements to the court regarding his ability to pay for the cost of the legal representation at state expense, and that the defendant has the ability to pay all or a portion of the costs of legal representation in conformity with the provision of § 6D, the state's attorney may file suit for reimbursement and may obtain an order of complete or partial reimbursement.

Said suit shall be filed no later than one year from the reimbursement determination by the court.

Execution of the judgment obtained under this provision shall be made in conformity with the provision of §6F

(I). Any person who submits to the court a materially false financial statement in connection with a determination of reimbursement for legal representation at public expense shall be guilty of a misdemeanor punishable by

a fine of $500 and/or by imprisonment of no more than six months.

(J). No information or testimony compelled of the defendant under these provisions (or any information directly or indirectly derived from such information or testimony) may be used against the defendant in any criminal case, except a prosecution under these provisions.

7. FINANCING THE PUBLIC DEFENDER SYSTEM.

(A). There is hereby established in the General Fund of the State Treasury an account to be known as the State Public Defender's Account. All moneys received by the State Public Defender shall be paid into the State Treasury and credited to the State Public Defender's Account. All moneys in the State Public Defender's Account are hereby appropriated continuously for and, subject to the approval of the State Defender Commission, shall be used by the State Public Defender in carrying out the purposes of this Act.

(1) The State Legislature shall appropriate full and adequate funding to provide for the staffing and administrative operation of the State Public Defender's Office, and for the provision of representation for all defendants within the State in all post-conviction proceedings and in all actions brought in the federal courts in this state pursuant to the provisions of Section 5(C) of this Act.

(2) The Board of County Commissioners shall annually appropriate money to administer the county public defender office if it has elected to provide representation under the provisions of this Act. Such appropriation shall be in an amount sufficient to administer the county public defender

office in the manner recommended by the State Public Defender Office.

(3) The State Public Defender may seek and accept funds from the federal government and private organizations. Any such funds received shall be appropriated first for the administration of the State Public Defender Office, and any surplus shall be appropriated to the county public defender offices in a manner to be determined by the State Public Defender with the approval of the State Defender Commission.

(B). The State Public Defender shall prepare and present its budget directly to the State Legislature. The budget shall not be presented as part of the judicial or executive budgets nor shall it be subject to diminution or alteration by any branch of government other than the appropriating authority. The Defender Commission shall review and advise the State Defender on the budget before its submission.

(C). The county public defender shall prepare and present its budget directly to the county board of commissioners. The State Public Defender shall review and approve the county public defender's budget before its submission. If a county public defender's budget is diminished or altered by the county board of commissioners in a way to or to the extent that, in the opinion of the State Public Defender, the county public defender's office will be prevented from providing effective assistance to its clients, the State Public Defender may, with the approval of the State Defender Commission, disband the county public defender's office. In such event, the county shall provide services to indigents pursuant to the requirements of Section 23-2-2.

(D). The defender office budgets shall include all necessary expenditures including, but not limited to, investigators, secretaries, social

workers and paralegals, office space, a professional law library, funds for procurement of experts and consultants, ordering of minutes and transcripts on an expedited basis, equipment, supplies, and administrative costs.

(E). The defender system shall be exempt from competitive bidding requirements for purchasing of services or equipment where necessary for timely procurement.

(F). The administrative state office shall be located in the state capitol.

Local defender offices shall be located near the appropriate courthouses, but never in such proximity that the defender becomes identified with the judicial and law enforcement components of the criminal justice system. Defender offices shall maintain an interview and waiting room in the courthouse.

(G). The location of joint county public defender offices shall be determined by consideration of the relative benefits of access to trial courts, penal institutions and clients; the availability of adequate office and library facilities and basic support services and access to adequate means of transportaiton.

(H). The State Defender shall establish a separate division to provide appellate and other post-conviction representation and one or more separate offices to provide representation to prison inmates.

8. PUBLIC DEFENDER OFFICE PERSONNEL.

(A). The State Defender, County Public Defenders, and staff attorneys shall be full-time employees and may not engage in the private practice of

law, provided that Deputy Defenders may, with the approval of the State Defender, employ part-time staff attorneys where adequate staffing is not otherwise economically feasible.

(B). County public defenders shall employ, with the approval of the State Defender, staff attorneys, investigators, secretaries and other employees under their direct supervision. Appointments shall be based upon merit. Upon appointment, staff attorneys shall be required to make a commitment of at least two years.

(1) Defender staff attorney promotion policies shall be based upon merit and performance criteria.

(2) Removal of defender staff attorneys shall be only for cause, except during a six-month probationary period for newly hired attorneys.

(C). The compensation of all positions within the state defender system shall be set at a level which is commensurate with qualifications, experience, and the responsibilities involved.

(1) The compensation of the State Public Defender shall be comparable to that of judges of the State Supreme Court and shall be professionally appropriate when compared with the compensation of the private bar.

(2) The compensation of chief county public defender shall be comparable to that of the circuit judges of the state, and shall in no event be less than that of the local chief prosecutor.

(3) The compensation of staff attorneys shall be sufficient to attract qualified personnel. Salary levels thereafter shall be set to promote the State Public Defender's policy on retention of legal staff and shall in no event be less than that paid in the office of the local prosecutor.

(4) The compensation of support personnel shall be comparable to that paid in private law offices and related positions in the private sector and shall in no event be less than that paid for similar positions in the court system and in the office of the local prosecutor.

(5) An attorney who represents an eligible person under this Act may not receive any fee in addition to that provided in the Act.

APPENDIX F

Inmate Survey Questionnaire

RAPID CITY INMATE SURVEY QUESTIONNAIRE

Ex-Offender Program

Date:_____

PERSONAL DATA

Name:_____ Age:_____

Residence:_____

Tribe:_____

Marriage Status:_____ Children:_____

Work Experience:_____

Education: 1 2 3 4 5 6 7 8 9 10 11 12 1 2 3 4

Where convicted:_____

How convicted: Jury Trial___Guilty Plea___Parole Violation_____

Offense:_____

Sentence:_____

Parole Date:_____

Attorney:_____

Judge:_____

Why was crime comitted?_____

_____

What do you need while imprisoned?_____

_____

What do you need when released? Housing____ Clothing_____

Tools____ Education____ Vocational Training___

Employment____

Other_____

Comments:

END