COMPREHENSIVE PLAN FOR PROVISION
OF DEFENSE COUNSEL FOR INDIGENT ACCUSED IN
THE STATE OF NEW MEXICO

Submitted by the National Legal
Aid and Defender Association
Technical Assistance Team

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Background. Following the decision of the United States Supreme Court in Argersinger v. Hamlin, 92 S.Ct. 2006 (1972), holding that, in any criminal case in a state court, "No imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel," many states were impelled to re-examine their systems for delivery of criminal defense services. New Mexico, which heretofore provided appointed counsel only in cases where the possible criminal sanction was imprisonment in excess of six months, was no exception. On August 10, 1972, the State of New Mexico Governor's Council on Criminal Justice Planning, on behalf of itself, the University of New Mexico Law School, the Second Judicial District Magistrate Court, "and other concerned parties," requested technical assistance from the Law Enforcement Assistance Administration (LEAA). Specifically, the Governor's Council wished to know: (1) Whether a pilot public defender program operating in the Ninth Judicial District was providing adequate counsel to indigent accused; (2) About the "pros and cons of assigned counsel versus contract counsel;" and (3) Whether a statewide public defender program should be instituted in New Mexico. At the request of LEAA, the National

1/ In New Mexico, the courts of original jurisdictions for all criminal charges carrying penalties in excess of six months imprisonment are the district courts in the state's thirteen judicial districts. The state has relied upon an appointed counsel system in the district courts, with compensation supplied by state legislative appropriation. In fiscal 1972, $340,309 was expended by the state for appointed counsel. For a breakdown of expenditures by judicial district, see Appendix F.
Legal Aid and Defender Association and the Criminal Courts Technical Assistance Project of American University set up a Technical Assistance Project which arrived in Albuquerque, New Mexico, on September 24, 1972. The group was headed by R. A. Green, Jr., of Gainesville, Florida, and staffed by Addison M. Bowman, of Washington, D.C., and Patrick J. Hughes, Jr., of Chicago, Illinois. Biographical data on these individuals is included in Appendix A.

Conclusion. The technical assistance group concludes that the State of New Mexico should establish a comprehensive statewide public defender system to provide defense services consistent with the Sixth Amendment requirement of counsel in criminal cases articulated in the Arveringer opinion. The details of the proposed plan are set forth at pp. 24-30 and in Appendix B, infra, and a budget comprises Appendix C.

Methodology. The technical assistance group was aided in its study of New Mexico's needs by Constance J. Cohn, Court Specialist for the Governor's Council on Criminal Justice Planning. Because of time limitations, we were unable to visit many of the judicial districts in the state. We sought to evaluate the situation in the Second Judicial District, which includes Bernalillo County and Albuquerque. We visited Santa Fe in the First Judicial District, and Clovis and Gallup in the Ninth and Eleventh Districts. We met with numerous individuals, including: Chief Judge Stowers and the entire bench of the Second Judicial District Court; Judge Blythe and Judge-elect Compton of the Ninth Judicial District Court; Judge Zinn of the Eleventh Judicial District Court; Magistrates Blackhurst, Kilbourne, and Davis of Bernalillo County; Judge Mower of the Albuquerque Municipal Court; Oliver Payne of the state Attorney General’s office, Larry Coughenour, Director, Administrative Office of the
Courts; District Attorneys Brandenburg, Hensley and DePauli of the Second, Ninth and Eleventh Districts and several of their assistants; Jack Love, Federal Defender in Albuquerque; Messrs. Nohl and Muniz of the State Department of Finance and Administration; Ms. Budke of the Legislative Finance Committee; Robert Deiss, Executive Secretary of the New Mexico Judicial Council; Professors Geer, Daniels, and McPherson, University of New Mexico Law School; several University of New Mexico law students; attorneys Earl Potter, Seth Montgomery and Lowell McKim from Santa Fe; Charles Driscoll and Steve Durkovich from Albuquerque; William Bonham, an assistant district attorney, and Fred Tharp and Fred Boone from Clovis; John Paul Gallegos, Santa Fe Legal Aid; Mike Browde and Mike Norwood, Albuquerque Legal Aid; and C. B. Moya, Pilot Cities Program.

In Clovis, we discussed the pilot defender program, which presently operates on an annual funding of $26,000 (most of which has been provided by an LEAA grant), with Fred Tharp and Fred Boone, the contract defenders there. We spoke with their investigator and with one of their clients. We also examined their forms and reviewed some of their case files. We were unable to gain sufficient insight into the Clovis program in the day allotted for our visit to permit a definitive evaluation of the office and we had no opportunity for court observation of either defender. However, it does appear that they are providing effective defense services. Both agree that to satisfy the requirements of Argersinger, the Ninth District would need at least three full-time lawyers and a full-time investigator and in this we concur (see Appendix B). Judge Blythe and Judge-elect Compton both favor a public defender system based on the Ninth District experience. One criticism we have of this pro-
ject is that the lawyers employed are part-time. The basis for our conclusion that public defenders should be full-time is stated elsewhere in the plan and will not be repeated here except to state that essentially there is little difference between a part-time contract defender and an assigned counsel system except for the number of attorneys who participate. We believe neither are appropriate as the primary method of delivering effective defender services in New Mexico. We would be remiss if we did not express reservation about the absence of a board of trustees or other governing agency which is politically independent and free from judicial supervision to oversee the work of the defenders in Clovis. The ABA, in their Standards for Criminal Justice, Providing Defense Services 1.4 (1967), points out that ultimate control of a defender system should rest in such an independent board which is "free from political influence and ... subject to judicial supervision only in the same manner and to the same extent as ... lawyers in private practice."

See also National Legal Aid and Defender Association, Standards for the Criminal Defense 7.0 (1972).* We hasten to add that we detected no improper pressures or influences directed at the Clovis defenders. Another problem we saw in the Clovis program is that the defenders do not enter a case until after a formal appointment by the court. Such a practice may, in some instances, result in a denial of counsel at a critical stage such as custodial interrogation or an identification confrontation. We suggest that the defenders make their services available at any time subject to subsequent ratification by the court.

The technical assistance group studied the Annual Reports of the Director of the Administrative Office of the Courts for calendar years 1969, 1970 and 1971; a

*Draft standards submitted to the National Advisory Commission on Standards and Goals for the Criminal Justice System by NLADA consultants. These standards are now under consideration by the Commission and may be subject to modification prior to approval.
Working Paper, "Indigent Defense in New Mexico," prepared for the Institute of Social Research and Development, University of New Mexico; an Analysis of the Problems of Indigent Defendants in Chaves County, New Mexico, by District Judge Paul Snead, Fifth Judicial District; a Proposal for Legal Services, Providing Representation to Defendants in the Municipal Court of Santa Fe, prepared by the Santa Fe Legal Aid Society; and numerous other reports, proposals, correspondence and draft legislation relevant to the object of study. Although we regret that time did not permit a more extensive survey of caseloads, statistics and attitudes throughout the state, we are satisfied that our conclusions are valid for the reasons that follow:

Present situation. The technical assistance group believes that New Mexico's needs are best served by a statewide public defender. The state, with a total population of 1,014,979 persons (1970 census), presents special problems with respect to the provision of defense services. The large population centers are in Bernalillo County (Albuquerque), Santa Fe County and Dona Ana County (Las Cruces), with a combined population of 439,303 persons. Not surprisingly, the three corresponding judicial districts handle nearly half of the criminal cases docketed annually in the courts of New Mexico. The rest of the judicial districts comprise large geographic areas (e.g., the seventh, which contains Catron, Socorro, Sierra and Torrance Counties) with relatively sparse populations and low numbers of criminal case filings. A map of New Mexico's judicial districts is included in Appendix D. The state has a minority group population of 409,617 persons, of whom the vast majority are Spanish speaking people. State and local revenues are low compared with
national averages, and the state has a large population which would be considered indigent for appointed counsel purposes.

In the district courts, having jurisdiction of all criminal cases where the maximum possible sanction is imprisonment in excess of six months, the state has provided appointed counsel for indigent accused for some years, and the system has functioned reasonably well to date. Determination as to whether a defendant qualifies for appointed counsel is usually made by the court through use of a questionnaire or affidavit, and compensation of appointed attorneys is pursuant to a fee schedule. In fiscal 1972 the New Mexico Legislature allocated $397,425 for appointed counsel fees, of which $340,309 was actually expended. Since statistics on number of cases wherein counsel were appointed are unavailable, the cost per case cannot be calculated. Nevertheless, several observations are in order. In Bernalillo County the budget for the current fiscal year for compensation of appointed counsel in the Second Judicial District Court is $180,000. Of this amount $19,726 had been expended as of September 15, 1972, in 118 District Court cases, amounting to an average cost per case of $167. This is substantially lower than the national average, and in our opinion is unacceptable. We know that appointed counsel are entitled by statute to receive a fee of up to $300 in cases where a trial does not result, and up to $400 in cases actually tried, see the Indigent Defense Act, N.M. Stat. Ann. 41-22-1 through 41-22-10. It is thus difficult to understand why in Bernalillo County, for

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3/ These amounts probably need to be revised upward. Compare the Federal Crimi-
example, average compensation is considerably less than $200. Apparently, the fee schedule promulgated for the Second District (see Appendix E) accounts for the discrepancy. Rather than payment for total hours expended on a case, as most such schedules prescribe, the Bernalillo County fee schedule sets up flat payment rates, such as $10 for "Filing bond reduction petition," and $25 for a sentencing, regardless of time spent. The schedule permits the attorney to charge $10 per hour for out-of-court time expended on the case, but limits payment for this category to $130.

Although we understand that the fee schedule just described is a recently adopted modification of a previous schedule considered inadequate, we nevertheless believe that compensation now available to assigned counsel is insufficient. We recognize the lawyers, as officers of the court and ministers of justice, have traditionally provided able representation in appointed criminal cases as a service to the courts and to the community, regardless of compensation. We believe, however, that there is an overall correlation between the amount of compensation available and

4/ The group questions the assumptions implicit in this fee schedule. Should not an attorney be compensated for total hours spent on a case? The federal schedule allows $30 for in-court time and $20 for out-of-court time up to $1,000 per felony, see 18 U.S.C., Section 3006A(d). The New Mexico limitation of 13 billable out-of-court hours per felony seems somewhat arbitrary. Likewise, payment of up $50 for "motions" may be inadequate in the case where the motion to suppress evidence is far more important than the trial itself.

Should the state decide to continue with the appointed counsel system, it is recommended that a statewide fee schedule similar to the federal payment schedule be adopted.
the quality of services rendered, and are thus led to conclude that the quality of representation in appointed cases in New Mexico is jeopardized by this factor. This judgment is obviously somewhat subjective, and notable exceptions are present. The private bar in New Mexico has responded admirably to the challenge of Gideon v. Wainwright, 372 U.S. 335 (1963), requiring appointed counsel in felony cases. Nevertheless, members of the bar tell us that the overall quality of representation suffers because of inadequate compensation, and the conclusion is nearly inescapable in view of the number of cases requiring appointed counsel, and the compensation available.

In calendar year 1971, 3,820 criminal cases and 2,961 juvenile cases were closed in the New Mexico district courts. Even assuming an indigency rate of only 50%, the average statewide compensation rate could not have exceeded $100 per case. We have spoken with lawyers who feel strongly that appointed counsel are not adequately compensated for their appointed case work in the district courts. This problem is aggravated by the fact that in some districts there are only a handful of lawyers able or willing to accept appointment; indeed, in some counties there are no lawyers at all. The burden therefore falls on a very few lawyers whose primary professional interest is in their private practice. Even in Albuquerque, we are told, 

5/ Juveniles charged with law violations are entitled to appointed counsel if indigent, see In Re Gault, 387 U.S. 1 (1968). We understand that the district courts, which have jurisdiction of juvenile cases, provide assigned counsel pursuant to the requirement of the Gault decision.

6/ We project elsewhere an average statewide indigency rate for district court cases of 75%.
the list of lawyers willing to accept district court appointments has recently de-
creased, and some able lawyers have refused to continue to accept appointed cases.
This is simply too great a burden to place on a small segment of the private bar. Nor can an adequate solution be found in requiring recent law graduates to accept appointments for the first five years of their professional life. In the first place, serious felony cases should not be assigned to attorneys without substantial experience in criminal trial work. Secondly, in many districts there are no recent graduates. The only solution to the problem in district court, short of a statewide defender, would be to increase the compensation schedules sufficiently to attract a substantially greater number of lawyers to this kind of work. In our judgment this would require, at a minimum, a doubling of the amounts in the fee schedules, and an annual expen-
diture of about one million dollars.

The more serious problem in New Mexico following Argersinger concerns the Magistrate Courts. Petty offenses and misdemeanors (other than those high misde-
meanors tried in District Courts) are handled throughout the state by 70 magistrates. In these courts appointed counsel have not been provided, yet nearly all offenses

7/ Some lawyers have decided to refuse further appointments because of inadequate compensation; others, undoubtedly, have simply found the practice not to their liking. The "new" Albuquerque fee schedule (see Appendix E) may improve this situation, but in our judgment this is at best a temporary palliative. In fiscal 1973 the Second Judicial District has budgeted $180,000 for appointed counsel (see Appendix F). If this were applied only to felony cases in district court the average compensation would be $180 per case. This leaves out of consideration the 499 juvenile and 985 magistrate cases in which we predict there will be a need for appointed counsel in the Second District in 1973.

8/ The state has appropriated $365,600 for attorney compensation in fiscal 1973. The breakdown by judicial districts appears in the chart in Appendix F.
tried by magistrates permit the possibility of a jail sentence. Unless the magistrates are to be stripped of their power to impose sentences of incarceration, it will be necessary to provide counsel in these courts. The magistrates handled approximately 48,341 criminal cases in fiscal 1972, of which number it can safely be assumed a significant percentage involved indigent defendants. Many of these courts are located in sparsely populated, geographically isolated areas where attorneys are not readily available for court appointments.

The technical assistance group has attempted to estimate the number of magistrate cases in which counsel will be required in the future. We talked to magistrates, judges and lawyers. We studied responses filed by a number of the magistrates to a questionnaire recently distributed by the Administrative Office of the Courts. We believe that in at least 1/8 of the cases, or roughly 6,000 cases (based on 1971 statistics) counsel will be required. The breakdown by judicial districts is found in Appendix F. We hasten to add that this figure has no solid statistical justification, because statistics are simply unavailable. Moreover, the number of cases in which counsel will be needed may vary depending on the ability and willingness on the part of magistrates to advise defendants of their rights and to avoid statements and actions which would tend to inhibit exercise of those rights. We feel that our magistrates' case estimates are, if anything, conservative because: (1) The assumption was that magistrates will be able to conclude in 2/3 of the cases that no possible jail sentence is involved, and in those cases counsel will not be required. Magistrates estimate that they impose sentences including imprisonment in only 10% of their cases, but it seems reasonable to assume that in a much larger percentage, i.e., about 33 1/3%,
the possibility of incarceration could not be ruled out in advance. (2) Of these cases
we estimate a 50% statewide indigency rate. This is lower than our projected 75% in-
digency rate for district court cases, but seems justified by the lower fee schedules
for misdemeanors and petty offenses and the estimates supplied by some of the magis-
trates themselves. (3) Finally, we assumed that of those indigent defendants entitled
to appointed counsel before the Magistrate Courts, only 75% would exercise their
rights.

We thus anticipate a need for appointed counsel in the following numbers of
cases:

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court criminal</td>
<td>2491</td>
</tr>
<tr>
<td>District Court juvenile</td>
<td>2122</td>
</tr>
<tr>
<td>Magistrate Court cases</td>
<td>6046</td>
</tr>
</tbody>
</table>

Breakdown by judicial districts appears in the caseload chart in Appendix F. The
figures are obtained from the 1971 Annual Report of the Director of the Administrative
Office of the Courts. We also studied the 1970 and 1969 Annual Reports and found that
the 1971 figures are not out of line with those in the two previous years. The deri-
vation of our figure of 6046 magistrate cases has been explained. The 2491 and 2122

9/ We have omitted the needs of the state's 60-odd Municipal Courts, because there
was simply not enough time available to study them. It may be that the need for coun-
sel in these courts, which handle many criminal ordinance violations punishable by im-
prisonment, is as great as that in the Magistrates Courts. A report, "Indigent Defense
in New Mexico," supra, note 2, points out that in the Albuquerque Municipal Court
2,051 persons were sentenced to jail terms in 1971. In our view, several suggestions
are in order for these courts: (1) "Public drunkenness" should be decriminalized, as
has been done elsewhere, if as we understand large numbers of Municipal Court of-
fenses are of this nature; (2) if the state adopts a comprehensive public defender as
recommended in this report, each District Defender could contract with the local unit
of government to provide representation for a sum which would enable the defender to
augment his staff according to the projected need for counsel.
District Court criminal and juvenile cases projected as needing counsel were obtained by assuming a uniform 75% statewide indigency rate in district courts. Obviously the indigency rate will vary from district to district and from case to case. Yet, 75% seems, if anything, a conservative estimate based on our conversations with judges and lawyers. Estimates for Bernalillo County varied from 70% to 90%; Judge Blythe estimated an 80% rate in the Ninth Judicial District Court. In any event, inaccuracies will not affect our statewide defender budget (see Appendix C) greatly because we assume a full-time public defender lawyer can handle the following yearly caseloads:

1. 150 felony cases, OR
2. 400 misdemeanor cases, OR
3. 200 juvenile cases.

These figures were adopted by the Defender Committee of the National Legal Aid and Defender Association. They appear in Standards for the Criminal Defense, a booklet prepared by NLADA consultants for the National Advisory Commission on Criminal Justice Standards and Goals.* Based on our experience in defender offices, we believe these caseloads standards are entirely realistic and should not be exceeded in defender offices.

The most troublesome question is: if New Mexico does not opt now for a public defender system, how are appointed counsel to be provided in the 6046 magistrate cases? First, there is the problem of cost. We have previously indicated that the $365,600 budgeted for attorney fees in the current fiscal year is grossly inadequate for the district court cases. It is thus unthinkable that magistrate representation can be provided without an additional appropriation in the neighborhood of $500,000.

Note: These standards have not yet been approved by the Commission and may be subject to modification prior to approval.
This figure is arrived at by multiplying the 6,000 cases by an average cost per case of between $75 and $100. We have studied letters written by about 15 magistrates, whose estimates of the cost of attorneys' fees average about $75 to $100 per case. Some estimates are as low as $25; others go as high as $200. Magistrate William W. Thomas of Chaves County estimates "$150 to $200 if they [the attorneys] have to come down to Hagerman, New Mexico." This raises the issue of travel to isolated magistrates' locations, which should be compensated for.

Even if the problem of cost can be resolved, it may be virtually impossible to induce lawyers to accept these appointments. Lawyers have told us the practice before magistrates' courts is one they do not enjoy. All but nine of the magistrates are non-lawyers, and many do not conduct their proceedings according to the rules of evidence and procedure with which lawyers are familiar and comfortable. Added to this is the travel factor, and the important consideration that the lawyers available in many counties have their hands full with indigent defense work in the district courts. Presumably, legislation could be enacted enabling magistrate cases to be transferred to the large population centers where more lawyers are available. Such a move, however, would provide only an apparent resolution, because the defendant, the witnesses and the evidence would have to be transported substantial distances to accommodate counsel. Furthermore, in most criminal cases the lawyer or his investigator will have to visit the area of the alleged violation to interview witnesses and gather the facts. Transfer of the case thus fails as a realistic solution, because: (1) if the lawyer is conscientious, he will have to travel to the area of the offense in many cases, and in those cases transfer does not obviate the cost and travel problems out-
lined above; or (2) the lawyer will not investigate the facts and will therefore provide the appearance, but not the substance, of effective legal representation.

A statewide public defender system thus appears to us to be the only sensible plan for New Mexico to adopt. As spelled out in the following pages, its advantages for this state are numerous: (1) It will upgrade the quality of defense representation; (2) It is ideally suited to cities such as Albuquerque and Santa Fe; (3) Because of geographical and demographic factors mentioned above, it appears to be the only way counsel can effectively be provided throughout the rest of the state; (4) Its cost will not significantly exceed that which we estimate the state should be prepared to provide for effective representation in an appointed counsel plan. Judge Paul Snead of the Fifth Judicial District writes that in his judgment "it is imperative that we go to a public defender system, manned and staffed in essentially the same manner as the district attorney's offices of the state." On his estimate of the need for counsel following *Argersinger*, he concludes that "We simply cannot tolerate a program [of appointed counsel] which consumes upwards of 25% of the entire productive effort of the Bar Association, without adequate compensation."

Advantages of a Public Defender System. The technical advisory group has recommended a statewide public defender system principally because we are persuaded that only through such a system can a state begin to approach the ideal of "equal justice

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10/* Judge Snead's conclusion is in line with our thinking that the need for public defender services is probably greater in districts without large urban centers such as Albuquerque and Santa Fe because of the enormous burdens which have to be imposed on private attorneys in smaller communities. It would thus be no answer to the state's problem to set up a pilot defender program in Albuquerque, where far greater numbers of private attorneys are available to shoulder increased caseloads.
under law" in its criminal courts. Those people we spoke to in New Mexico unanimously agreed that our philosophy should be to attempt to conceptualize and to develop the best possible plan for this state -- not the cheapest or the most politically feasible, but the best from the standpoint of delivery of good criminal defense representation for indigents. This we believe we have done. We should point out initially that each of us believes that, following Argersinger, an organized public defender system is the best plan for any state. Those who sought our assistance in the New Mexico project did not elicit our views on the relative merits of public defenders and appointed systems. They were interested in our knowledge of and experience in various systems for delivery of defense services. This being their criterion, it was likely that any team selected for the job would have brought to its work a preference for the public defender system, because those persons throughout the country who are most knowledgeable about providing defense services overwhelmingly prefer organized defender services.

In 1965 the National Legal Aid and Defender Association adopted "Standards for a Defender System," which expressed a preference for a public defender system only in urban areas. Defense services in other areas, according to the standards, should be provided "locally in accordance with the needs and traditions of the jurisdiction to be served." Similarly, the American Bar Association, in its Standards Relating to

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11/ See, e.g., Goldberg & Hartman, Help for the Indigent Accused: The Effect of Argersinger, 30 NLADA Briefcase 203 (1972). This article is reprinted in its entirety in Appendix G.

12/ See Handbook of Standards for Legal Aid and Defender Offices (NLADA, 1970).
Providing Defense Services (1967), refused to express a preference for any particular method of providing counsel. Commentary in the ABA Standards makes it clear that they relied upon the position adopted by NLADA.

In 1972, NLADA consultants to the National Advisory Commission on Standards and Goals for the Criminal Justice System submitted an authoritative new set of standards entitled Standards for the Criminal Defense, Standard 4.1 of which says:

A FULL-TIME DEFENDER ORGANIZATION SHOULD BE AVAILABLE FOR ALL COMMUNITIES, RURAL OR METROPOLITAN, AS THE PREFERRED METHOD OF SUPPLYING ATTORNEY SERVICES TO INDIGENT CRIMINALLY ACCUSED.

Following is the commentary supporting this section, quoted in full:

The randomly selected assigned counsel method of supplying lawyers to the poor developed under a jurisprudence where counsel was not required to be assigned in non capital cases. (See Betts v. Brady, 316 U.S. 455 (1942)). But in 1963, Gideon v. Wainwright, 372 U.S. 335 exploded when the scene, [sic] requiring counsel for all poor accused of felonies.


With such extensive representation required it is impractical to expect private practitioners to undertake the bulk of the representation of the indigent criminally accused. In many localities, particu-
larly rural areas, there are not sufficient attorneys available in the bar to meet the need. Nor is it realistic to assume that private counsel, most of whom are non-criminal law practitioners, and who are assigned only occasionally to represent the indigent accused, can undertake such complex representation competently.

Moreover there is a good deal of evidence that an organized defender office can provide high quality defense at considerably less expense than an assigned counsel system offering the same range of services. Some comparative costs illustrate this point. 1/

**TABLE OF COMPARATIVE CASE COSTS**

**SELECTED JURISDICTIONS**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Appointed Counsel</th>
<th>Public Defender</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Santa Clara, California</td>
<td>$302.00</td>
<td>$73.00</td>
<td>1971</td>
</tr>
<tr>
<td>Cook County, Illinois</td>
<td>$250.00</td>
<td>$95.00</td>
<td>1971</td>
</tr>
<tr>
<td>Denver, Colorado</td>
<td>$486.00</td>
<td>$108.00</td>
<td>1970</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>$130.00</td>
<td>$80.00</td>
<td>1970</td>
</tr>
<tr>
<td>New Jersey</td>
<td>$232.00</td>
<td>$165.00</td>
<td>1970</td>
</tr>
</tbody>
</table>

A recent Virginia Bar Association Study indicated that in two assigned counsel only districts in 1970 the following costs were incurred, per case:

14th Judicial District (population 131,362) $185.00

1/ Memorandum to Committee on Public Defender Systems and Judiciary, Junius Allison, Professor of Law, Vanderbuilt University School of Law (National Legal Aid and Defender Association, Chicago, Illinois, 1972).

26th Judicial District (population 352,006) $176.60

While in two districts where an organized public defender office undertook indigent criminal defense the following cost per case was reported in 1970:

12th Judicial District (population 222,692) $103.10
18th Judicial District $ 94.40

Furthermore, the defender districts showed a higher proportion of dismissals, of convictions given probation or suspended sentences, and of trials terminated during the same period.

The 1966 Report of the National Conference on Manpower (Legal Manpower Needs of Criminal Law, p. 407) stated that the organized defender system has the advantage of "economy and efficiency" over the assigned counsel. This was also the conclusion of the President's Commission on Law Enforcement. ("The Challenge of Crime in a Free Society" Report by the President's Commission on Law Enforcement and Administration of Justice, 1967 pp. 150-151).

The American Bar Association's "Standards Relating to Providing Defense Services" June 1967, did not recommend either the defender or assigned counsel system as the preferred delivery mechanisms for legal services to the poor. However, that work was completed in 1967, before Coleman and Argersinger and with the background of the occasional assignment of a poor person's case. Today, the bulk of criminal defense work is the indigent client who must be provided with counsel. In this circumstance an assigned counsel system cannot adequately meet the need.

Two paramount reasons make it unattractive for the assigned private counsel to represent indigents. First, he cannot devote the time required to an assigned case when regular clients must be served. Secondly, the hourly scale or fee maximum set by most jurisdictions cannot realistically compensate private counsel for his efforts on behalf of the indigent criminally accused.

Also, it would be impossible for the assigned counsel to provide the range of representation of the public defender, unless appropriations to compensate him are enormously increased. Such a budgetary allocation would vastly exceed that of a defender organization serving the same client, because of the efficiency of a departmentalized full-time, full service defender operation. Moreover, it is uneconomical and unfair to both client and public defender to change from private assigned counsel to defender at, for example, the appellate level because the private counsel cannot continue the time consuming representation contemplated by a full service defender system.

Upon relieving the assigned counsel the defender will have to familiarize himself with the case and expend an effort establishing rapport with
the new client who may be bitter and resentful at the desertion of
his former attorney necessitated by economic considerations. Such
an abrupt change will also further dehumanize the convicted accused
who must now confront the most dehumanizing of all experiences, in-
stitutional life in a correctional system, for it becomes readily ap-
parent to him where economic considerations force such a change that
he, a person in trouble is not as important as the pursuit of income.

Furthermore, the knowledge gained by an attorney during the pre-
trial proceedings often cannot be duplicated by subsequent counsel.

Thus, for the efficient operation of the criminal justice system
consistent with emerging conceptualizations of modern trial practice,
rehabilitation procedures and diversionary measures, only a defender
system can adequately provide the services contemplated at an ac-
ceptable financial cost.

Coupled with the foregoing considerations is the need to provide
attorney services in misdemeanor and traffic courts, in ordinance vio-
lation and juvenile courts. Frequently, these courts are not in the
easily accessible center of the city where private attorneys are lo-
cated. The enormity of the assignment load in such courts in an urban
area makes it unrealistic to consider individual assignment of cases.
While suggestions have been made to provide for assignment days for
private attorneys in such courts, that seems impractical because of the
rigid control that must then be exercised over continuance days to
assure that the next court date is on the same day as the duty day of
the assigned counsel. Moreover, it would be extremely difficult to
stimulate competent private counsel to accept such assignments over
an extended period of time because they offer little glamor and do not
enhance the reputation of the participating private lawyer.

While it may be suggested that young private lawyers could serve
their apprenticeship in the minor offense courts, such assignments
would not improve the poor image that the public has of the lower
courts, nor does it satisfy the requirement of providing adequate
defense services. Most persons confronted with a possible jail sentence,
even of short-term duration, would find any term in detention a cata-
tropic for it could mean loss of employment, reputation in the communi-
ty and social disgrace. Hence, obtaining effective representation is of
paramount importance to the accused misdemeanor, as it is to the ac-
cused felony client, and competent representation must be provided for
at all levels. Moreover, if the average citizen does become involved
in the criminal justice system it is most frequently in the minor courts.
To have inadequate and ineffective court personal in the minor courts
may leave a lasting poor image of the system further entrenching the
cynicism towards the courts that is already too prevalent.

Only the full-time defender organization can provide the training
Finally, with an organized defender system more attention and time can be devoted to initial training and later to continuing education. While private practitioners do participate in continuing education sessions, most find it impossible to participate in any extended program or with any degree of frequency because of the demands of private clients. On the other hand, the multi-lawyer defender office can conduct its own continuing education program, without reliance on outside agencies. The flexibility also will contribute to a more efficient court operation because delays occasioned by private attorneys having conflicts in their schedules can be avoided. An organized defender office will be immensely more efficient than a like number of private attorneys because of its hierarchial structure, with supervisory components and organization, that could not be duplicated in an assigned counsel system. On the other hand, maintaining acceptable standards of performance and efficiency in the assigned counsel system would be infinitely more difficult as compared to a defender system, because of the lack of structure and supervision, even in the most highly organized assigned counsel organization.

The Institute of Court Management in its examination of felony processing in Cuyahoga County, Ohio, in 1970, recommended "the implementation of a strong public defender system for Cuyahoga County" because of the efficiency and effectiveness of such a system. "Felony Processing System, Cuyahoga County, Ohio," The Institute for Court Management, University of Denver Law Center, Denver, Colorado, 1971, p.54. This study concluded that, (pp. 55–56)

"A Public Defender office is better able to organize training programs for staff, develop manuals and guides to criminal procedure and practice, monitor current cases handed down daily by local, state and federal courts. A Public Defender office is better able to arrange strong investigative staff, to contract with psychiatrists and other experts, obtain a range of laboratory tests and other necessary defense procedures."
Just as we rely on the office of prosecuting attorney to prosecute all felonies rather than relying on a system whereby the courts appoint individual prosecutors for individual felonies, so do we believe a defense delivery system has a superior capability under a centralized public office than today's system of spraying appointments between private and public counsel.

An organized defender system is less costly than assigned counsel. It is also more effective. Accordingly, it is strongly urged that it be recommended that an organized defender office be available for all indigent criminally accused. Such a recommendation will not end some involvement by the private bar as assigned counsel, for there will always be some conflict of interest situations that will make public defender representation legally impossible. (See Standard 4.2).

It will be noted that the NLADA Commentary stresses that the cost of defender services is lower than that required to compensate appointed counsel. This will not be the case in New Mexico, where we estimate that the cost per case has been about $100. The cost per case of the proposed defender plan which follows is $133. Our earlier comments regarding the inadequacy of compensation of appointed counsel should be borne in mind. We believe that $133 per case is substantially less than it would cost New Mexico to provide adequate services in an appointed counsel system following Argersinger. In any event, we believe that a statewide defender system will prove itself in the long run in terms of quality of services and cost.

14/ This figure is arrived at by adding to the total cost of the plan less capital outlay ($1,400,000) an amount equal to 1/5 of the first year capital outlay ($22,200), and dividing the total ($1,422,200) by the total number of cases to be handled, or 10,659. This caseload figure does not include appeals, which will be handled by the defender, and which would decrease the average cost per case of the defender. See Appendix C.

15/ We earlier pointed out that adequate services in district and magistrate courts would cost at least $1,000,000 and $500,000, respectively.
Of particular interest might be the experience in Colorado, another western state similar to New Mexico in population, population density areas and geography. Colorado has high density population centers and extensive rural areas with low population density. In 1969 the Colorado legislature enacted legislation adopting a statewide public defender system, and the system has proved itself since that time. In a letter dated July 26, 1972, to Mr. Ramon Maes of the New Mexico State CEO Office, Rollie R. Rogers, Public Defender for Colorado, discusses the Colorado experience. Mr. Rogers points out:

"I feel that in light of the many decisions that have been handed down by our United States Supreme Court in the field of constitutional and criminal law that a public defender system is next door neighbor to a constitutional necessity. All of the people in our system are first of all dedicated to the concept that a poor person is entitled to an excellent defense and every person in the system is or is rapidly becoming an expert in the field of criminal and constitutional law. Criminal law, as we both know, is complex and really requires the services of a person with expertise in that field if an accused person is to be honestly, vigorously and capably represented. Our experience has been that all too often, and particularly in smaller communities, the majority of the members of the private Bar are not interested in defending criminal cases and are not paid enough under court appointment schedules to be really concerned and really dig in and investigate and prepare a case for the accused. This does not happen in our system, for if we have a deputy who does not vigorously apply all of his skill and energy toward full time pursuit of being a public defender, he is terminated and we get someone with the proper motivation.

Certainly another advantage of a public defender system is where there is an appellate division, it handles practically all of the appeals to the Colorado Supreme Court and into the federal courts for post conviction relief. When you get people who become experts in the appellate process, and who can control some way or another the manner in which critical issues are brought before the Supreme Court, it is certainly of benefit to accused people.

* * *

If New Mexico forms a public defender system they will have to
wrestle with the problem of part time employees versus full time employees. Our statute makes it obligatory that all of our professional people be full time. Knowing Colorado, I know that you are aware that in the sparsely populated areas it may seem advisable to have part time defenders. However, our experience has been that it is much better if all of our defenders are full time even though it means considerable travel for some of the deputy defenders in remote areas. If you have part time people, one of three things is bound to happen: (1) A truly dedicated person will work probably full time and be paid a part time salary and thus it is not fair to him; (2) An unmotivated person will take his monthly part time salary as a retainer fee and then dig in on his private practice; and (3) It is possible that there would be a quid pro quo and the deputy public defender would be properly compensated, the client properly defended and the state get its money worth. The latter is probably most remote and we certainly feel that our system has been more successful because we have full time people.

* * *

As I mentioned to you on the phone, Kansas, Oklahoma and Texas are studying the possibility of statewide systems and because of our experiences I had the pleasure to address the joint judiciary committee of the Oklahoma Legislature. I also addressed the Kansas State Bar Association and the Texas State Junior Bar Association explaining our system and encouraging the development of a statewide defender system in their states.

The technical assistance group concurs in Mr. Rogers' remarks, especially as they relate to full-time versus part-time defenders. The ABA Standards Relating to Providing Defense Services make clear that the "defender office should be staffed with full-time personnel." The value of having full-time criminal lawyers at a time when the criminal law is expanding and changing rapidly goes without saying. Also the defender whose only calendar is his criminal caseload is more responsive to the needs of his clients and the problems of the court. The two part-time defenders in the Clovis office recommend a full-time defender, and we agree.

The plan. The problem is to provide volume quality representation at a reasonable cost. As stated earlier in this report, we believe a unified statewide defender system is the only reasonable solution for New Mexico.

One paramount consideration is assuring a non-political system of defenders. Simple election is not the answer for obvious reasons. Selection by the court is not recommended in the ABA standards because of the need for the fact and appearance of independence. Most states with defender systems have opted for a board or commission to select the Defender, with overall control of the regional defender offices resting in the State Defender so selected. We so recommend. The next question is how to constitute the supervising commission? We suggest the creation of a 25 member New Mexico Defender Commission constituted as follows:

13 members representing each of the state's thirteen judicial districts, selected by the members of the bar within that district and who may not be a judge or judicial officer.

1 member designated by the Chief Justice of the New Mexico Supreme Court and who may not be a judge or judicial officer.

1 member designated by the Dean of the University of New Mexico law school.

1 member designated by the Judicial Council of New Mexico but who may not be a judge or judicial officer.

1 member who shall be the Director of the Administrative Office of the Courts of

New Mexico.

8 members who shall be appointed by the governor of New Mexico and who may not be members of the bar, judges or judicial officers.

The thirteen district representatives should be practicing attorneys. Members of the judiciary and district attorneys' offices should not serve on the board. The actual composition of the board probably merits further consideration by knowledgeable persons in the state, because we have possibly omitted groups or interests that deserve to be represented. For example, the state bar association has committees which would be interested in the work of the State Defender. Another vital consideration is adequate representation on the board of the state's large minority group population. The goal is to select a State Defender who will be insulated from political pressures and responsive to the needs of the population served by the defender.

18/ Standard 7.1 of Standards for the Criminal Defense (1972) provides:
Policy shall be established by and supervision maintained over a public defender office by a governing board subject to the following provisions:
(a) A majority of such governing board shall consist of practicing attorneys.
(b) At least one-third of the board members should be representative of groups whose members derive a particular benefit from the proper functioning of the public defender's office.
(c) Persons with whom the public defender may have a professional or adversary relationship, including the members of the Judiciary and Prosecution, shall not serve on such a board.
(d) It shall be the duty of the governing body, on the one hand, to ensure that the duties of the public defender are discharged properly with diligence and competence and, on the other hand, to insure that the office of the public defender is insulated against political pressures and influences.
offices.

The commission would be empowered to appoint the State Defender, to file necessary reports with legislative bodies, and to seek continued and adequate funding for the defender system. The commission would exercise general supervisory authority over the entire system, but would have no control over the conduct of individual lawyers or individual cases.

The only requirement for the office of State Defender is membership in the New Mexico bar for at least three years. The Defender would be a full-time employee and would serve at the pleasure of the commission. He would establish a District Defender office in each of the state's thirteen judicial districts along the lines proposed in Appendix B. He would have sole responsibility for hiring and firing of district defenders and other personnel. The State Defender would exercise operational control and supervision over the entire system through the District Defenders.

Administrative Structure. One Administrative Office in the State Capitol staffed

19/ We considered appointment of the State Defender for a term certain, subject only to removal by the commission for cause, but rejected this approach on the ground that it would repose an unwarranted amount of autonomy in the Defender.

20/ We discussed the possible mergers of the Second and Thirteenth Districts (Bernalillo, Sandoval and Valencia Counties) and the First and Fourth Districts (Rio Arriba, Los Alamos, Santa Fe, Mora, San Miguel and Guadalupe Counties), but concluded that the distances involved and caseload statistics are such that a regional office in each district is warranted.

21/ We believe strongly that the defender should have absolute discretion in the choice, employment and tenure of all personnel, legal and non-legal. Should some local input be thought necessary, however, it could be provided that selection of each of the district defenders be subject to ratification by the governing board, a majority of whose members are representatives of the judicial districts.
as follows:

(1) New Mexico State Defender at a salary of $25,000. This salary is comparable to salaries paid the Attorney General and the Federal Defender.

(2) Deputy State Defender. He would be responsible for heading an appellate division of three assistant defenders and for staff training. In consultation with district defenders, he would develop and implement an orientation and training program for newly hired assistants, and would prepare and disseminate to the district offices periodic training materials and bulletins. Salary $20,000.

(3) Chief, Inmate Counselling Division. He would develop and supervise an inmate counselling program at the state penitentiary located near Santa Fe. The inmate counselling would be done by law students from the University of New Mexico Law School. This unit would handle post-conviction litigation, parole revocation proceedings, and other legal services to inmates. (Regarding counsel at parole revocation proceedings, see Morrissey v. Brewer, 92 Sup. Ct. 2593 (1972)(concurring opinion of Justice Brennan). Salary $16,000.

(4) Chief Investigator. He would be responsible for training and administrative supervision of all investigators, and would coordinate allocation of investigative services among the districts. Salary $11,000.

(5) Chief of Paralegal Services. He would be responsible for training and administrative supervision of all paralegal personnel. In addition, he would act as

22/ Our plan calls for 11 paralegal aides distributed among the various district offices. We define a paralegal employee as a person without a law degree who is trained to perform tasks ordinarily done by lawyers, thus significantly increasing the
statewide advocate for rehabilitative programs and resources needed to provide long-range solutions for the problems of the state's offender and ex-offender population. Salary $10,000.

(6) Administrative Aide, who would be the chief administrative assistant to the Defender at a salary of $10,000.

Thirteen Regional Offices would be located in each of the state's judicial districts. Each district office will have at least one full-time defender assigned, together with appropriate investigative/clerical staff. Our staffing patterns are based on the following assumptions derived from Standards for the Criminal Defense (1972):

1. A full-time public defender lawyer can effectively handle during one year 150 felony cases, or 400 misdemeanor cases, or 200 juvenile court cases.

2. There should be one secretary for every two defender lawyers.

3. There should be one investigator for every three defender lawyers.

4. There should be at least one paralegal employee in each office.

Each district office in our plan is staffed to handle 100% of the indigent cases productively at low cost. Paralegal persons may be part-time college or law students, persons with or without college degrees, or ex-offenders. Experience in other states demonstrates that paralegal aides are an important component of a defender office. They can provide the information and resources needed to secure pre-trial release for clients, conduct interviews of clients and their families, coordinate job development efforts for accused persons and ex-offenders, and maintain liaison with community based rehabilitation programs. They can facilitate diversion from the criminal system for certain types of offenders such as those with mental health problems, narcotic addicts, and first offenders. They can prepare pre-sentence reports and rehabilitative programs for defenders' clients. See generally National Institute of Law Enforcement and Criminal Justice, Rehabilitative Services for the Criminal Defense (U.S.G.P.O. 1970).
we anticipate will call for counsel except the Second Judicial District. There we would have recommended staffing the office with 12 assistant defenders, but we of the private bar in the work of the defender. There are private lawyers and law students who are willing to continue to accept appointed cases, and we believe a sound plan should encourage a mixed system in this city, because there are benefits to the defender and the administration of justice to be realized by encouraging involvement of the private bar in appointed criminal defense work. To this end, the District Defender in the Second District will appoint, as special assistant public defenders on a per-case basis, selected members of the bar. These lawyers will differ from normal "assigned counsel" in that they will be assigned by the Defender and will have access to the investigative and supportive resources of the Defender's Office. These special assistant public defenders will be compensated by the State Defender from the line item provided for these services in the budget. In other districts the District Defender should have discretion to appoint private lawyers as needed on a case-by-case basis.

In addition, maximum involvement by law students will be encouraged. In the Second District, the Clinical Legal Education Program of the University of New Mexico Law School presently has the willingness and ability to assist the District Defender in the representation of from 400 to 600 misdemeanor cases per year.

\[23/\] Compare the federal Criminal Justice Act, 18 U.S.C., Section 3006A(a), which permits a federal district to set up a defender organization, but requires that any plan "shall include a provision for private attorneys."
(Obviously, this law student participation assumes adequate supervision, training and professional competence on the part of the student practitioners.)

District Defenders should receive at least $16,000 per year, and should have been admitted to practice for two years prior to appointment. Assistant Public Defenders should receive an average of $11,000. These are all full-time positions, and the actual amount paid will vary depending on the amount of previous experience. Investigators' salaries are set at $8,000 to compare with salaries paid to police investigators.

_Expense Items Commentary._ These items are estimates based on experience in other jurisdictions. Admittedly, they are rough and should be suitably staffed and refined before implementation of the program. Most are based on averages for 13 offices--obviously these are valid for estimation purposes only.

Also, no consideration is given to possible "in kind" contributions of, for example, office space by counties, municipalities or the state. Such would obviously reduce dollar needs.

_Capital Outlay Commentary._ Here again, these are estimates based on soft data and are of limited usefulness.

Two observations: (1) the equipment could probably be leased at 1 1/2% per month of its value instead of purchased--thus reducing cash needed first year. (2) These are non-recurring items. Realistically, the amount spent for capital outlay the first year would be required in the second year for salary adjustments, lapse factors and additional personnel needed for ever-increasing caseloads.