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Appellate Representation of Indigents in Indiana

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The right to counsel on appeal is necessarily a function of two elements. First is the right afforded by the Constitution and various statutes. Part I of this note will identify the background of that right, its development and limits under precepts of due process and equal protection, and the present status of that right in Indiana. Second, regardless of how extensive the legal right to appointed counsel may be, the realization of that right depends upon the efficacy of the method employed to provide legal services to indigent appellants.

Factors of importance to the appellant are the availability of counsel, the length of time necessary to perfect an appeal, and ultimately the effectiveness of such representation. An additional factor of importance to the state is the cost of providing legal counsel in appellate proceedings. This is important not only as an element of the state's budgeting program, but also as it affects the relationships of the state to local governments. Part II of this note analyzes these elements through the use of objective data relating to the success and cost of various methods of appointing counsel.

PART I. THE RIGHT TO COUNSEL ON APPEAL

The United States Supreme Court held in *Douglas v. California*[1] that the equal protection clause of the fourteenth amendment requires the appointment of counsel for indigents' appeals from state court convictions. In a more recent case, *Ross v. Moffitt*,[2] the Court limited its holding in *Douglas* to the facts of that case, thus requiring appointed counsel only on the first, direct appeal of right. While the Court's decision in *Moffitt* conforms to the practice previously dictated by most courts, Indiana statutes and court decisions rendered under pre-*Moffitt* conceptions of the requirements of equal protection provide a right to counsel in at least some subsequent appellate proceedings as well.

Although the legal basis of the most forthright assertion of an extensive right to counsel has been undercut by *Moffitt*, Indiana may still provide "supraconstitutional" rights to indigent defendants. Indeed, other Indiana court decisions and state policies arguably provide such benefits regardless of the United States Supreme Court's interpretation of the dictates of due process and equal protection.

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[1] 372 U.S. 353 (1963).

[2] —— U.S. ——, 94 S. Ct. 2437 (1974).

THE BACKGROUND OF THE RIGHT TO COUNSEL

The right to appointed counsel on appeal is logically, if not constitutionally, associated with the right to appointed counsel at trial. As such it is appropriate to view the right on appeal in light of the development of the right at trial.

Pre-19th century English law afforded a very limited right, created by the courts, to representation for criminal defendants.[3] A similar practice was followed in the Colonies.[4] While considerable discretion continues to exist in English trial judges,[5] the modern right to counsel in American trial courts is codified in both constitutions and statutes.

The sixth amendment is today the basis of an absolute right to appointed counsel at trial, yet this is somewhat puzzling considering the apparent lack of controversy which it generated between its proposition in 1789 and its ratification in 1791.[6] Several explanations have been given for this low-key acceptance of the amendment. One is that in the era surrounding the adoption of the amendment it was expected that developments in criminal process would generally be matters of state rather than federal law.[7] Several scholars and jurists, on the other hand, have concluded that the sixth amendment was specifically intended to provide an absolute right to *retain* counsel, with the right to appointed counsel for indigents only in capital cases—an interpretation that would not have been controversial in light of then existing common law.[8] While scholars had occasion to comment on the meaning of the sixth amendment, until the early twentieth century courts did not.[9]

Modern History of the Right to Counsel at Trial: Due Process, the Sixth Amendment, and the Supreme Court

In 1932 the shocking sequence of events known as the *Scottsboro Cases* (*Powell v. Alabama*)[10] forced the Supreme Court to confront

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[3] *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 1–26 (1955).

[4] *Id.* at 25.

[5] *Id.* at 26.

[6] *Id.* at 27.

[7] H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 464–75 (1937).

[8] BEANEY, *supra* note 3, at 28; 2 T. COOLEY, COMMENTARIES ON THE CONSTITUTION 551 (4th ed. 1873); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 599 (3d ed. 1858).

[9] Comment, *Right to Appointed Counsel at Collateral Attack Proceedings*, 19 U. MIAMI L. REV. 432, 436 (1965).

[10] 287 U.S. 45 (1932). Six black youths, all of whom were illiterate and residents of other states, were accused of raping two white girls following a racial disturbance on a train bound for Scottsboro, Alabama. There, the youths were apprehended and put to trial a few days later amid an atmosphere of hostile and excited public sentiment.

the issue of the right to counsel in state prosescutions. In *Powell* the Court did find a right to appointed counsel for the defendants, but it did so without relying on the sixth amendment.[11] Instead, the decision was founded upon a two-pronged analysis under the fourteenth amendment due process clause. First, Justice Sutherland reasoned:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The layman defendant] requires the guiding hand of counsel at every step in the proceedings against him.[12]

Second, the Court noted the widely accepted practice of appointing counsel by both state and federal courts (though in varying circumstances) as supporting the conclusion that such right was fundamental in nature.[13] Thus, by combining the necessity of counsel in such cases[14] with the fundamental nature of that right, due process alone may require the appointment of counsel at trial.

The potentially expansive concepts embodied in the statements above are limited, however, by reference to the specific facts of the case: "a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like . . . ."[15] These criteria might well not be met under less necessitous circumstances.

Six years later, in *Johnson v. Zerbst*,[16] the Supreme Court laid to rest the contention that the *Powell* criteria and the due process clause were necessary to establish a duty to appoint counsel in *federal* prosecutions. The sixth amendment, by itself,

> withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.[17]

While it is not surprising that the Court avoided reliance on due process (although it did cite *Powell*), it is significant that *Johnson* was a non-

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[11] The sixth amendment is mentioned, but not as a basis for asserting the right to counsel in this case. Rather, the Court considered the sixth amendment merely in rejecting the contention that since the right to counsel was expressly included in that amendment, it could not also be found to be an independent element of the due process clause of the fifth amendment, nor *ex vi termini* an element of fourteenth amendment protection. *Id.* at 66.

[12] *Id.* at 68–69.

[13] *Id.* at 73.

[14] The right to appointed counsel was described as "a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72.

[15] *Id.* at 71.

[16] 304 U.S. 458 (1938).

[17] *Id.* at 463 (footnote omitted).

capital case, that appointment was phrased as a condition precedent to the court's authority, and that an affirmitive duty was given to the trial judge to ascertain whether the defendant had properly waived his right.[18]

In *Betts v. Brady*,[19] the Supreme Court returned to the issue of appointment of counsel in state courts. The temptation to analogize sixth amendment guarantees with those of the fourteenth amendment due process clause was flatly rejected, as was the proposition that the former is incorporated in the latter.[20]

This case could have been distinguished from *Powell* in that here, defendant was accused of a noncapital offense. By ignoring that distinction, the Court indicated at least a possibility of expanding the right to appointed counsel. The Court did, however, reiterate the flexibility of the *Powell* standard by subjecting the indigent defendant's right to the test of "the totality of facts."[21] For the next twenty years state courts labored under that amorphous test, and the Supreme Court intervened frequently to assist in the emasculation of its own rule by finding a denial of due process in almost every case where the defendant did not have benefit of counsel.[22]

Toward the end of that twenty year period, in which the Supreme Court failed to produce a definitive opinion concerning appointment of counsel in state courts, the Court did venture to extend the holding of *Johnson v. Zerbst*. In *Johnson v. United States*,[23] the Court issued a one page per curiam opinion requiring federal courts of appeals to appoint counsel whenever the trial court judge certifies that a direct appeal is not taken in good faith, resulting in a refusal to appoint counsel on the appeal, and such certification is challenged. The only authority cited was *Johnson v. Zerbst*, and no elaboration of the Court's rationale was provided. The Court's silence may be explainable on the ground that appeals from district courts (including the right to appointed counsel) were governed by statute and court rules.[24] By merely stating its holding

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[18] *Id.* at 465.

[19] 316 U.S. 455 (1942).

[20] "The Sixth Amendment . . . applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment . . . ." *Id.* at 461–62 (footnotes omitted).

[21] *Id.* at 462.

[22] *See* Comment, *The Right to Appointed Counsel at Collateral Attack Proceedings*, 19 U. MIAMI L. REV. 432, 439–40 (1965). See especially *id.* at n.32, for a discussion of the liberality with which the Supreme Court found a denial of due process where the defendant did not have the benefit of counsel.

[23] 352 U.S. 565 (1957).

[24] 28 U.S.C. § 1915(b) (1970); FED. R. CRIM. P. 44:

If the defendant appears in court without counsel, the court shall advise

under *Johnson v. Zerbst*, however, it is said to have established

> not merely as a matter of policy but as a constitutional commandment—that an indigent must be furnished counsel in connection with his presentation of a direct appeal from a federal criminal conviction.[25]

In *Gideon v. Wainwright*,[26] the Court again confronted the issue of the right to counsel in state felony trials. The Court agreed with the assumption in *Betts v. Brady* that only those provisions of the Bill of Rights which are "fundamental and essential to a fair trial" are made obligatory upon the states by the fourteenth amendment.[27] Indeed, the only significant disagreement with *Betts* was the conclusion that the sixth amendment right to counsel is one of them.[28] It is not without some irony that in concluding the Court's opinion Justice Black, who dissented in *Betts*, labelled the *Betts* decision "an anachronism when handed down,"[29] and in so doing finally established an absolute right to representation by counsel in state criminal prosecutions.[30]

The United States Supreme Court and the Right to Counsel on Appeal

Due Process

Both the due process and equal protection clauses of the fourteenth amendment arguably require the appointment of counsel on appeal. The argument that the due process clause, by incorporating the sixth amendment right to counsel, requires appointment of counsel on appeal has received little support from judicial decisions. Rather, the United States Supreme Court has found that the sixth amendment requires counsel only at "critical stages" of the judicial process.[31] A "critical stage" has been found when either a defense may be irretrievably lost[32]

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him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

[25] Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 787 (1961).

[26] 372 U.S. 335 (1963).

[27] *Id.* at 342.

[28] *Id.*

[29] *Id.* at 346.

[30] In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court guaranteed this right to all whose liberty is at stake in a criminal trial. As such, it perfected the holding of *Gideon* by removing the felony/misdemeanor distinction, but it did not alter its rationale.

[31] Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961).

[32] United States v. Wade, 388 U.S. 218 (1967).

or when a confrontation jeopardizes a defendant's rights.[33]

While it is logical to suggest that subsequent appeals and collateral attacks are "critical stages," the Court's decisions indicate that the "critical stage" guarantee is concerned with pretrial rather than post-trial events.[34] Indeed, Mr. Justice Rehnquist, writing for the majority in *Moffitt*, dismissed the due process contentions by stating that since states need not provide any appeals at all, issues of fairness between the state and the individual, such as those involved initially at trial where the defendant is "haled into court," do not arise on appeal since such actions are initiated by the defendant.[35]

This cavalier dismissal of due process claims may have been employed to avoid the unbending logic of Justice Harlan's dissent in *Douglas*: once due process considerations are acknowledged, the requisites of fair procedure will not be exhausted at any particular stage of the proceedings.[36] Given the Court's disposition to deny any further extension of *Douglas*, equal protection provides a more palatable ground for allowing states to refuse counsel to indigents since (as all persons are intuitively aware) "equal protection" must stop some point short of "equalizing persons."[37] Much harder to accept would be the proposition that at some point in an individual's relation with the state, fairness becomes irrelevant, and wealth or physical power becomes determinative. Regardless of the Court's reason for choosing this approach, the result was that Moffitt's claims were deemed more appropri-

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[33] Coleman v. Alabama, 399 U.S. 1 (1970).

[34] Commentators have frequently proposed that the *Gideon* right to counsel should extend to post-trial proceedings. Day, *Coming: The Right to Have Assistance of Counsel at All Appellate Stages*, 52 A.B.A.J. 135, 136 (1966). *Cf.* Jacob & Sharma, *Justice After Trial: Prisoner's Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 524 (1970). Jacob and Sharma suggest that this argument is particularly strong regarding a writ of coram nobis (and those writs which it replaces or those which replace it) but it not so strong regarding habeas corpus, which is more likely to be viewed as a new suit. *Id.*

The absence among the Supreme Court cases cited at notes 31–35 herein of a finding of a "critical stage" at any post-trial event implied, even before *Moffitt*, that post-conviction stages were not "critical." *But see* United States *ex rel.* Pennington v. Pate, 409 F.2d 757, 761 (7th Cir. 1969) (Kerner, J., dissenting); and Petition of Croteau, 353 Mass. 736, 234 N.E.2d 737 (1968), holding that a proceeding to review sentence constitutes a "critical stage" necessitating appointment of counsel.

[35] —— U.S. ——, 94 S. Ct. at 2444. This analysis, while seductive in its simplicity, is contrary to practical experience. Indeed, it had earlier been rejected in cases involving the right to receipt of a free transcript, although not clearly on due process grounds. *See* text accompanying notes 41–43 *infra.*

[36] 372 U.S. at 366 (Harlan, J., dissenting).

[37] Limitations to rights otherwise subject to "logical extremes" have long been viewed as necessary and inevitable. *See* Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908). A more recent example is San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

ately considered under an equal protection analysis.[38]

The Development of the Equal Protection Rationale

The alternate basis affording protection to indigent defendants, equal protection, had its genesis in Justice Black's 1942 dissent in *Betts v. Brady*. Referring to criminal process in general, he stated that "[a] practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers merely because of their poverty."[39] Calling for universal appointment of counsel, he concluded: "Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."[40]

It was not until 1956, however, that equal protection came to the forefront in *Griffin v. Illinois*.[41] There, the issue was whether or not the state must provide a transcript without charge to an indigent who wished to appeal his conviction. The Court rejected the state's contention that since states are not constitutionally compelled to provide appeals, they are not responsible for removing economic barriers beyond the trial level. Rather, in looking at the essential nature of an appeal (as evidenced by the frequency of reversal) and noting that review had become an "integral part" of the criminal justice system in Illinois, the Court held that both equal protection and due process protect persons like the petitioner from invidious discrimination at all stages of the proceedings.[42] And, since "the ability to pay . . . bears no rational relationship to a defendant's guilt or innocence," effectively barring appeal on account of indigency constitutes invidious discrimination.[43]

The primary basis of the *Griffin* decision is reflected in Justice Black's now famous phrase, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[44] Three elements of *Griffin* were of particular importance to later decisions. For the first time a majority of the Supreme Court supported application of an equal protection rationale in cases involving indigent defendants. Second, while the specific facts of the case involved only the denial of a transcript, the Court's language was broad and included no attempt to limit its application. Third, there was little credence given

[38] —— U.S. at ——, 94 S. Ct. at 2444.
[39] 316 U.S. at 476 (Black, J., dissenting).
[40] *Id.* at 477.
[41] 351 U.S. 12 (1956).
[42] *Id.* at 18.
[43] *Id.* at 17–18.
[44] Id. at 19.

to the distinction between trial and appeal. Rather, the Court focused on the integrated system "for finally adjudicating the guilt or innocence of a defendant."[45]

A more extensive equal protection rationale than that which was apparent in *Griffin* was evinced in *Burns v. Ohio*,[46] where the Supreme Court held that the stage of judicial proceedings is irrelevant to an equal protection claim. There, the Court struck down a $20 filing fee required for leave to appeal to the Ohio Supreme Court. As opposed to *Griffin*, petitioner in *Burns* already had the benefit of one direct appeal of right. The state raised this distinction, arguing that since the appeal involved was discretionary the *Griffin* duty should not apply. Chief Justice Warren, writing for the Court, stated that this argument missed "the crucial significance of *Griffin*," that whereas a nonindigent could get a review on the merits of his application, an indigent could not.[47] This test amounts to a *but-for-indigence* test of equal protection; "[t]here is no rational basis for assuming that indigents' motions . . . will be less meritorious than those of other defendants."[48]

The expansive potential of the equal protection rationale was made clear in *Burns* and in *Smith v. Bennett*.[49] In *Burns*, the Court recognized that relief to the appellant need not be limited to those instances where denial of relief would constitute an absolute bar to his appeal.[50]

In *Smith* the argument that post-conviction remedies are "civil" in nature, and thus not subject to the more stringent standards of criminal process, was rejected as a bar to the application of the but-for-indigence standard. The Court, invalidating a statutory filing fee required with applications for post-conviction relief, refused to "quibble" over labeling

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[45] *Id.* at 18. Subsequent cases decided under *Griffin* reinforced and extended that decision and emphasized that a rich/poor dichotomy in criminal process is not to be tolerated. *Cf.* Eskridge v. Washington St. Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) (a procedure whereby an indigent's right to a free transcript was conditioned upon the trial judge's conclusion that there was reversible error was deemed not "an adequate substitute for the right to full appellate review available" to nonindigents).

[46] 360 U.S. 252 (1959).

[47] *Id.* at 257.

[48] *Id.* at 257–58.

[49] 365 U.S. 708 (1961).

[50] The opinion in *Burns* contrasted the absolute barrier to appeal posed by the filing fee in that case to the need found in *Griffin*, where defendant could at least raise some errors on appeal without a transcript. 360 U.S. at 258. This contrast implicitly recognized that *Griffin* does not require an *absolute* need to be shown before relief will be granted. By pointing out this contrast, *Burns* further expanded the potential of the equal protection rationale for aiding the indigent defendant.

While *Burns* and *Griffin* were not cited on this point, these cases were clearly rejected in the *Moffitt* opinion: "The question is not one of absolutes, but one of degrees." —— U.S. at ——, 94 S. Ct. at 2445.

collateral attacks as "civil" or "criminal."[51]

> Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each.[52]

These and later cases[53] confirmed the virtually limitless rationale which was emerging; states must not prohibit indigent defendants from taking appeals which nonindigents could pursue on account of their financial abilities.

When the Supreme Court finally faced the issue of right to counsel on appeal in state courts, it accepted the initial basis of *Griffin.* It declined, however, to employ the expansive potential of the rationale which had developed in the transcript and filing fee cases. In *Douglas v. California,*[54] defendant's request for counsel on direct appeal had been denied because, after having gone through the record, the state district court of appeal concluded that no good would be served by appointing counsel. In invoking *Griffin,* Justice Douglas, speaking for the majority, dispelled concern over the difference between the two cases (the refusal of transcript in *Griffin,* and appointment of counsel on direct appeal here): "In either case the evil is the same: discrimination against the indigent."[55]

In discussing the need for counsel on appeal, the opinion did not contend that such assistance is an absolute necessity;[56] rather, it focused on the qualitative aspect of an appeal with, as opposed to without, counsel.[57] The difference was held to amount to an impermissible discrimination since it was not based upon a distinction "between possibly good and obviously bad cases," but merely upon the wealth of the de-

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[51] 365 U.S. at 712.

[52] *Id.* at 714.

[53] In Lane v. Brown, 372 U.S. 477 (1963), as a consequence of the public defender's determination that defendant's appeal of the denial of his writ of error coram nobis would be without merit, the defendant was not entitled to a free transcript, and thus further appeal was foreclosed. In Draper v. Washington, 372 U.S. 487 (1963), the availability of transcript and stenographic services was conditioned upon a finding by the trial judge that appeal was merited. In both cases, had the defendant had financial means of his own, he could have prosecuted the appeal. The Supreme Court found both these schemes infirm because they imposed obstacles (the state officer's discretion) to indigent appeals not presented to nonindigents.

[54] 372 U.S. 353 (1963). *Douglas* was handed down the same day as Gideon v. Wainwright, 372 U.S. 335 (1963). The conspicuous absence of any significant reference to *Gideon* underscores the Court's separation of the sixth amendment rights at and before trial from post-trial rights founded upon equal protection.

[55] 372 U.S. at 355.

[56] This exemplifies the importance of the *Griffin* standard of need, discussed in note 50 *supra.*

[57] 372 U.S. at 357–58.

fendant.[58] The result is that as between the rich and the poor, "[t]here is lacking that equality demanded by the Fourteenth Amendment."[59]

The Court found a right to counsel in *Douglas,* but specifically limited its opinion to the issue presented by the facts: that of appointment of counsel on "the first appeal, granted as a matter of right . . . from a criminal conviction."[60] While this holding is a logical result of the *Griffin* rationale, there was no compelling reason to limit its application to that stage.

Many argue that assistance of counsel at subsequent stages of appellate review is just as necessary as it is at trial and on first appeal.[61] The limit was apparently chosen on the questionable belief (or fear) that subsequent appeals and collateral attacks by indigents are more likely to be frivolous than are first appeals granted as a matter of right,[62] and that the administrative burden of subsequent appeals with counsel would be excessive.[63]

Prior to its decision in *Moffitt,* the Supreme Court had not expressly imposed any requirement on states to appoint counsel beyond the first appeal of right. It had, however, spoken to the role and duty of counsel once appointed. In *Anders v. California,*[64] the indigent's right to "retain" counsel once appointed was solidified by requiring the court,

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[58] *Id.* at 357.

[59] *Id.*

[60] *Id.* at 356.

[61] Indeed, Justice Harlan, dissenting in *Douglas,* could find no basis for limiting the dictates of fair procedure to one appellate review. 372 U.S. at 356. *See* Jacob & Sharma, *supra* note 34, at 518–23. *See generally* Note, *Right to Counsel on All Appeals,* 11 HOUS. L. REV. 725 (1974); Comment, *Right to Counsel for Indigents Under the Nebraska Post Conviction Act,* 47 NEB. L. REV. 722 (1968); Note, *The Right to Appointed Counsel at Collateral Attack Proceedings,* 19 U. MIAMI L. REV. 432 (1965).

[62] The fear of frivolous appeals is partially assuaged by studies claiming that access to the legal resources may actually reduce the volume of frivolous appeals. *See* Jacob & Sharma, *supra* note 34, at 520–21.

[63] Indeed, Justice Clark's dissent in *Douglas* calls even the limited requirement of appointing counsel on direct appeals an "intolerable burden." Comparing this requirement to the Supreme Court's own very limited practice of appointing counsel, he suggested: "People who live in glass houses had best not throw stones." 372 U.S. at 359–60.

Several eloquent, if unscientific, responses have been offered to allay such fears:

> First, experience has shown that the availability of counsel has not cut off all pleas of guilty before trial. There seems no compelling reason why the guaranteed availability of counsel will result in appeals in every case *after* conviction.
>
> Second, there are few values a civilized society can put above giving a person charged with a crime full process before it deprives him of his liberty or life. If expenditures are required to procure the greatest possible insurance against the abortion of justice, money could hardly be better spent.

Day, *supra* note 34, at 138 (emphasis in original).

[64] 386 U.S. 738 (1967).

not counsel, to determine whether the appeal is so frivolous as to justify withdrawal.[65]

The Supreme Court was urged to address the question reserved in *Douglas*, whether appointment of counsel is necessary beyond the circumstances of that case, by the decision of the Court of Appeals for the Fourth Circuit in *Moffitt*.[66] In an opinion by Chief Judge Haynsworth, that court concluded that "the differences between appeals as of right and discretionary appeals do not warrant differentiation in constitutional doctrine."[67] Accordingly, whether *Douglas* rests upon equal protection grounds as indicated by the majority, or upon due process as argued in Justice Harlan's dissent,

> inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas*. . . . The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals.[68]

This holding conflicted with decisions of two other courts of appeals,[69] thereby setting the stage for the Supreme Court's grant of certiorari.[70]

As discussed above,[71] the Court dealt with petitioners' due process arguments in an abbreviated fashion, elaborating more fully in terms of the limits of equal protection. The but-for-indigence equal protection rationale emerging from the transcript and filing fee cases was not viewed as constitutionally required in the right to counsel area. That rationale emphasizes equalizing,[72] and thus raises questions as to the

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[65] *Id.* at 744. While *Anders* does not foreclose the possibility of withdrawal by appointed counsel, it does require him to support the appeal to the best of his ability. The procedure outlined allows withdrawal only if counsel finds the appeal wholly frivolous, and only after the preparation of a brief outlining any facts or questions which might arguably support the appeal. For a full discussion of *Anders* and a critique of Indiana's response to it, see Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals*, 49 IND. L.J. 740 (1974).

[66] Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, —— U.S. ——, 94 S. Ct. 2437 (1974).

[67] *Id.* at 654.

[68] *Id.* at 655.

[69] United States *ex rel.* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Peters v. Cox, 341 F.2d 575 (10th Cir.), *cert. denied*, 382 U.S. 863 (1965). *Peters* simply stated in a *per curiam* opinion that *Douglas* did not extend to discretionary appeals. The court in *Pennington*, however, thoroughly discussed its limitation of the right to counsel. In support of the limit chosen, the opinion cited the Supreme Court's practice of not appointing counsel for all indigents in petitioning for writs of certiorari, and the institutional burden such a requirement would place on states. 409 F.2d at 760.

[70] —— U.S. ——, 94 S. Ct. 864 (1974).

[71] See text accompanying notes 35–38 *supra*.

[72] The term "equalizing" as used here means duplicating resources or opportunities

"limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of [the Supreme] Court."[73]

The Court clearly chose to draw the barrier to that analysis at the point of the first appeal of right. Left unclear, however, is what criteria dictated its placement. The answer to that question is important because at that point in the relationship between the state and the indigent defendant, the state's duty changes from one of providing the indigent with an *equal* opportunity, to one assuring him "an *adequate* opportunity to present his claims fairly in the context of the State's appellate process."[74]

The sole criterion identified by Justice Rehnquist's opinion is whether, on the one hand, the indigent is only "somewhat handicapped" in prosecuting his appeal in comparison with a wealthy defendant, or whether, on the other, he is " 'entirely cut off from any appeal at all,' by virtue of his indigency . . . ."[75] As such, a standard of absolute necessity, rejected in prior Supreme Court decisions,[76] constitutes the only guide in *Moffitt*.

How then can one explain the absolute right to counsel in *Douglas*? There, the defendant was not barred from proceeding pro se or from obtaining a record of the earlier trial. Nor was it contended that defendant was totally incapable of identifying and raising some issues from his trial. Rather, the constitutional infirmity was that with the peculiar skills and guidance of counsel the wealthy defendant could obtain a "meaningful appeal" whereas the indigent, on his own, would likely not.[77] Such a difference, like that of preparing *discretionary* appeals with as opposed to without counsel, "is not one of absolutes, but one of degrees."[78] While admitting the "arcane" nature of the legal skills peculiar to preparing petitions for discretionary review, the opinion distinguishes the relative severity of Moffitt's handicap from that of Douglas on the grounds that Moffitt had already had the benefit of counsel in a prior direct appeal whereas defendant in *Douglas* had not.[79] This logic could as easily be applied to earlier stages as well;

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within a crude scheme of comparison, *e.g.*, a transcript versus no transcript at all, or representation by competent counsel versus no attorney, but not necessarily representation by the best counsel that anyone could hire.

[73] —— U.S. at ——, 94 S. Ct. at 2444.

[74] *Id.* at ——, 94 S. Ct. at 2447 (emphasis added).

[75] *Id.* at ——, 94 S. Ct. at 2445–46.

[76] *See* note 50 *supra* & text accompanying.

[77] 372 U.S. at 358.

[78] —— U.S. at ——, 94 S. Ct. at 2445.

[79] *Id.* at ——, 94 S. Ct. at 2446–47.

having had the benefit of counsel who identified and shaped the issues at the trial, Douglas' relative handicap in perfecting his own appeal is less than that faced by a defendant who was not represented by counsel at trial.

If the indigent defendant's rights beyond the first appeal are not to be viewed in relation to those of other classes of defendants (non-indigents), but with a view towards assuring an adequate opportunity to be heard, then what is really at issue is the fairness of the state's manner of dealing with the individual. This, however, best describes the essence of due process rather than equal protection.[80] This being so, *Moffitt*'s constitutional prescription is that equal protection requires that an indigent criminal defendant be accorded benefits substantially the same as other defendants through the first, direct appeal of right. Thereafter, due process-like standards of fairness apply to dealings between the individual and the state.

The ramifications of the constitutional analysis used in *Moffitt* for other areas may be clouded, yet the implications for the right to counsel on appeal are clear. The but-for-indigence equal protection standard is not constitutionally required beyond the first, direct appeal of right. States, of course, remain free to extend the indigent's rights to appointment and retention of counsel beyond the express requirements of *Douglas* and *Anders*. Through more rigorous interpretations of equal protection and due process combined with a refusal to allow appointed counsel to withdraw, courts in Indiana have exceeded the minimum requirements dictated by those cases.

The Right to Counsel on Appeal in Indiana

The right to assistance of counsel in criminal cases in Indiana has existed as long as, and is as extensive as, that afforded in any other state. As long ago as 1854, in *Webb v. Baird*,[81] the Indiana Supreme Court utilized an equal protection-type rationale to find a guarantee of appointed counsel at trial:

> It is not to be thought of, in a civilized community, for a moment,

[80] The *Moffitt* opinion itself contains the following description of the significance of these two concepts:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal Protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

—— U.S. at ——, 94 S. Ct. at 2443.

[81] 6 Ind. 13 (1854).

> that any citizen put in jeopardy of life or liberty, should be debarred of counsel *because he was too poor* to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.[82]

This right is embodied in the Indiana Constitution[83] and, in theory if not in practice, extends to *all* criminal prosecutions regardless of the characterization of the offense or the means by which it is punishable.[84] It has also been held that the state constitution guarantees an absolute right of appeal stemming from the basic grant of power to the Indiana Supreme Court.[85] In 1941, the state supreme court declared that to withhold counsel would, as a practical matter, withhold that absolute right to review.[86] Predating United States Supreme Court rulings to the same effect, the Indiana court stated that the same reasoning requiring appointment of counsel at trial "supports the view that the defendant is entitled to have counsel to advise him and represent him on appeal."[87]

The independent development of due process guarantees evinced by these several Indiana cases had relatively little impact, however. Rather, following its emergence in *Griffin*, the equal protection rationale provided the main avenue for developing indigents' rights on appeal both in decisions of the United States Supreme Court and in the opinions of courts in Indiana.

In *Willoughby v. State*,[88] the Indiana Supreme Court sustained trial counsel and the trial court in refusing representation for defendant on appeal where counsel had concluded there was no meritorious cause. In so doing the court based its decision on the questionable logic that a convicted defendant who had money would not pursue an appeal where his counsel had given similar advice.[89] Thus, Willoughby's indigence

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[82] *Id.* at 18 (emphasis added).

[83] "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ." IND. CONST. art. 1, § 13.

[84] Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951). *Cf.* Argersinger v. Hamlin, 407 U.S. 25 (1972), discussed at note 30 *supra*, where, for the first time, it was recognized that the sixth amendment extends to misdemeanors, but only where conviction may result in imprisonment.

[85] Warren v. Indiana Tel. Co., 217 Ind. 93, 26 N.E.2d 399 (1940).

[86] State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941).

[87] *Id.* at 577, 34 N.E.2d at 131. This case, decided three years after *Johnson v. Zerbst* (establishing the federal court rule requiring appointment of counsel at trial), established the state rule on appeal well before *Zerbst* was applied to federal court appeals in *Johnson v. United States*. *See* text accompanying notes 16–24 *supra*.

[88] 242 Ind. 183, 177 N.E.2d 465 (1965).

[89] *Id.* at 197, 177 N.E.2d at 472.

was not found to trigger a denial of equal protection. Why, the Court reasoned, should the state bear the cost of an appeal merely because of the person's indigency?[90]

Concurrent with its decision in *Douglas*, the United States Supreme Court, in *Lane v. Brown*,[91] struck down the Indiana practice whereby the indigent's right to a transcript (for use in seeking post-conviction relief) hinged upon the public defender's discretionary finding of merit. Because lack of a transcript created a substantial barrier to the indigent's ability to appeal and because nonindigents were not subject to such a discretionary finding of merit, the practice constituted a denial of equal protection.[92] Following prior transcript cases, the Court spoke narrowly to the issue of the petitioner's inability to pursue appeal for lack of a transcript, but did not mention the right to counsel[93]

In *Frazier v. Lane*,[94] a federal district court reviewed the Indiana practice of appointing counsel under former Indiana Supreme Court Rule 2-40A,[95] which had been adopted in 1963 in response to *Lane v. Brown*. The only difference in the revised rule was that the Indiana Supreme Court was allowed to review the state public defender's declination to continue to represent the petitioner.[96] This amounted to a screening procedure in which the indigent must make a preliminary showing of merit to the supreme court rather than to the state public defender as a condition precedent to having counsel appointed.

In establishing a right of at least initial representation of indigents in subsequent appeals under the Indiana public defender system, the

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[90] *Id.*; *accord*, Brown v. State, 241 Ind. 298, 171 N.E.2d 825 (1961), where the Indiana Supreme Court held that the state public defender's decision not to file a belated appeal if he concluded there was no merit did not constitute a denial of equal protection.

[91] 372 U.S. 477 (1963).

[92] *Id.* at 485.

[93] *Id.* at 484.

[94] 282 F. Supp. 240 (N.D. Ind. 1968).

[95] 243 Ind. xxxix (1963). This rule has since been replaced by *Post-Conviction Remedy Rule 1*. IND. ANN. STAT. P.C. 1 (Code ed. Supp. 1974).

[96] An example of the operation of this rule was seen in State *ex rel.* Henderson v. Boone Cir. Ct., 246 Ind. 207, 204 N.E.2d 346 (1965), where although the public defender's refusal was upheld, the court did find it appropriate to scrutinize the contention that the appeal was based on no merit in order to ensure that such decision was not arbitrary. *Id.* at 212, 204 N.E.2d at 349. This case might have come out differently had petitioner presented a stronger argument. The petitioner's equal protection argument rested on varying treatment accorded different indigent petitioners, *id.* at 212, 204 N.E.2d at 348, rather than upon the contrast between the availability of appeal with counsel to the prisoner with money as opposed to the lack of such opportunity facing the indigent. In raising the issue of discrimination *among* indigents, petitioner apparently failed to note the issue which was determinative in *Griffin* and *Douglas*—discrimination *against* the indigent.

Frazier court cited its previous suggestion in *Brown v. Lane*[97]

> that a screening procedure by which an indigent defendant had to make a preliminary showing of merit before he could secure either counsel or a transcript violated that person's right to equal protection of the law, once it was shown that the non-indigent had full access to the appellate processes without having to make such a showing.[98]

Although the lower court's holding in *Brown v. Lane* had been vacated by the Supreme Court's determination of the same case,[99] *Frazier* said that the opinion had been affirmed "in essence."[100]

Then the *Frazier* court cited *Douglas* as strongly suggesting

> that *any* discriminatory screening procedure requiring a preliminary showing of merit before a collateral appeal may be enjoyed, short of that procedure suggested in *Anders* v. *State of California* . . . is constitutionally deficient.[101]

The court also discussed the possibility that the case may have come out differently had the state public defender been "in the first instance vested with authority to act *as an advocate*" rather than as an outside examiner determining preliminary questions of merit.[102] The court focused on the important distinction between the right to have counsel appointed and the right to "retain" such counsel once appointed. If counsel had been acting as an advocate, his withdrawal might have been permissible under *Anders*.[103]

The decision in *Frazier*, by requiring at least initial representation for all petitioners in order to take advantage of the system of discretionary review available to nonindigents, extended beyond the requirements suggested by the facts in *Douglas* and more recently made clear in *Moffitt*. Indeed, the *Frazier* utilization of the but-for-indigence equal protection rationale approaches, in the right to counsel area, the logical conclusion of the theme of the transcript and filing fee cases. But even *Frazier*, by recognizing the *Anders* limitation to the defendant's right to retain counsel once appointed, tolerates different treatment of indigents

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[97] 196 F. Supp. 484 (N.D. Ind. 1961), *aff'd*, 302 F.2d 537 (7th Cir. 1962), *vacated on other grounds*, 372 U.S. 477 (1963).

[98] 282 F. Supp. at 243–44.

[99] 372 U.S. at 485.

[100] 282 F. Supp. at 242. The Supreme Court, after reviewing the case's lower court history said, "We agree that the Indiana procedure at issue in this case falls short of the requirements of the Fourteenth Amendment of the United States Constitution." 372 U.S. at 478.

[101] 282 F. Supp. at 244 (emphasis added).

[102] *Id.* at 245 (emphasis in original).

[103] *See* text accompanying notes 64–65 *supra*.

in counsel cases than that which was allowed in the transcript and fee cases.[104]

From the indigent's point of view that basic difference was minimized, if not eliminated, by the Indiana Court of Appeals decision in *Dixon v. State*[105] which rejected the standard for withdrawal of counsel suggested by the United States Supreme Court in *Anders v. California.*[106] *Anders* shifted the responsibility to the reviewing court to decide whether or not counsel, believing the appeal wholly frivolous, should be allowed to withdraw after submitting a brief in support of any possible contentions in petitioner's favor. As was noted by the court in *Dixon*, the very fact of counsel's desire to withdraw (with supporting reasons outlined in her brief) reflects adversely upon a petitioner's case.[107]

The *Dixon* court adopted the view of the Missouri Supreme Court, as expressed in *State v. Gates*,[108] placing an absolute duty on appellate counsel

> to prepare and submit to the appellate court a brief defining legal principles upon which claims of error are based, and designating and interpreting relevant portions of the transcript of the trial.[109]

In deciding that counsel should not be allowed to withdraw, the Missouri court reasoned that the attorney is most helpful to both his client and the court if he retains the role of an advocate.[110] Unlike the Missouri court, however, *Dixon* extended this standard to appointed counsel on post-conviction remedies as well as on direct appeals.[111] Reaching the same result on an alternative ground, the court stated that even without

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[104] Such tolerance is due to the inherent difference between transcript and counsel. That difference is that once a transcript is supplied there is no additional cost or marginal consumption of resources involved in its continued retention or utilization, *i.e.*, transcripts presumably have no economic rent. The retention and consumption of additional units of defense and appellate legal services, however, do entail additional costs, whether in the form of larger bills to appointed counsel or opportunity costs of the public defender (and ultimately additional costs of staff expansion).

There is, of course, the possibility of maintaining a private defender system with limits to compensation (which in fact now exists), or lowering the maximums which are currently in effect. The outcome of taking the latter approach, in terms of both the reaction of the private bar and the effect on the quality of services provided, would be predictably negative. Even viewed independently, that seems a questionable goal for judicial or legislative policy making.

[105] —— Ind. App. ——, 284 N.E.2d 102 (1972).

[106] *See* notes 64–65 *supra.*

[107] —— Ind. App. at ——, 284 N.E.2d at 103.

[108] 466 S.W.2d 681 (Mo. 1971).

[109] —— Ind. App. at ——, 284 N.E.2d at 105.

[110] 466 S.W.2d at 683.

[111] —— Ind. App. at ——, 284 N.E.2d at 106.

rejecting *Anders*, Post-Conviction Remedy Rule 1[112] should be interpreted as mandatory and as not granting discretion to the public defender to decide whether or not to continue to provide representation.[113]

By either holding, the indigent is benefited in that his right to "retain" counsel once appointed is absolute. This element, combined with the extensive grant of the right to counsel provided by the Indiana cases discussed previously in this section, would afford the indigent defendant in Indiana criminal cases with the most secure opportunity to enjoy equal protection under the law as exists in any jurisdiction.

One factor, however, bars the recognition of an absolute right to counsel in *all* appeals. The Supreme Court's effective rejection in *Ross v. Moffitt* of the but-for-indigence equal protection standard undercuts the reasoning of the district court in *Frazier v. Lane*. Although *Frazier* dealt with a post-conviction action, the adoption of a but-for-indigence standard would also dictate the appointment of counsel for preparation of requests for transfer of adverse decisions of the Indiana Court of Appeals to the Indiana Supreme Court.[114] Nevertheless, a strong policy argument lies for providing assistance on such second direct appeals as well.

There is no doubt as to the constitutional right to counsel at trial and upon the first appeal of right. Indiana, however, has chosen additionally to provide representation to indigent inmates seeking post-conviction remedies.[115] By virtue of the obligatory assignment of the public defender and the duty of such counsel not to withdraw, indigents enjoy an absolute right to counsel in those discretionary appeals. Appointment of counsel in such cases, which are distinctly separate civil actions, represents a more radical extention of the basic right to counsel than would the granting of counsel on direct appeals to the state supreme court, such appeals being part and parcel of the system for finally adjudicating the defendant's guilt or innocence. It is difficult to imagine a state policy which requires withholding assistance in the

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[112] IND. ANN. STAT. P.C. 1 (Code ed. Supp. 1974).

[113] —— Ind. App. at ——, 284 N.E.2d at 107.

[114] In United States *ex rel.* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), the Court of Appeals for the Seventh Circuit specifically denied appellant's claim of right to counsel on appeal to the Illinois Supreme Court. The court could have distinguished *Frazier* as a post-conviction action. Instead, the decision made no reference to *Frazier*, leaving open the validity of that case.

[115] IND. CODE § 33-1-7-2 (1971), IND. ANN. STAT. § 13-1402 (1956 Repl.) provides:

> It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired.

lesser instance while providing it in the more extreme. This is especially so where the indigent's claims might be more quickly and economically resolved through a final direct appeal than through a subsequent collateral proceeding.[116]

CONCLUSION

The United States Supreme Court's decision in *Ross v. Moffitt*, by rejecting the but-for-indigence standard of equal protection in the right to counsel on appeal area, has drawn the line for equating indigents' opportunities to those of nonindigents at the first, direct appeal of right. Through its legislative and judicial policies, Indiana has long afforded counsel in some discretionary appeals as well. An extension of the right to counsel to appeals to the Indiana Supreme Court would transform Indiana's almost complete system of benefits to one of an absolute right to counsel. Such action would bring into full realization the United States Supreme Court's earlier praise: "In the administration of its criminal law, Indiana seems to have long pursued a conspicuously enlightened policy in the quest for equal justice to the destitute . . . ."[117]

SCOTT T. KRAGIE

[116] Some unnecessary delays and expenses could be averted by resolving issues on direct appeal which might otherwise be presented in the form of collateral attack after incarceration has begun.

[117] Lane v. Brown, 372 U.S. 477, 478 (1963).

PART II. METHODS OF PROVIDING REPRESENTATION

DEFENDER SYSTEMS

Appointed Counsel and Local Public Defender Systems

In Indiana, representation for indigents taking direct appeals from criminal convictions is provided by court-appointed counsel or local public defenders. No legislation mandates a uniform method of providing such representation. Frequently, the attorney representing the indigent criminal defendant at the trial level, however selected, will also represent the defendant on appeal. As the method of appointing counsel at the trial level often determines, in effect, who will represent the defendant on appeal, consideration must be given to the methods used to provide trial level representation for indigent criminal defendants.

Four separate and largely unrelated statutes govern the appointment of counsel to defend indigents accused of the commission of a

crime. The applicability of two of these statutes is determined by county population. The first is directed to counties at least 400,000 in population having a separate criminal court.[1] In these counties the judge of the criminal court is authorized to appoint one or more attorneys to serve as public defenders to represent any poor person who is accused of committing a crime and who does not have sufficient means to employ an attorney.[2] The second statute applies to counties having a population between 100,000 and 175,000.[3] In these counties the judge of the circuit court is authorized to appoint a public defender to represent an accused indigent.[4]

There are no comparable statutes which apply only to those counties having populations between 175,000 and 400,000 or counties having populations less than 100,000. A third statute,[5] however, gives the judge of any court having criminal jurisdiction, except in those counties with a population of 400,000 or more, the power to contract with any attorney or group of attorneys to provide legal counsel for all or some of the indigent persons charged with the commission of a crime who are without sufficient means to employ an attorney.[6]

These three discretionary statutes are means by which courts may comply with the requirement of providing counsel for indigent defendants. For the purposes of this study, any attorney appointed by the court under any of these three statutes is defined as a public defender. In practice, the county public defender systems range from long-established programs with full-time staffs to recently created programs in which a local attorney, under contract with the court, serves as public defender on a part-time basis. At the time of this study, there were public defender offices operating in 17 counties.

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[1] IND. CODE § 33-9-6-1 (1971), IND. ANN. STAT. § 4-5716 (1968 Repl.).

[2] *Id.* Marion and Lake Counties have established public defender systems under this statute.

[3] IND. CODE § 35-11-1-1 (1971), IND. ANN. STAT. § 9-3501 (Supp. 1974).

[4] *Id.* Seven counties fall within these population parameters: Delaware, Elkhart, LaPorte, Madison, Tippecanoe, Vanderburgh and Vigo. At the time of this study, only LaPorte and Tippecanoe Counties had not established public defender systems. Tippecanoe now has a model program funded by the Indiana Criminal Justice Planning Agency and LaPorte is in the process of establishing a public defender program.

[5] IND. CODE § 33-9-10-1 (1971), IND. ANN. STAT. § 9-3509 (Supp. 1974).

[6] In Allen and St. Joseph Counties, which are the only counties with populations between 175,000 and 400,000, the courts have elected to contract under this statute with local attorneys to serve as public defenders. The data show that the following are counties with a population less than 100,000 in which the courts have contracted with one or more local attorneys for part-time public defender services: Clark, Daviess, Floyd, Grant, Henry, Howard, Porter and Wayne. Monroe County operates a model program funded by the Indiana Criminal Justice Planning Agency.

Even if counsel is not provided pursuant to any of these statutes, the fourth statutes[7] requires that the court appoint an attorney whenever the judge is satisfied that the defendant is indigent. Most appointments of counsel for indigent criminal defendants are made under the provisions of this statute.

To ascertain which methods of appointing appellate counsel are utilized in practice, survey letters were sent to the circuit court judges of the 88 judicial circuits in Indiana.[8] Each judge was asked to describe the system he or she used to appoint counsel to represent indigents perfecting an appeal immediately following conviction. Written responses were received from 34 judges. The local public defender or circuit court clerk was contacted by telephone in 23 other counties. Of the remaining 35 counties from which no data were received, only 12 are counties from which appeals were taken by indigent defendants during the two year period of this study.

The methods described in response to the survey letter fall into the following general categories:

1. No established method: judges assign counsel solely on a case-by-case basis.
2. Public defender system: judges routinely appoint the local public defender in circuits which employ a defender system.[9]
3. Rotation system: judges appoint counsel on a rotating basis from a plenary list of local bar members.
4. Limited rotation system: judges appoint counsel from a list of local attorneys with criminal defense experience.
5. Appointment of novice attorneys: judges assign new members of the local bar who are willing to accept appointment as counsel for indigent defendants.

The responses indicated that most judges have no established method for appointing appellate defense counsel. As noted earlier, however, the attorney who serves as counsel at the trial level, whether appointed or privately retained, is frequently appointed by the court

[7] IND. ANN. STAT. § 34-1-1-3 (Code ed. 1973).

[8] Although there are 92 counties in Indiana, some of the smaller counties are consolidated for judicial purposes and fall under the aegis of a single judicial circuit. These counties are Crawford and Harison, Dearborn and Ohio, DuBois and Martin, Jefferson and Switzerland. IND. CODE §§ 33-4-1-1 to -1-92 (1971), IND. ANN. STAT. § 4-332 (Supp. 1974).

[9] In some circuits employing a public defender system, while the public defender is usually assigned to take appeals, counsel may be provided through one of the other four methods for the remaining cases.

to take the appeal if the defendant is indigent at the time of the appeal.[10] A few judges did indicate in their responses that, while they make appointments on a case-by-case basis, they were careful to choose highly competent criminal attorneys as defense counsel.[11]

In the 20 circuits which have adopted some type of public defender system for trial representation, the public defender is usually assigned to take appeals as well. This seems to be the case without regard to the statutory basis of the office or the composition of its staff.[12]

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[10] Typical responses from this group were as follows:

"All appointments for pauper defendants in criminal cases are made by the judge of the court prior to arraignment, and in the event the defendant requests an appeal, the same attorney is instructed to represent the defendant on appeal."

"If the indigent has had pauper counsel for the trial and an appeal is required, usually but not necessarily in all cases, the same counsel is appointed to carry through the case."

[11] Those judges described their appointment systems as follows:

"[T]he court uses a system of appointing individual attorneys who are available to act as pauper attorneys in criminal cases. This is not a rotating thing but depends on the competency and availability of criminal counsel."

"I appoint the best criminal appeals attorney in my county . . . to represent indigents."

[12] This table provides a description of the current Indiana local public defender programs, including those established subsequent to the years of this study. Blanks indicate either that no appeals have been taken since the establishment of the county program, or that the information was unascertainable through telephone interviews.

County (by population)	Type of staff	Permanent office	Number of appeals handled	Paid extra for appeals
Marion	5 full-time att'ys	Yes	None	—
Lake	8 part-time att'ys	Yes	None	—
Allen	9 part-time att'ys	Yes	Almost all	Yes
St. Joseph	4 part-time att'ys	No	Almost all	Yes
Vanderburgh	5 part-time att'ys	Yes	Most	Yes
Madison	2 part-time att'ys	No	Some	Yes
Delaware	3 part-time att'ys	No	All	Yes
Elkhart	2 part-time att'ys	No	All	Yes
Vigo	2 part-time att'ys	No	All	Yes
Tippecanoe*	2 full-time att'ys	Yes	All	No
Porter	1 part-time att'y, 1 deputy	No	Most	Yes
Monroe*	2 full-time att'ys	Yes	All	No
Grant	1 part-time att'y, 2 deputies	No	All	
Howard	1 part-time att'y, 1 deputy	No		
Wayne†	1 part-time att'y	No		Yes
Clark	2 part-time att'ys	No	None	—
Floyd	1 part-time att'y	No	All	No
Henry*	2 part-time att'ys	No	All	Yes
Cass*	1 part-time att'y	No		
Daviess*	1 part-time att'y	No	All	No

* Denotes programs established after January 1972.

† Wayne County also has a small rotating list of attorneys who handle less serious crimes. Whoever is assigned a case at the trial level also is assigned to take the appeal.

Many circuits from which responses were received use a rotation system. These circuits are equally divided between those that rotate appointments among all members of the local bar[13] and those that rotate appointments among a list of criminal attorneys.[14]

The judges of several circuits admitted that only new and inexperienced attorneys are appointed to defend indigents; that, indeed, only a few young attorneys would accept such appointments. In part this is because the fees paid for pauper defense work often are considerably lower than fees charged by retained counsel.

The lack of uniformity among circuits in methods used to provide appellate representation to indigent defendants does not necessarily indicate that such defendants are receiving representation of uneven quality. However, a comparison of reversal rates between those counties employing any of the discretionary appointment methods and those counties using some system of public defender representation suggests that an indigent defendant's potential for successful appeal may be enhanced by the appointment of counsel familiar with and experienced in criminal defense work.[15]

State Public Defender System

The office of the state public defender was created by statute in 1945,[16] and it is the sole centralized public defender system in Indiana. The state public defender is appointed by the Indiana Supreme Court to serve a term of four years[17] at an annual salary determined by the

[13] The most typical response indicated that appointments were made "on rotating basis from list of all attorneys." Marshall Circuit Court, 72d Judicial Circuit, is one of a few courts not using a public defender system which indicated a recognition of the problems inherent in attempting to provide competent appellate representation where local bar members are either unwilling or unable to represent the indigent criminal defendant. The concern of that court resulted in the following system. A list of local attorneys has been compiled who are willing to do criminal work at a set fee of $25.00 per hour. They are generally younger attorneys and serve the circuit and superior courts on a rotating basis. The judge, however, reserves the right to seek out and appoint attorneys who have had more experience in criminal defense work to represent those accused of more serious felonies.

[14] Responses included:

"It for any reason trial counsel cannot handle the appeal, other counsel is appointed from the bar of this county on a rotating basis from those attorneys who handle criminal cases."

"[T]he Court rotates appointment from a list of attorneys who handle criminal cases."

[15] *See* Table 13.

[16] IND. CODE §§ 33-1-7-1 to -6 (1971), IND. ANN. STAT. §§ 13-1401 to -1406 (1956 Repl.).

[17] IND. CODE § 33-1-7-1 (1971), IND. ANN. STAT. § 13-1401 (1956 Repl.).

court.[18] The office of the state public defender is in Indianapolis. The public defender is authorized to appoint deputies and office personnel[19] and to order transcripts of court proceedings at the expense of the state[20]

The scope of responsibility of the state public defender is delineated by statute:

> It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired.[21]

In addition to the duty to represent indigents seeking post-conviction relief, the public defender is required to comply with the request of any state trial court to provide representation for indigent criminal defendants should the trial court be unable to appoint counsel within a reasonable time.[22] In practice, however, the minimum fee schedule for state public defender service[23] affords an effective deterrent against such trial court requests. Budget constraints on the county courts have dictated local counsel appointment for the defense of indigents at both the trial and appellate levels in all but exceptional circumstances. Consequently, the workload of the state public defender is almost exclusively confined to the post-conviction relief for which state funds are authorized.[24] Post-Conviction Remedy Rules 1 and 2 (P.C. 1, 2) are the statutory provisions governing such relief.

P.C. 2[25] allows any convicted defendant to petition the trial court

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[18] IND. CODE § 33-1-7-4 (1971), IND. ANN. STAT. § 13-1404 (1956 Repl.).

[19] *Id.*

[20] IND. CODE § 33-1-7-5 (1971), IND. ANN. STAT. § 13-1405 (1956 Repl.).

[21] IND. CODE § 33-1-7-2 (1971), IND. ANN. STAT. § 13-1402 (1956 Repl.).

[22] IND. CODE § 33-9-11-1 (1971), IND. ANN. STAT. § 9-3504 (Supp. 1974). The responses indicate that Clark and Miami are counties which rely on the state public defender to represent indigents on direct appeal. However, during the two years of this study no direct appeals were taken from either of these counties.

[23] IND. CODE § 33-9-11-3 (1971), IND. ANN. STAT. § 9-3506 (Supp. 1974).

[24] *See* IND. CODE §§ 33-1-7-1, -3 -6 (1971), IND. ANN. STAT. §§ 13-1401, -1403, -1406 (1956 Repl.).

[25] Post-Conviction Remedy Rule 2 provides, in relevant part:

> Section 1. Any defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion for new trial, where:
>
> (a) no timely and adequate motion to correct error was filed for the defendant;
>
> (b) the failure to file a timely motion to correct error was not due to the fault of the defendant; and
>
> (c) the defendant has been diligent in requesting permission to file a belated motion to correct error under this rule.
>
> . . . .
>
> Section 2. Any defendant convicted after a trial may petition the appellate

for permission to file a belated motion for new trial or a motion for belated appeal. Since both motions are, by definition, made after time for direct appeal has expired, the state public defender is required to represent indigent defendants desiring to file such petitions.[26] In addition, the office has the duty of representing indigents appealing from trial court denials of permission to file belated motions for new trials.[27] P.C. 2 becomes operative only when the failure to file a timely motion was not due to the fault of the defendant[28] and where the defendant has been diligent in requesting a belated filing.[29] Should either of these conditions not be met, a defendant is not precluded from proceeding under P.C. 1, which affords a full inquiry into the propriety of incarceration. In practice, only a small portion of the state office's workload is comprised of belated indigent representation under P.C. 2.[30]

The overwhelming majority of the state public defender system resources are devoted to providing indigents with counsel for pursuing post-conviction remedies under P.C. 1.[31] While the belated motions allowed pursuant to P.C. 2 permit relief based only on errors appearing in the trial transcript, P.C. 1 sanctions a review of new facts,[32] the sentence imposed,[33] and "any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy . . . ."[34] Although an attempt to perfect an appeal under P.C. 2 is a prerequisite to use of P.C. 1,[35] the breadth of inquiry available under P.C. 1 affords a remedy which pragmatically subsumes that of P.C. 2 belated motions.

A proceeding under P.C. 1 is initiated through the filing of a peti-

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tribunal having jurisdiction by reason of the sentence imposed for permission to file a belated appeal where:

(a) he filed a motion to correct error which was overruled;

(b) no appeal was perfected for the defendant;

(c) the failure to perfect the appeal was not due to the fault of the defendant; and

(d) the defendant has been diligent in requesting permission to file a belated appeal.

IND. ANN. STAT. P.C. 2 (Code ed. Supp. 1974).

[26] IND. CODE § 33-1-7-2 (1971), IND. ANN. STAT. § 13-1402 (1956 Repl.).

[27] *See id.*, IND. ANN. STAT. P.C. 2, § 1(c) (Code ed. Supp. 1974).

[28] *Id.* §§ 1(b), 2(c).

[29] *Id.* §§ 1(c), 2(d).

[30] This information was provided in a telephone conversation with a member of the state public defender staff.

[31] *Id.*

[32] IND. ANN. STAT. P.C. 1, § 1(a)(4) (Code ed. Supp. 1974).

[33] *Id.* § 1(a)(3).

[34] *Id.* § 1(a)(6).

[35] *Id.* § 1(b).

tion with the clerk of the court in which the conviction took place.[36] Upon a finding of indigency by the court, a copy of the defendant's petition is forwarded to the state public defender. Although an indigent defendant may proceed pro se,[37] the trial court is not empowered to appoint counsel other than the state public defender for a P.C. 1 proceeding.[38] Deputy attorneys of the state office are assigned to geographical districts in which they represent indigents in P.C. 1 hearings before the trial court in which the defendant was convicted. The mandatory language of section 4 of P.C. 1 compels the state public defender to provide the requested indigent representation, regardless of the apparent merit of the defendant's contentions, through and including the appeal of a trial court denial of post-conviction relief.[39]

The obligation to represent indigents in post-conviction remedy proceedings is not imposed upon the state defender by statute until that office receives the filed petition.[40] The public defender, however, has undertaken to assist imprisoned indigents with the initial filing when requested to do so by the defendant. Should the public defender find merit in the defendant's allegation of illegal imprisonment, without further inquiry an action is brought to set aside the original conviction or limit the severity of the sentence. Although the state public defender may inform an indigent defendant that his contentions lack apparent merit, the defender still must file the petition and proceed with the case if the defendant so desires.

The current state public defender was appointed in 1970, at which time five deputy attorneys, two of whom were part-time, assisted with the statewide caseload of post-conviction relief proceedings. The number of deputies gradually increased until it reached its current level of ten in August 1973. Questionnaires were sent to each of the deputy attorneys to ascertain their backgrounds, experience, and subjective evaluations of the efficacy of the present state public defender system.

The nine questionnaires returned indicated common denominators of youth and relative inexperience with criminal law prior to joining the defender staff. The average age of the attorneys was 28 years. None were admitted to the Indiana Bar prior to 1970. Four of the respondents had no prior practical experience in criminal law. Indeed, only one of

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[36] *Id.* § 2.
[37] *Id.* § 9.
[38] State *ex rel.* Casey v. Murray, 231 Ind. 74, 106 N.E.2d 911 (1952).
[39] *See* Dixon v. State, —— Ind. App. ——, 284 N.E.2d 102 (1972).
[40] IND. ANN. STAT. P.C. 1, § 9 (Code ed. Supp. 1974).

the deputy attorneys professed prior criminal law exposure beyond participation in a law school clinic.

The respondents' express reasons for joining the public defender staff, however, demonstrated an affirmative interest in the type of work performed by the public defender office. The most commonly cited reasons were "an interest in prisoner's rights" (four affirmative responses), "a desire to do full-time criminal post-conviction remedy work" (three affirmative responses), and "an interest in criminal law" (four affirmative responses). Seven of the nine responses contained at least one of these three bases for accepting employment with the public defender staff. The staff's interest in the type of work done by the public defender may offset the attorneys' lack of prior practical criminal experience.

The questionnaires further demonstrate agreement as to the overly burdensome caseload imposed upon the staff. No responding attorney described his caseload as "light." Three attorneys referred to the workload as "entirely too heavy," three as "heavy," and only three as "manageable." The heavy caseload was also reflected by the seven responses indicating the need for an increased number of attorneys on the staff. Five of the nine responding attorneys felt that an addition of four or more deputies would be appropriate.

Data Analysis

Two standards were chosen to measure the relative merits of the three methods used in Indiana to provide counsel for indigent defendants taking direct appeals or appealing trial court denials of post-conviction relief. The first standard is the delay in appellate proceedings which is attributable to counsel for indigent defendants. The optimal system for providing counsel should minimize the time delay between conviction or trial court denial of post-conviction relief and completion of the appellate process. The longer the system takes to provide review of the propriety of a conviction or imprisonment, the less meaningful the right to appellate counsel becomes. The second standard for measuring the effectiveness of appellate representation is the extent to which appellate counsel procures some form of relief for indigent defendants. In addition to comparing the three systems on the basis of these two standards, this part of the note examines the costs involved in providing appellate representation. The indigent appellant's interest in a swift and favorable review must be viewed in light of the costs incurred by any system used to provide counsel.

Delay Factor

The specific periods of delay on which this analysis focuses are those between the initial filing of notice of appeal with the court to the filing of the transcript, and from the time of the filing of the transcript to the filing of the brief. Comparisons of these parameters of delay reveal significant discrepancies among the three systems used in Indiana to provide appellate representation for indigents.

Table 1 provides the pertinent delay figures for indigent criminal appeals to the Indiana Supreme Court in 1971 for the period from the filing of notice of appeal to the filing of the brief.

Table 1: Delay—1971—Indiana Supreme Court

System	No. of cases	Notice of appeal to filing of brief (Average days per case)
Appointed counsel	68	134.2
State public defender	13	196.6
Local public defender	32	75.9

These figures show that the local public defender system averaged substantially less per case delay over this period. The appeals conducted by court-appointed counsel are shown to have resulted in an average per case delay which is 58.3 days greater over the notice-to-brief period than was found for cases handled by local public defenders. Cases taken by the state public defender showed yet another delay increment averaging 62.4 days per case longer than that of assigned counsel and 120.7 days longer than that required by local public defenders. Thus, in 1971 the average notice-to-brief time span for the state public defender system was 159% greater than that of the relatively rapid local public defender system, and 46% greater than that of the appointed counsel system.

To discern the extent to which the delay disparities are directly attributable to the system of providing counsel, it is useful to subdivide the notice-to-brief time span into two component. While the delay incurred between the filing of notice of appeal and the filing of the transcript may depend on the administrative and clerical efficiency of the trial court, the time required from transcript filing to brief submission is within the exclusive control of appellate counsel. Both of these delay components for the supreme court in 1971 are segregated in Table 2.

Table 2: Delay—1971—Indiana Supreme Court

System	No. of cases	Notice of appeal to filing of transcript (Average elapsed day per case)	Filing of transcript to filing of brief (Average elapsed day per case)
Appointed counsel	70	53.0	80.2
State public defender	14	50.7	149.8
Local public defender	32	26.8	48.8

Although the average notice-to-transcript delays are roughly equivalent for the assigned counsel and state public defender systems, the cases handled by local public defenders showed notice-to-transcript delays averaging only 52% of those for the other two systems. The transcript-to-brief figures, however, still demonstrate an average period of delay for the state public defender that is 207% longer than the delay attributable to local public defenders. The figures for the state public defender also reveal an average delay that is 87% greater than the delay attributable to locally appointed counsel. The introduction of an intermediate court of appeals in 1972[41] failed to disturb the overall delay rankings of Indiana's three indigent appellate representation systems.

Table 3: Delay—1972—Indiana Court of Appeals, combined districts

System	No. of cases	Notice of appeal to filing of transcript	Filing of transcript to filing of brief	Notice of appeal to filing of brief
		(Average elapsed days per case)		
Appointed counsel	82	21.7	49.0	70.7
State public defender	37	60.9	115.5	176.4
Local public defender	39	19.8	39.3	59.0

[41] The current Indiana Court of Appeals was created by a constitutional amendment ratified in 1970, in an effort to relieve the growing caseload of the state supreme court. IND. CONST. art. 7, §§ 5, 6. The court of appeals is presently divided into three courts representing separate geographical districts, each court consisting of three judges. Districts of the court are empowered to receive all criminal appeals from trial court judgments which do not impose minimum sentences greater than 10 years. More severe sentences are reserved for the Indiana Supreme Court. *See* IND. ANN. STAT. A.P. 4(A)(7) (Code ed. 1973). Since the court of appeals began operation on January 1, 1972, the 1972 court of appeals delay data are presented in composite form and segregated by geographical district as well.

The composite 1972 court of appeals data set forth in Table 3 show no clear preference in terms of delay minimization between the court-appointed and local public defender systems. However, the figures show that the state public defender system entails substantially more undesirable delay through all phases of the appellate process than either of the alternate defender systems. The statewide system is burdened with an overall average period of delay that is 199% above that of the local public defender and 149% over that of court appointed counsel.

The delay figures for the sparse number of criminal appeals to the Indiana Supreme Court in 1972, as shown in Tables 4–6, generally reflect the same rankings for the three systems as were exhibited by the figures for 1971.

Table 4: Delay—1972—Indiana Supreme Court

System	No. of cases	Notice of appeal to filing of brief (Average elapsed days per case)
Appointed counsel	12	129.4
State public defender	6	252.7
Local public defender	11	109.1

Table 5: Delay—1972—Indiana Supreme Court

System	No. of cases	Filing of transcript to filing of brief (Average elapsed days per case)
Appointed counsel	13	72.4
State public defender	8	84.6
Local public defender	11	65.3

Table 6: Delay—1972—Indiana Supreme Court

System	No. of cases	Filing of transcript to filing of brief (Average elapsed days per case)
Appointed counsel	12	84.8
State public defender	6	213.5
Local public defender	11	43.8

The above tables reveal that the local public defenders prevailed in all aspects of delay minimization, with the second-place appointed counsel system showing an overall superiority to the state public defender system. For the entire period between the filing of notice to appeal and the submission of briefs (Table 4), the disparity between state and local defender representation was slightly more than 143 days. The state public defender system showed an average per case delay that was 123 days greater than that for the appointed counsel system.

An additional indicator of delay is the number of petitions for extension of time that are filed by appellate defense counsel prior to the

submission of briefs. Tables 7–9 provide the average number of such petitions filed per case.[42]

Table 7: Delay—1971—Indiana Supreme Court

System	Notice of appeal to filing of transcript	Filing of transcript to filing of brief	Notice of appeal to filing of brief
	(Average petitions for extension of time per case)		
Appointed counsel	.87	1.1	2.0
State public defender	1.1	3.1	4.1
Local public defender	.37	.49	.81

Table 8: Delay—1972—Indiana Court of Appeals, combined districts

System	Notice of appeal to filing of transcript	Filing of transcript to filing of brief	Notice of appeal to filing of brief
	(Average petitions for extension of time per case)		
Appointed counsel	.40	.48	.88
State public defender	1.2	1.6	2.8
Local public defender	.38	.36	.74

Table 9: Delay—1972—Indiana Supreme Court

System	Notice of appeal to filing of transcript	Filing of transcript to filing of brief	Notice of appeal to filing of brief
	(Average petitions for extension of time per case)		
Appointed counsel	1.0	1.3	2.0
State public defender	1.5	2.8	3.7
Local public defender	1.2	.73	1.9

These data substantiate the delay rankings established for the three systems in Tables 1–6 which measure actual time delay in days. The state public defender system submitted the most petitions per case in both the notice-to-transcript and transcript-to-brief periods in the supreme court in 1971 and 1972. The data show that the same was true in the court of appeals in 1972. The data generally reaffirm the superiority of the local public defender system in delay minimization, with that system showing fewer petitions for extension of time than either court-appointed counsel or the state public defender system in the supreme court in both 1971 and 1972. In the court of appeals the local public defender system had significantly fewer petitions for extension of time per case than the state public defender, and also had slightly

[42] Since a number of incomplete cases were included only in the notice-to-transcript calculations, the overall notice-to-brief averages are not equal to the summations of notice-to-transcript and transcript-to-brief figures in every instance.

fewer per case than the locally appointed counsel system.

Effectiveness Factor

The second standard of efficient appellate representation is the extent to which counsel procures relief for indigent defendants. Tables 10–12 show the percentage of indigent appeals which resulted in some form of defendant relief in 1971 and 1972. For the purpose of this analysis, a "reversal" has been defined as encompassing all appellate modifications of trial court convictions which inure to the benefit of defendants, including outright reversal, new trial, or sentence modification. As with the delay data, the data on reversal rates are subdivided into those appeals heard by the Indiana Supreme Court in 1971 and the analogous 1972 appeals to both the supreme court and the court of appeals.

Table 10: Reversal Rate—1971—Indiana Supreme Court

System	Affirmed	Reversed (Number of cases)	Reversal rate
Appointed counsel	60	6	9.1%
State public defender[43]	11	3	21.4%
Local public defender	20	12	37.5%

Table 11: Reversal Rate—1972—Indiana Court of Appeals, combined districts

System	Affirmed	Reversed (Number of cases)	Reversal rate
Appointed counsel	65	13	16.7%
State public defender	25	11	30.6%
Local public defender	28	11	28.2%

Table 12: Reversal Rate—1972—Indiana Supreme Court

System	Affirmed	Reversed (Number of cases)	Reversal rate
Appointed counsel	7	2	22.2%
State public defender	4	1	20%
Local public defender	9	1	10%

[43] While there were occasional actual reversals during the years of the study, *e.g.*, Dexter v. State, —— Ind. ——, 297 N.E.2d 817 (1973), most of the relief obtained for clients by the state public defender was in the form of "technical successes" or vacation of guilty pleas. Technical successes encompass relief for clients short of release from prison. Examples of technical successes include Tooley v. State, —— Ind. App. ——, 297 N.E.2d 856 (1973); Young v. State, —— Ind. App. ——, 293 N.E.2d 802 (1973); Love v. State, —— Ind. ——, 272 N.E.2d 456 (1971). Examples of vacation of guilty pleas include Bonner v. State, —— Ind. App. ——, 297 N.E.2d 867 (1973); Lovera v. State, —— Ind. App. ——, 283 N.E.2d 795 (1972); Dube v. State, —— Ind. App. ——, 275 N.E.2d 7 (1971).

The dramatic fluctuation in supreme court reversal rates between 1971 and 1972 shown in Tables 10 and 12 is likely attributable to the severely limited sample from which the 1972 rates are derived. Because the small number of 1972 supreme court cases makes the reversal rates in Table 12 suspect, this study will focus on the data for the 1971 supreme court and the 1972 court of appeals. As shown in Table 10, the local public defender system achieved the highest reversal rate in the supreme court in 1971; the state public defender had the second highest. The reversal rate of the appointed counsel system was substantially lower than that of either defender system. Table 11 indicates that the state public defender system achieved the highest reversal rate before the court of appeals in 1972, with its local counterpart demonstrating only a slightly lower reversal rate. Again, the reversal rate of appointed counsel was the lowest of the three systems.

The composite reversal rates for the three systems in both the supreme court and the court of appeals for the two year period are set forth in Table 13.

Table 13: Reversal Rate—1971 and 1972—Supreme Court and Court of Appeals

System	Affirmed	Reversed (Number of cases)	Reversal rate
Appointed counsel	132	21	13.7%
State public defender	40	15	27.3%
Local public defender	57	24	29.6%

The composite data reveal that the two public defender systems maintained comparable reversal rates throughout the two year period of this study. The appointed counsel system failed to rival either of the public defender systems in frequency of obtaining relief for indigent defendants. During the years 1971 and 1972, the appointed counsel reversal rate was only 50% that the state public defender, and 46% that of the local public defender system.

Cost Analysis

A third significant factor in assessing the desirability of a particular system for providing appellate representation to indigent defendants is the cost of maintaining that system. The information available concerning such costs does not allow a direct per case comparison of the expenditures of the three systems. It does, however, provide a basis for projecting both the cost currently borne by the counties and the cost of a prospective statewide appellate defender system.

Cost to the Counties

Neither statutory provision nor court practice mandates a statewide system for reporting expenditures made by the counties in providing representation for indigents on criminal appeals. To ascertain the cost to the counties of providing such representation, a questionnaire was sent to the auditor of all 92 Indiana counties. Each auditor was asked to provide the amount expended on counsel appointed to take indigent appeals and the number of such appeals taken during 1971 and 1972.

While the data provided are representative of county costs over this two year period, there is no necessary correlation between specific appeals considered in the delay and effectiveness portions of this study and the total county expenditures during either year. Because attorney's fees are usually paid by the county at the conclusion of representation, they are often reflected in the auditor's records a year or more after the case has been filed with the appellate or supreme court.

A compilation of the data received yields only an approximation of costs since many counties reported that their records do not distinguish between trial and appellate representation. Moreover, many counties which reported total appellate costs were not able to determine the number of appeals to which those expenditures were applied.

Forty-six counties replied to the questionnaire. Twenty-six reported that they were able to segregate appellate costs from trial level costs. A number of the responding counties were not included in the study because the reported expenditures appeared to be unduly high given the size of the county, and the accuracy of the response was therefore questionable. County reports were disregarded when a comparison between those reports and data taken from the court of appeals and supreme court docket books revealed a blatant disparity. Such disparities suggested that the responses erroneously included both trial and appellate costs or were otherwise inaccurate.

The counties whose responses appeared accurate reported the following total expenditures. In 1971, 13 counties[44] spent a total of $59,209, and in 1972, 13 counties[45] spent a total of $66,145 for appellate representation for indigents. Eleven counties reported no expeditures for appellate representation during either 1971 or 1972.[46] However, the

[44] Counties included are Blackford, Dearborn, DeKalb, Elkhart, Gibson, Greene, Jefferson, Monroe, Owen, Posey, St. Joseph, Vanderburgh and Wayne.

[45] Counties included are Dearborn, DeKalb, Elkhart, Greene, Monroe, Owen, Newton, Posey, St. Joseph, Shelby, Steuben, Vanderburgh and Wayne.

[46] The counties reporting no expenditures are Benton, Brown, Cass, Crawford, Harrison, Montgomery, Noble, Ohio, Parke, Union and Wabash.

total number of counties with no expenditures probably approaches 50.[47] The remainder of the counties responding to the questionnaire could not segregate expenditures made for appellate representation from those made for trial representation.

To ascertain an approximate cost per case and the total costs to the counties for 1971 and 1972 in the absence of comprehensive, direct data, a profile was constructed of eight counties which reported both the amounts expended for appellate representation in 1971 and 1972 and the number of appeals which those expenditures represented. The counties used in this profile are geographically dispersed throughout the state and range in population from 12,000 to 243,000. Both those counties which employ public defenders and those which appoint counsel on a case-by-case basis are included. Since local public defenders who handle appellate work are paid fees in addition to their regular salaries,[48] no cost distinctions can be made between counties which employ public defenders and those which appoint counsel. The profile is reflected in Table 14.

Table 14: Profile of county expenditures, 1971–72

County	Expenditures 1971	Appeals 1971	Expenditures 1972	Appeals 1972
Elkhart	$3000	1	$650	1
Dearborn	1500	2	3830	2
DeKalb	1313	1	1213	1
Monroe	1438	1	764	1
Owen	750	1	750	1
Posey	1800	4	950	2
St. Joseph	12,859	9	7124	10
Wayne	4000	2	9000	9
Totals	$26,660	21	$24,281	27

The average per case cost of indigent representation to the eight counties was $1270 in 1971 and $899 in 1972. The average per case cost to the counties over the two year period was $1061. Records of the court of appeals and the supreme court show that 102 direct appeals were taken by indigent criminal defendants in 1971, and 145 such appeals were taken in 1972.[49] The average per case cost of $1061 for the eight-

[47] This estimate is based on the fact that the docket books for the supreme court and courts of appeals reveal that appeals were taken from only 42 counties during 1971 and 1972.

[48] Four counties are exceptions to the general practice of paying an additional fee to public defenders for appellate work: Daviess, Floyd, and the counties with model programs, Monroe and Tippecanoe.

[49] The dramatic increase in the number of cases filed in 1972 over the number filed

county profile, if projected to the entire state, would indicate a cost to all counties of $108,222 for 1971 and $153,845 for 1972.

Costs to the State

While the available data on county expenditures for appellate representation of indigents have allowed calculation of average costs per case and total projected cost for all counties, a similar analysis cannot be made on the basis of the reported expenditures of the existing state public defender office. The budgets of the state public defender office for the years studied[50] were not segregated into expenditures for post-conviction proceedings at the trial court level and expenditures for subsequent appeals from adverse trial court rulings. Since a substantial but indeterminate portion of the office's resources are devoted to the filing of petitions before the trial court and to related defendant interviews, it would be highly misleading to estimate any average per case costs for the state public defender from the data. Consequently, it is impossible to infer from the budgets of the state office the projected cost of implementing a state-funded defender system to handle all direct appeals.

The cost to the state of providing representation in all direct appeals through a prospective statewide appellate defender system must therefore be approximated through the use of external data if a meaningful comparison is to be made with the cost currently borne by the counties.

To determine the projected cost to the state of providing such a system, it was necessary to estimate the number of attorneys that would be required to handle the volume of direct appeals taken in 1972.[51] The Illinois Public Defender Project provides a basis for estimating that figure. Under that project, the average number of dispositions per month per full-time attorney is 1.61.[52]

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in 1971 is probably due to the fact that the courts of appeals began to function in 1972, thereby making an additional three courts available for appellate litigation.

[50] The actual expenditures of the state public defender's office, for the fiscal years covered by this study, are as follows:

Fiscal 1970: $ 78,353
Fiscal 1971: $101,735
Fiscal 1972: $127,979.75

[51] Since data from 1971 reflect those cases filed before the establishment of the court of appeals, only data from 1972 are used as a basis for this projection.

[52] D. Worsley, An Evaluation of the Illinois Defender Project 93–94 (Apr. 27, 1973) (unpublished paper on file with the INDIANA LAW JOURNAL). (Reprinted by special permission of the author. All rights reserved by David E. Worsley, Danville, Ill.) The following table depicts the figures used to arrive at the monthly average caseload per attorney. Six offices have been established to handle all direct appeals in Illinois under the aegis of the Project. The caseload varies from office to office. The monthly figure

If this figure is adopted as representing a manageable case load for each attorney, it can be estimated that eight attorneys could have adequately handled the 145 appeals filed in Indiana by indigents in 1972. Assuming an average salary of $12,000, the cost to the state for attorney services would have been $96,000. Administrative and overhead costs must be added to this figure to reach the total expenditure necessary to support that system.

Subtracting the $96,000 in salaries from the estimated expenditures made by the counties ($153,845)[58] leaves $57,845 to cover the incremental administrative and overhead costs incurred by the addition of eight attorneys to the public defender system. Based on these figures, it may fairly be stated that the current method of representing indigents on direct appeals could be replaced by a comprehensive public defender system at little or no additional cost. Indeed, if economies of scale were exploited by making these additions to the current state public defender staff, total expenditures may actually be less than under the present scheme of representation.

CONCLUSION

To assess the desirability of any prospective alteration of Indiana's current hybrid system of appellate representation for indigents, it is necessary to balance the vindication of indigent defendants' rights against the costs of proposed systems of appointment. A system capable of providing swift and effective representation, but at a prohibitive cost, is no more palatable than an inexpensive system which fails to adequately represent defendants. Thus, any recommendations must be conditioned upon the relative importance attributed to considerations of delay,

of 1.61 cases per attorney is based on a total of 924 dispositions handled over a period of 32 months.

Monthly Average Caseload per Attorney*

Entity	Months of operation	Number of lawyers	Number of dispositions	Average caseload per lawyer per month
Illinois Defender Project	32	17.9	924	1.61
"New" Chicago Office	2	10.5	36	1.71
"Old" Chicago Office	30	3.6	241	2.23
Elgin [Ill.]	29	2.7	125	1.61
Ottawa [Ill.]	29	3	239	2.74
Springfield [Ill.]	28	3	154	1.83
Mt. Vernon [Ill.]	25	2.7	129	1.89

* Period covered: Jan. 1, 1970—Aug. 31, 1972.

[58] *See* text accompanying notes 49, 50 *supra.*

reversal rate and cost.

Taking the reversal rate as the primary indicator of a system's efficacy in representing indigents, the data strongly suggest the superiority of public defender systems over appointed counsel. The greater ability to obtain relief which inheres in a system of attorneys devoted to criminal defense work has been demonstrated by the performance of both local and state public defender representation at the appellate levels. The state office's high reversal rate indicates that full-time exposure to criminal law more than compensates for the relative youth and inexperience of the staff attorneys. Expanded public defender systems at either the state or local level would provide the benefits of more effective representation to all indigent criminal appellants, while simultaneously eliminating disparities in the effectiveness of counsel which result from divergent methods of appointing counsel on a case by case basis.

While the delay data reveal the superiority of local public defenders in pursuing appeals promptly, the state defender incurred delays significantly greater than those of appointed counsel. However, the data provide no basis for concluding that an expanded statewide appellate defense system would require more attorney-hours per case than a system of appointed counsel. As previously noted, the state defender's delays in filing appellate briefs are incurred by a staff which devotes the bulk of its resources to the preparation of petitions for post-conviction relief at the trial court level, and which has expressed an existing need to hire additional attorneys. While an appointed counsel system of representation can minimize delay simply by making additional appointments as needed, the state office is constrained by its limited staff size. The delay data highlight the undersirable tendancy of an inadequately funded state defender office to hamper the speedy vindication of indigent appellants' rights. On the other hand, the data provide no basis for inferring that such delays would continue under an expanded and adequately funded state defender system.

The analysis of costs indicates that the benefits accruing to indigents from an expanded appellate public defender system may be obtained at costs which compare favorably with those currently borne by the counties in providing appellate services to indigents. The additional full-time attorneys required to adequately handle the existing appellate caseload could be hired at a cost that probably would not exceed the current level of aggregate county expenditures. Similarly, there is no reason to believe that future increases in the number of indigent ap-

peals would result in greater additional costs under a public defender system than under a system of appointed counsel.

The conclusion that a balancing of costs against the rights of indigents favors the implementation of an expanded public defender system leaves open the question of how such a system is best effectuated. Three alternative forms of statewide appellate public defense are possible. First, the current state defender office could be expanded to handle all direct appeals from its Indianapolis office. Second, a central state office could oversee regional offices, which in turn would be charged with the duty to prosecute indigent appeals arising within their geographical districts. Finally, a public defender system could be entirely localized, with district defenders having no affiliation with a central state office.

The alternative of expanded but fully localized public defense services is realistic only if the legislature were to mandate local public defender representation of all accused indigents at the trial court level. Such a provision would be necessary to generate a sufficient workload to justify the local offices economically. It would also afford defendants the benefits of rapid and effective representation made possible by having the same counsel at both trial and appellate levels.

The implementation of an expanded appellate defender system under a centralized office would offer several additional benefits. A central office would be capable of providing expert training and investigative assistance such as that available to the prosecution through the state attorney general and the Indiana Prosecuting Attorneys Council. While interests of local autonomy might favor the alternative of a centralized appellate defender system with regional offices, the data provide no direct basis for differentiating between such a system and a fully centralized system. The optimal balance between centralized and regional offices which would minimize the burden of travel may ultimately hinge upon the projected time an attorney will spend interviewing his clients, conducting investigations, and appearing before the appellate courts, all of which are located in Indianapolis.

The right of all indigent criminal defendants to representation by counsel on appeal would be bolstered by the institution of an appellate public defender system. To the extent that result is achieved, the interests of the entire criminal justice system would be furthered as well.

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