North Dakota Law Review

Volume 49 | Number 3 Article 9

1973

Meeting the Challenge of Argersinger: The Public Defender System in North Dakota

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MEETING THE CHALLENGE OF ARGERSINGER: THE PUBLIC DEFENDER SYSTEM IN NORTH DAKOTA

To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No man shall be taken or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by lawful judgment of his peers or by the law of the land.

—MAGNA CARTA

Whenever an individual is confronted with prosecution for a criminal offense, no matter how serious the penalty, he is at a great disadvantage if not guided by the hand of counsel. When a person enters the courtroom as a defendant, with the resources of the state at work against him, he is unlikely to willingly forego the protection afforded by a proper defense. Central to that defense is the presence of an attorney. However, the barrier of poverty has placed the assistance of counsel beyond the reach of a substantial minority of Americans.

Over the years it has been the concern of courts in the United States to rectify this imbalance. The recent decision of *Argersinger v. Hamlin*,[1] extending the right to counsel to indigent misdemeanants, provides an occasion to examine the development of this right, its current federal status, the parallel development in North Dakota, and a novel project to implement it.

It is the purpose of this note to focus on the regional Public Defender project currently in operation in the Bismarck area; its inception, its goals, its conduct, its effectiveness, and its future. While some statistical comparisons will be made with jurisdictions employing the assigned system for providing counsel, it is not the purpose of this note to enter upon a detailed evaluation of the relative strengths and weaknesses of the public defender system vis-a-vis the assigned system.

1. Argersinger v. Hamlin, 407 U.S. 25 (1972).

I. FEDERAL DEVELOPMENT

A. HISTORICAL PERSPECTIVE

Constitutional law has experienced an expansion of the rights of the accused in the past several decades with a concomitant thrust toward insuring that the indigent[2] is not denied the full measure of his constitutional protections because of financial disability. The evolution of the rights of the criminal accused has been inextricably bound up with the "right against self-incrimination" clause of the Fifth Amendment[3] and the "right to counsel" clause of the Sixth Amendment,[4] as incorporated and made applicable to the states through the Fourteenth Amendment.[5]

The right of the accused to be effectively represented by counsel has not been limited to the courtroom.[6] While the initial attention of the Supreme Court was focused on the representation to be afforded an accused person at trial, first in the case of a crime involving capital punishment,[7] and later in all felony prosecutions[8] and juvenile proceedings;[9] the right of the accused to be represented by counsel has subsequently been extended to include such pre-trial stages as surreptitious interrogation of an indicted person,[10] of a

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2. At the present time there is no widely accepted definition of "indigent." Standards applied by various jurisdictions are flexible and contemplate consideration of a wide range of factors. In regard to the determination of indigency with respect to right to counsel, *see generally* Note, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C. L. REV. 705 (1971); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1073-74 (1963); Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579-80 (1963); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel System*, 13 STAN. L. REV. 522, 545 (1961). In North Dakota, in most cases of indigency is determined by a series of questions put to the defendant or in the alternative a financial affidavit is requested prior to a determination that a need exists.

3. U.S. CONST. amend. V. "No person shall be held to answer for a capitol, or otherwise infamous crime . . . nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

4. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

5. U.S. CONST. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. *See* Kamisar, *The Right to Counsel and the 14th Amendment: A Dialogue on the Most Persuasive Right of an Accused*, 30 U. CHI. L. REV. 1, 60-61 (1962). Kamisar posits the idea that the services of a lawyer to his client might be of much greater value outside the courtroom than in it.

7. Powell v. Alabama, 287 U.S. 45 (1932).

8. Gideon v. Wainwright, 372 U.S. 355 (1963).

9. *In re* Gault, 387 U.S. 1 (1967).

10. Massiah v. United States, 377 U.S. 201 (1964).

criminal suspect,[11] a suspect under custodial interrogation,[12] a defendant appearing in an identification line-up,[13] and at preliminary hearings.[14] A right to counsel has been found to exist on appeals provided as a matter of right,[15] and in the peno-correctional processes of probation revocations or deferred impositions of sentence.[16]

Justice Brennen clearly enunciated the applicable standards in *United States v. Wade*,[17]

> It is central to [the constitutional] principle that in addition to counsel at trial, the accused is guaranteed that he need not stand alone against the State at any stage of prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. . . .[18]

B. THE ROAD TO *Argersinger*

The Supreme Court initiated its extension of the right to counsel to the indigent accused in state criminal prosecutions in *Powell v. Alabama*.[19] In reversing the conviction of a condemned rapist who had not been represented at his trial, (although the entire local bar of Scottsburo, Alabama, was ostensibly appointed to defend Powell) the Court said, "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."[20] Thirty years later the Court employed the same rationale to overturn the conviction of a defendant sentenced to five years in prison, whose request for the assistance of counsel was denied in a felony prosecution for breaking and entering with intent to commit a crime.[21]

In light of *Powell* and the broad statements made in *Gideon*,[22] the way had been cleared[23] under "conventional analogical analy-

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11. Escobedo v. Illinois, 378 U.S. 478 (1964).
12. Miranda v. Arizona, 384 U.S. 436 (1966).
13. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).
14. Coleman v. Alabama, 399 U.S. 1 (1970).
15. Douglas v. California, 372 U.S. 353 (1963).
16. Mempa v. Rhay, 389 U.S. 128 (1967).
17. United States v. Wade, 388 U.S. 218 (1967).
18. *Id.* at 226.
19. Powell v. Alabama, 287 U.S. 45 (1932).
20. *Id.* at 68-69.
21. Gideon v. Wainwright, 372 U.S. 335 (1963).
22. Here the Court acknowledges that the right to counsel is fundamental to a person "charged with a crime," *id.* at 343, and that the right extends to "all criminal prosecutions." *Id.* at 339.
23. The holding in Betts v. Brady, 316 U.S. 455 (1942), applying the Sixth Amendment right to counsel to accused felons only in "special circumstances" has been specifically overruled by Gideon v. Wainwright, 372 U.S. 335 (1963). It has been suggested that the Betts rule as applied in practice was tantamount to a rule requiring counsel in cases involving felonies:

sis"[24] to extend the right to representation by counsel to indigent misdemeanants. Yet in the same manner that *Powell* became equated with requiring the appointment of counsel in capital cases,[25] *Gideon* became equated with requiring the appointment of counsel only in felony cases.[26]

In the immediate post-*Gideon* days, the extension of the right to counsel in non-federal misdemeanor prosecutions seemed to be both a logical and likely development.[27] The Supreme Court heightened this speculation with its *per curiam* decision in *Patterson v. Warden*,[28] vacating the petitioner's conviction on a misdemeanor charge which carried a felony-length sentence. Although *Gideon's* broad dictum provided ample foundation for making such an extension, the unrepresented misdemeanant was given scant consideration, as the Court instead concentrated on expanding the rights of the accused felon.[29]

Although the Supreme Court seemed reluctant to definitively apply its *Gideon* rationale to accused misdemeanants, other federal courts were willing to impose such a duty on the states, at least to the extent that they were able to do so without more concrete direction from the Supreme Court. In *Harvey v. Mississippi*[30] the court was impelled to extend the right to counsel based on the implications that could be drawn from the Supreme Court's activity in right-to-counsel decisions following *Gideon*.[31] It was found that, "such disadvantages [as lack of assistance of counsel] and conse-

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> In non-capital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially eroded. . . . [T]here have been not a few cases in which special circumstances were found in little or nothing more than the 'complexity' of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.

Gideon v. Wainwright, 372 U.S. 335, 350-51 (1963) (Harlan, J., concurring).

24. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 717 (1968).

25. In Gideon v. Wainwright, 372 U.S. 335, 343 (1963), the Court said:

> While the Court at the close of its Powell opinion did by its language . . . limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakeable.

26. In Mempa v. Rhay, 389 U.S. 128, 134 (1967), the Court stated that *Gideon v. Wainwright* stood for the proposition that "there was an absolute right to the appointment of counsel in felony cases."

27. Junker, *supra* note 24, at 687.

28. Patterson v. Warden, 372 U.S. 776 (1962), *rev'g* Patterson v. State, 227 Md. 194, 175 A.2d 746 (1961). Patterson was convicted of carrying a concealed weapon (a misdemeanor) and sentenced to a two year prison term. The Maryland Supreme Court affirmed the conviction, holding that appointment of counsel was available only in "serious cases."

29. *See* notes 7 to 17, *supra*.

30. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). Here the petitioner was convicted of the misdemeanor of "possession of whiskey," and sentenced to 90 days in jail, without being advised of his right to be represented by counsel.

31. *Id.* at 271. While the *Harvey* court ackknowledged the argument that such a right was implicit in the holding of *Gideon* itself, it declined to make a decision on that basis.

quences [as that of a guilty plea] may weigh as heavily on an accused misdemeanant as on an accused felon."[32] On its face, it is not unreasonable to construe *Gideon* as incorporating the Sixth Amendment to the same extent as the right to counsel is applicable in federal prosecutions.[33] Quoting *Evans v. Rives*,[34] the *Harvey* court defined the Sixth Amendment requirement in the case of a federal misdemeanor:

> It is . . . suggested . . . that the constitutional guarantee of the right to the assistance of counsel in a criminal case does not apply except in the even of 'serious offenses.' No such differentiation is made in the wording of the guarantee itself, and we are cited no authority, and know of none, making this distinction. The purpose of the guarantee is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[35]

The court, in *McDonald v. Moore*,[36] relied on the *Patterson—Harvey* line of cases in rejecting the "serious offense" rule,[37] finding that under *Gideon* the state must meet the same standard which is applied in federal prosecutions.[38]

Whatever uncertainty surrounded the applicability of *Gideon* to misdemeanor prosecutions was ended by the Supreme Court in a series of decisions denying *certiorari* to misdemeanants convicted in state courts without the benefit of an attorney.[39] In *Winters v. Beck*,[40] Justice Stewart dissented, saying that "no State should be permitted to repudiate those words [the holding in *Gideon v. Wain-*

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32. *Id.* at 269.

33. *See* Junker, *supra* note 24, at 688. The author draws the analogy that because the defendant in Mapp v. Ohio, 367 U.S. 643 (1961), was convicted of a felony, no one has suggested that the prohibition against unlawful search and seizures applied only to state felony prosecutions. The author quotes Katz v. United States, 389 U.S. 347, 360 (1967), "There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes . . . [T]he Fourth Amendment draws no lines between various substantive offenses." *Id.* at 688 n.23.

34. Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942).

35. Harvey v. Mississippi, 340 F.2d 263, 271 (5th Cir. 1965).

36. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

37. *Id.* at 110.

38. *Id.* at 108.

39. Heller v. Connecticut, 154 Conn. 743, 226 A.2d 521, *cert. denied,* 389 U.S. 902 (1967); Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 634, *cert. denied,* 385 U.S. 905 (1966); De Joseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied,* 385 U.S. 482 (1966).

40. Petitioner was convicted of "immorality" and sentenced to 9½ months in jail based on his inability to pay a $254 fine. He neither asked for counsel nor was informed of any right to counsel, nor was he informed of the nature of the charges against him, the possible consequences, nor of his right to examine witnesses.

wright[41]] by arbitrarily attaching the label 'misdemeanor' to a criminal offense."[42] Even the dissenting opinions cannot be characterized as unequivocally supporting the expansion of the right to counsel misdemeanants. *DeJoseph v. Connecticut*[43] indicated that the purpose of the dissent was not to advocate the result the Court should have reached, but rather that the petition should be considered in order "to clarify the meaning of *Gideon*."[44]

The due process rationale applied in *Gideon*[45] proved ineffective during the remainder of the 1960's as an answer to the question of whether a misdemeanant had a constitutional right to counsel; perhaps resolution of the issue was even more remote than when *Gideon* was first handed down.[46]

It was speculated that the sweeping scope of the Court's equal protection argument in *Douglas v. California*[47] might well provide impetus for extending the right to counsel to accused misdemeanants,[48] one authority stating:

> Nor . . . does *Douglas* stop at discretionary review and post-conviction proceedings. Indigent persons may find that they also have been awarded absolute rights to assigned counsel in justice courts, juvenile proceedings, probation revocation, hearings—*everywhere* a rich man may appear with counsel![49]

Despite such conjecture, when the expansion came to rank the right of a misdemeanant to be represented by counsel[50] a decade after *Gideon v. Wainwright*,[51] the rationale was strictly founded in the due process clause; indeed, *Douglas* was not even mentioned.

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41. Gideon v. Wainwright, 372 U.S. 335 (1963).
42. Winters v. Beck, 385 U.S. 905, 908 (1966).
43. Petitioner was convicted of criminal non-support and sentenced to one year imprisonment. Requests for counsel were rejected both at arraignment and trial because the accused had failed to request a finding on his claim of indigency pursuant to the State's procedural rules.
44. De Joseph v. Connecticut, 385 U.S. 982 (1966).
45. Gideon v. Wainwright, 372 U.S. 335 (1963).
46. Junker, *supra* note 24, at 715-16.
47. Douglas v. California, 372 U.S. 353 (1963).
48. *See* Junker, *supra* note 24, at 693-95; Kamisar, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 6-9 (1963). Indicative of the efficacy of the equal protection rationale, the Court in Mayer v. City of Chicago, 404 U.S. 189 (1971); and Williams v. Oklahoma City, 395 U.S. 458 (1969), held that where misdemeanor convictions were appealable, the state was required to furnish a "record of sufficient completeness," 404 U.S. at 198, to allow full and effective review. Speaking directly to the subject of misdemeanors, the *Williams'* court held that a state cannot allow "unreasoned distinctions" to impede equal access to appellate courts, 395 U.S. at 459.
49. Kamisar, *The Right to Counsel in Minnesota: Some Field-Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 7-8 (1963).
50. Argersinger v. Hamlin, 407 U.S. 25 (1972).
51. Gideon v. Wainwright, 372 U.S. 335 (1963).

C. *Argersinger* AND BEYOND

It was not until 1972 that the Court finally recognized the right of the misdemeanant to be represented by counsel. In *Argersinger v. Hamlin*,[52] the defendant was charged and convicted of carrying a concealed weapon, a misdemeanor punishable by imprisonment for six months and a $1,000 fine. Unrepresented at his trial, Argersinger received a 90 day jail sentence. The appeal to the Supreme Court was on a writ of habeas corpus, the petitioner alleging that without the assistance of counsel he was unable to properly "raise and present to the trial court good and sufficient defenses" to the charge.[53] In finding that the Constitution does not tolerate distinctions between brief and substantial deprivations of liberty, the Court held that:

> absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[54]

In every relevant sense, the indigent misdemeanant is indistinguishable from the indigent charged with a felony.[55] This has been accepted at the federal level as a truism for over 40 years,[56] and is now applicable at the state level, ending the day when the misdemeanor prosecution could be called the " 'Appalachia' of the criminal justice system."[57] The *Argersinger* Court recognized that the rationale in *Powell* and *Gideon* was relevant not only to felony situations but to "all . . . criminal prosecutions"[58] in which an accused is deprived of his liberty.[59] In reaching its decision the Court rejected the "petty offense" theory,[60] holding that there is no correlation between denying an accused counsel at his trial and the constitutionally permissible occasions when a defendant may be tried without a jury.[61]

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52. Argersinger v. Hamlin, 407 U.S. 25 (1972).
53. *Id.* at 26.
54. *Id.* at 37.
55. Junker, *supra* note 24, at 686.
56. Evans v. Rives, 126 F.2d 633, 638 (5th Cir. 1942).
57. Junker, *supra* note 24.
58 Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).
59. *Id.* at 32-33.
60. *See generally* Junker, *supra* note 24, at 704-08.
61. Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972). The Florida Supreme Court denied Argersinger's petition, relying on the rationale that because Duncan v. Louisiana, 391 U.S. 145, 159 (1968), extended the right to jury trials only to non-petty offenses punishable by more than six months imprisonment, that the right of a misdemeanor to counsel was similarly limited.

Mr. Justice Powell (concurring) disagrees on this point: "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." *Id.* at 45-46.

Argersinger raises several problem areas, which may be categorized as the imprisonment problem, the appointment problem, the magnitude problem, and the non-enforcement problem.

In linking the right to counsel with an "imprisonment standard,[62] the majority opinion[63] requires that this determination be made by determining whether incarceration is in fact imposed, and not on the mere possibility that it might be imposed. The Tenth Circuit Court of Appeals, in applying *Argersinger*, noted that the decision "forbids imprisonment without representation . . . not trial without representation."[64] It is on this point that Justice Powell in applying his "fundamental fairness"[65] approach disagrees:

> When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.[66]

This argument is reminiscent of Justice Clark's concurring opinion in *Gideon v. Wainwright*,[67] where he noted that, ". . . there cannot constitutionally be a difference in the quality of process based merely upon a supposed difference in the sanction involved."[68] Such an approach is founded on the premise that conviction of a crime may involve consequences which are at least as serious as incarceration.[69] This advocated expansion of the right to counsel remains for future determination, as the *Argersinger* majority saw no need for resolving the question.[70]

A second major problem area centers around the degree of judicial discretion to be employed in the appointment of counsel. The Court outlines the responsibility of the trial judge, stating:

> [E]very judge will know when the trial of a misdemeanor starts that no imprisonment may imposed, even though local law permits it, unless the accused is represented by

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62. Junker, *supra* note 24, at 708-09. Because of the case-by-case approach employed in applying this standard, it is questionable if this approach will not constitute a reversion to the "special circumstances" rule in *Betts v. Brady*, leading to similar administration problems. *Id.* at 709.

63. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

64. Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972).

65 Argersinger v. Hamlin, 407 U.S. 25, 49 (1972).

66. *Id.* at 48.

67. Gideon v. Wainwright, 372 U.S. 335, 349 (1962).

68. *Id.* at 349.

69. In Mayer v. City of Chicago, 404 U.S. 189, 197 (1970), the Court stated, "A fine may bear as heavily on an indigent accused as forced confinement. Th collateral consequences of conviction may even be more serious. . . ." In *Argersinger*, Mr. Justice Powell cites the example of a conviction resulting in a suspension or revocation of the accused's driver's license as being more serious than a short period of confinement. Argersinger v. Hamlin, 407 U.S. 25, 48 (1972).

70. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

> counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.[71]

Criticism of the implementation of the *Argersinger* rule is based on two lines of reasoning. First, it is suggested that the force of the majority opinion will compel a judge to forego exercising his judicial discretion in the sentencing stage by requiring him to decide in advance of the trial whether or not the imprisonment option will remain open.[72] A second related problem raises an equal protection question. Under the rule enunciated by the Court, individual defendants may be subjected to unfair and unequal treatment, depending on whether a judge makes an arbitrary and discriminatory pre-trial determination as to what sentence he will impose.[73]

The third problem area involves the "magnitude" of the decision. That is, whether there are sufficient resources available to meet the demands of *Argersinger*.[74] In 1965, it was estimated that 5,000,000[75] persons are charged with misdemeanors each year, with approximately 700,000 persons actually sentenced to imprisonment.[76] Estimates as to how many of these misdemeanants are indigent range from 25-50 per cent.[77]

Rejecting Justice Powell's assertion that the nation's legal resources are insufficient to implement the requirements of *Argersinger*, the majority estimated that only 1,575-2,300 full-time attorneys would be required to represent all indigent misdemeanants.[78] The "Report of the Conference on Legal Manpower Needs of Criminal Law" found:

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71. *Id.* at 40.

72. *Id.* at 53. Mr. Justice Powell surmises that the practical effect will be that counsel will be appointed in all but the most minor offenses where imprisonment would be totally out of the question. *Id.* at 55. Mr. Chief Justice Burger would rely on the "predictive evaluation" of the trial judge and the prosecutor. *Id.* at 42.

73. *Id.* at 54. Ironically enough, Mr. Justice Douglas lends support for this position in his *Douglas v. California* opinion, where the Court held that a preliminary review of an indigent's appeal to determine if an attorney should be appointed, was violative of equal protection as subjecting certain individuals to a prejudgment in the merits of their cases. Douglas v. California, 372 U.S. 353, 355-56 (1963).

74. *See* Junker, *supra* note 24, at 715-18. The author suggests that one possible reason that the recognition of the right to counsel in the misdemeanor prosecution was so long neglected was that "non-recognition of the indigent misdemeanant's right to counsel at trial also serves to avert recognition of the misdemeanant's right to a pre-trial and post conviction counsel." *Id.* at 717.

75. Goldberg, *Help for the Indigent Accused: The Effect of Argersinger*, 30 NLADA BRIEFCASE, 203, 205 (July, 1972), places the figure at 8,000,000.

76. L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 123 (1965) [hereinafter cited as L. SILVERSTEIN].

77. *Id.* at 125.

78. Argersinger v. Hamlin, 407 U.S. 25, 37, n.7 (1972). Mr. Chief Justice Burger cited a need for more defense attorneys and prosecutors in light of the decision. *Id.* at 42-43 (concurring). Mr. Justice Brennan suggested that law students may "provide an important source of legal representation for the indigent." *Id.* at 40 (concurring).

> [T]he number of lawyers working full-time on the prosecution and defense needed to satisfy the demand for lawyers in felony and misdemeanor cases is 15,000-20,000. . . [T]he lawyers manpower presently in the field meets less than half the estimated need.[79]

A third report indicated a manpower requirement of 4,200-6,000 full-time attorneys.[80] Only after the effects of *Argersinger* are analyzed will there be any indication of how nearly our legal resources measure up to the demands of our constitutional guarantees.

The fourth problem area relates to non-enforcement of existing laws punishable as misdemeanors, and more specifically, the impact of implementing *Argersinger* in rural areas.[81] Due to the meager financial resources of many small communities and the minimal supply of lawyers in rural America, Justice Powell suggests that a community could be forced to forego enforcement of its own ordinances.[82] Another way out would be the decriminalization of some offenses, and the elimination of incarceration for others.[83]

It is evident that *Argersinger* is an imperfect decision. At best, it leaves many questions unanswered, necessitating either:

1) Action by state legislatures and courts to eliminate the problems presented by *Argersinger*, and to conform to the requirements of the decision; or
2) Future guidance by the Supreme Court.[84]

The effect of *Argersinger* will vary from state to state, however, the greatest impact of the decision will be on states that previously lacked any requirement for providing counsel to the indignet accused.[85] Now that the constitutional standard is set, what will be the effect of *Argersinger* on North Dakota law?[86]

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79. 41 F.R.D. 389, 393-94 (1966).
80. Goldberg, *supra* note 75 at 205.
81. Argersinger v. Hamlin, 407 U.S. 25, 60-61 (1972).
82. *Id.* Wood, South Dakota, is cited as an example.
83. Goldberg, *supra* note 75, at 204. Examples of offenses which could be decriminalized are: certain sexual practices, abortion, gambling, prostitution, and possession of marijuana. Examples of offenses for which incarceration could be removed as a possible penalty include: traffic offenses, public intoxication, prostitution, obscenity, and some forms of disorderly conduct.
84. Mr. Justice Powell advocates the following three-pronged approach to determine in what cases counsel should be afforded to an accused misdemeanant:

> 1) If the offense is one in which the state is represented by counsel and most defendants who can afford the services of an attorney hire one, then there is the presumption that the indigent also needs the assistance of counsel;
> 2) In conisidering the probable consequences of a conviction, as the seriousness of the consequences increase, so does the probability that an indigent should be represented by counsel.
> 3) Individual factors in each case should be considered.

Argersinger v. Hamlin, 407 U.S. 25, 63-64 (1972).
85. Goldberg, *supra* note 75, at 205.
86. Argersinger v. Hamlin, 407 U.S. 25, 27 n.1 (1972), *citing* 3 CREIGHTON L. REV. 103, 119-33 (1970), stated that at the time the decision was handed down, "[t]welve States provide[d] counsel for indigents accused of 'serious crime' in the misdemeanor category. . . . Nineteen States provide[d] for the appointment of counsel in most misdemeanor cases."

II. THE CURRENT STATE OF THE LAW IN NORTH DAKOTA

The right to counsel embodied in the Sixth Amendment[87] to the other United States Constitution has been applied to trials in state courts through the Due Process Clause of the Fourteenth Amendment.[88] Through case law,[89] statutory enactments[90] and constitutional provisions,[91] the State of North Dakota has made every effort to guarantee this right.

In defining the rights of an accused, Section 13 of the North Dakota Constitution refers to "criminal prosecution" and states that in such prosecution "the party accused shall have the right . . . to appeal and defend in person and with counsel."[92] Sections 27-08-31,[93] 29-01-27,[94] and 29-13-03[95] of the North Dakota Century Code have been referred to as "legislative expressions of the guarantee of one accused of crime to appear in person and with counsel."[96] The effectiveness of these statutes in maintaining a minimum standard of the privilege of counsel depends largely on judicial interpretation.

The evolution of these basic laws culminated with the adoption of S.B. No. 233 in 1967.[97] This enactment imposed a limitation on effective sentencing when violators of the state criminal law were tried without the right to counsel. The earliest North Dakota reference to such a right and its proper implementation appears in a statute passed by the thirteenth session of the Dakota Territory Legislative Assembly held in Yankton in 1879. The statute states:

> § 1 COUNTY TO EMPLOY COUNSEL FOR INDIGENT DEFENDANT—That in all criminal cases triable in the Territory of Dakota, where it is satisfactorily shown to the court that

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87. U.S. CONST. amend. VI, *supra* note 4.
88. U.S. CONST. amend. XIV, *supra* note 5.
89. *See e.g.*, State v. Heasley, 180 N.W.2d 242, 247 (N.D. 1970); Stone v. State, 171 N.W.2d 119, 126 (N.D. 1969); Smith v. Woodley, 164 N.W.2d 594, 597 (N.D. 1969); John v. State, 160 N.W.2d 37, 44 (N.D. 1968).
90. *See* N.D. CENT. CODE §§ 27-08-23 (1960), 27-08-24 (Supp. 1971), 27-08-31 (repealed (1967), 29-01-27 (repealed 1967), 29-07-01.1 (Supp. 1971), 29-13-03 (1960). Chapter 27-08 deals generally with County Courts of Increased Jurisdictions.
91. *See* N.D. CONST. §§ 13, 111. Section 13 deals with right to counsel while section 111 concerns powers and duties of County Courts.
92. N.D. CONST. § 13.
93. N.D. CENT. CODE § 27-08-31 (repealed 1967). "In all criminal cases in the county court having increased jurisdiction, when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall assign counsel for the defense. . . ."
94. N.D. CENT. CODE § 29-01-27 (repealed 1967). "In all criminal actions when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense. . . ."
95. N.D. CENT. CODE § 29-13-03 (1960). "If a defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him. Counsel so assigned shall serve without cost to the defendant. . . ."
96. State v. Whiteman, 67 N.W.2d 599, 607 (N.D. 1954).
97. N.D. SESS. LAWS, ch. 259, § 3 (1967), *codified at* N.D. CENT. CODE 29-07-01.1 (Supp. 1971).

> the defendant has no means, and is unable to employ counsel, the court shall in all such cases, where counsel is appointed and assigned for defense, allow and direct to be paid by the county in which such trial is had, a reasonable and just compensation to the attorney or attorneys so assigned for such services as they may render: *Provided, however*, that such attorney or attorneys shall not be paid a sum to exceed twenty-five dollars in any one case.[98]

In a historical sense this territorial measure changed very little in the ninety years it existed. It was only in terms of monetary reimbursement to the attorney that the most recent statute differed from its predecessor. From an increase to "fifteen dollars per day"[99] in 1915, the amount was raised to the level of "twenty-five dollars per day"[100] which lasted until passage of the 1967 statute. North Dakota Century Code section 27-08-31, which provided counsel for indigents in county courts of increased jurisdiction, achieved a similar type of transition from its inception until its eventual replacement by section 29-07-01.1. The statute incurred several changes from the beginning—when services were worth no more than twenty-five dollars in any case[101]—to a figure that was "not to exceed fifty dollars per case."[102]

The most precise change came with the creation of section 29-07-01.1 which superseded both sections 27-08-31 and 29-01-27.

> APPOINTMENT OF COUNSEL FOR INDIGENTS—PAYMENT OF EXPENSES—The magistrate before whom a defendant charged with the violation of state criminal law is brought may appoint counsel from a list prepared under the direction of the senior district judge in his district and in the manner prescribed by him. The determination of the degree of need of the defendant shall be deferred until his first appearance before the trial judge, and the court may require the defendant to answer all inquiries under oath concerning his need for appointment of counsel. *Thereafter, the court concerned shall determine, with respect to each proceeding, whether the defendant is a needy person. The appropriate judge may appoint counsel for a needy person at any time or for any proceeding arising out of a criminal case if reasonable.*
>
> Lawyers appointed to represent needy persons shall be compensated at a reasonable rate to be determined by the court. Expenses necessary for the adequate defense of a

98. N.D. SESS. LAWS of 1879, ch. 7, § 1.
99. N.D. SESS. LAWS of 1915, ch. 15, § 1.
100. N.D. SESS. LAWS of 1955, ch. 208, § 1, *codified as* N.D. CENT. CODE § 29-01-27 (1957 Supp.) (repealed 1967).
101. N.D. SESS. LAWS of 1895, ch. 43, § 20.
102. N.D. SESS. LAWS of 1955, ch. 199, § 1, *codified as* N.D. CENT. CODE § 27-08-31 (1957 Supp.) (repealed 1967).

needy person, when approved by the judge, shall be paid by the county wherein the alleged offense took place. A defendant with appointed counsel shall pay to the county such sums as the court shall direct. The state's attorney shall seek recovery of any such sums any time he determines the person for whom counsel was appointed may have funds to repay the county within six years of the date such amount was paid on his behalf.[103]

The adoption of this legislation did three things: it authorized appointment of counsel for indigents at the preliminary hearing stage, it deferred the determination of need until the initial appearance before the trial judge, and it required the defendant to answer under oath inquiries concerning his request for counsel.

It was significant that the statute provided for court-appointed counsel for indigents in "the court concerned" and before "the appropriate judge." A 1970 North Dakota decision, *State v. Heasley*,[104] utilized this emphasis in determining the applicability of section 29-07-01.1 to county courts with increased jurisdiction as well as district and county courts.[105]

In *Heasley* the defendant was charged with a misdemeanor that was punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than $500, or by both such fine and imprisonment.[106] In addition, the defendant was required to conduct his own defense in a jury trial. The trial court attempted to appoint counsel for the defendant, but the attorney appointed by the court refused to handle the defense. The court made no further attempt to provide another attorney to represent the accused. The lower court declared that since this was a misdemeanor case, appointment of counsel was not mandatory:

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103. (Emphasis added). The Forty-third Legislative Assembly of North Dakota indefinitely postponed a bill which would have amended 29-07-01.1. The bill was designed to give judges wider discretion in payments to court appointed counsel. In effect it would have raised the fee paid to a standard set by the North Dakota Bar Association. The reason for failure of the proposal was found in this portion of the new amendment:

> . . . . and they shall be taxed (attorney's fees and expenses) against the defendant as a judgment by the court which upon being deadlocked shall constitute a lien upon the real estate of the defendant in like manner as a judgment for money in a civil action.

This separately classified defendants with real property and those with personal property.

104. State v. Heasley, 180 N.W.2d 242 (N.D. 1970).

105. The question of the right to counsel in municipal courts arose in North Dakota by way of an inquiry to and subsequent opinion rendered by the Attorney General. *See* [1968-1970] REP. OF ATT'Y GEN. OF NORTH DAKOTA. That opinion pointed out that under section 29-07-01.1 of the North Dakota Century Code (Supp. 1971) an indigent defendant charged with a violation of a state criminal law may have counsel appointed by the court, the cost to be incurred by the county wherein the offense took place. The Attorney General believed that the emphasis on " 'state criminal' as well as the provision that expenses of court appointed counsel for indigents shall be paid by the county wherein the alleged offense took place" made it clear that such statute should not apply to municipal ordinance violations.

Whether a municipal judge is required as a matter of law to appoint counsel in such instance the Attorney General declared that section 29-07-01.1 as amended "is permissive rather than mandatory. Each situation must be determined on its own merits."

> This is a misdemeanor case in which the court appointment of counsel is not mandatory; certainly, a defendant has a right to be represented by counsel if he so chooses, but he must first attempt to obtain counsel and if he, for one reason or another . . . other than lack of funds . . . is unable to obtain counsel, he is not entitled to have a court appointed counsel.[107]

In a foresighted opinion Judge Knudson ruled, in line with *Argersinger*:[108]

> Under the provisions of Chapter 259 of the Session Laws of 1967, § 29-07-01.1 pocket supplement to the North Dakota Century Code, the judge of the county court with increased jurisdiction, or the judge of the district court, as the case may be, must go forward to determine whether or not the defendant is indigent and a needy person, and the judge thereof, the appropriate judge, upon making a determination that defendant is a needy person, *must appoint counsel for the defendant at public expense in any proceeding arising out of a criminal case, whether the offense charged is a misdemeanor or a felony.*[109]

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106. The law defining 'misdemeanor' is found in N.D. CENT. CODE § 12-01-07 and states: "Crimes or public offenses are either felonies or misdemeanors. A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary also is punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is, except when otherwise specially declared by law to be a felony, a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary."

The Forty-third Legislative Assembly in January of 1973 made massive revisions of the criminal code and under N.D. CENT. CODE 12.1-01-04(20) (Supp. 1973):

> "misdemeanor" means an offense for which a term of imprisonment of one year or less is authorized by statute.

107. State v. Heasley, 180 N.W.2d 246 (N.D. 1970). The lower court determined that presence of counsel in this case was not requisite for going to trial. It further reasoned that if defendant failed to show he was unable to retain counsel for purposes of an appointment and the fact that he was not charged with a felony allowed the court to proceed against the defendant without counsel. *Id.* at 46-47.

108. Argersinger v. Hamlin, 407 U.S. 25 (1972).

109. State v. Heasley, 180 N.W.2d 242, 249 (N.D. 1970) (emphasis added).

The rule *Heasley* adopts follows substantially the recommendations of a report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society.* The Commission recommends the following (p. 150):

> The objective to be met as quickly as possible is to provide counsel to every defendant who faces a significant penalty, if he cannot afford to provide counsel himself. This should apply to cases classified as misdemeanors as well as those classified as felonies. Counsel should be provided early in the proceedings and certainly no later than the first judicial appearance. The service of counsel should be available after conviction through appeal, and in collateral attack proceedings when the issues are not frivolous. The immediate minimum, until it becomes possible to provide the foregoing, is that all criminal defendants who are in danger of substantial loss of liberty shall be provided with counsel.

The American Bar Association's project on minimum standards for criminal justice in its Approved Draft, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (1968), proposes the following as a minimum standard:

Before the defendant is asked whether he desires or is in need of counsel he must be informed of all his rights.[110] It is meaningless to ask a person about his desire for assistance by counsel when he is unaware of his right to have representation at public expense.[111] *Heasley* summarizes concisely the duties of a trial judge when confronted with an indigent in need of counsel. He should:

> (1) inform the accused of his right to counsel and of an indigent defendant's right to a court-appointed counsel at public expense; (2) ask the accused if he desires aid of counsel; (3) if the accused desires counsel, inquire into his financial condition; and (4) if the accused is financially unable to employ counsel of his own choice, appoint competent counsel to represent him at the expense of the county.[112]

The key element espoused by the *Heasley* opinion was that the court had the duty to determine the need of the defendant.[113] The accused in North Dakota is not required to begin such proceedings; the court must initiate the proper inquiry and have the defendant file a statement of indigency.[114]

The decision illustrates that North Dakota has precisely defined the duties of district and county courts in pre-trial proceedings. Unless a person intelligently and understandingly waives his rights[115] he must be afforded the right to counsel.[116]

In addition to the constitutional requirement of appointment of counsel, sections 29-07-01 and 29-07-01.1 of the North Dakota Century Code require that a magistrate appoint counsel for a defendant charged with the violation of a "state criminal law." The Attorney General has stated that, "if the legislature had intended to limit

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> Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise. *Id.* at § 4.

110. *See* N.D. CENT. CODE 29-07-01.1 (Supp. 1971). The duty resting upon the trial court to properly advise a defendant in criminal actions concerning his constitutional and statutory rights has been considered by North Dakota Courts prior to State v. Heasley. *See, e.g.*, State v. Hefta, 88 N.W.2d 626 (N.D. 1958); State v. Whiteman, 67 N.W.2d 599 (N.D. 1954); State v. Malnourie, 67 N.W.2d 330 (N.D. 1954); State v. Magrum, 38 N.W.2d 358 (N.D. 1949); Mazakahomni v. State, 25 N.W.2d 772 (N.D. 1947).

111. State v. Heasley, 180 N.W.2d 242, 250 (N.D. 1970).

112. *Id.*

113. The court disregards an argument by the prosecution that defendant must make a showing of indigency or being a needy person to be eligible for court appointed counsel at County expense. *Id.*

114. See appendix for examples of indigency forms used in North Dakota.

115. *See, e.g.*, State v. Heasley, 180 N.W.2d 242 (N.D. 1970); Stone v. State, 171 N.W.2d 119, 126 (N.D. 1969); State v. O'Neill, 117 N.W.2d 857, 861-62 (N.D. 1962); State v. Hefta, 88 N.W.2d 626, 631 (N.D. 1958); State v. Whiteman, 67 N.W.2d 599, 611 (N.D. 1954); State v. Magrum, 38 N.W.2d 358, 361 (N.D. 1949).

116. There are no provisions in North Dakota law to pay for the expenses of preparation and investigation, however, the court has power to subpoena and order the county to pay fees for witnesses for indigent defendants. *See* N.D. CENT. CODE § 31-01-19 (Supp. 1971).

the appointments to felony cases, it could easily have used the term 'felony' instead of the broad term 'criminal cases'."[117] Almost without question misdemeanors are considered within the sphere of the criminal law.[118] In light of *Heasley* and the Attorney General's interpretation of the statutory framework, it is safe to conclude that North Dakota law already conforms with the *Argersinger* standards.

III. THE REGIONAL PUBLIC DEFENDER EXPERIMENT IN NORTH DAKOTA[119]

A. INTRODUCTION

Since the right to counsel in criminal cases has now been extended to indigent defendants, there has been much disagreement as to how the courts should meet this requirement. The Supreme Court provided little direction in *Argersinger*, declaring that it did "not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirements."[120]

Historically, a judge simply assigned an attorney to represent an indigent on an ad hoc basis. This is generally referred to as the "assigned counsel system" and in most cases operates entirely through the county judge. The system is "simple in its concept and basic operation."[121] If a defendant appears in court during a criminal prosecution without a lawyer and it is learned he cannot afford one, the judge appoints one for him. Appointments are made from attorneys in private practice on a case by case basis. The lawyer who is assigned is expected to represent the client with the same enthusiasm as if he had been retained.[122]

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117. [1966-1968] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Nov. 15, 1967 at 61.

118. Various opinions in other jurisdictions have ruled prior to *Argersinger v. Hamlin* that such a right to the assistance of counsel must be appointed in misdemeanor cases to defendants who are judged indigent. *See, e.g.*, James v. Heasley, 410 F.2d 325, 333 (5th Cir. 1969); Marston v. Oliver, 324 F. Supp. 691, 696 (E.D. Va. 1971); Arbo v. Hegstrom, 261 F. Supp. 397, 400 (D. Conn. 1966); Alexander v. City of Anchorage, 490 P.2d 910, 915 (Alaska 1971); Rodriquez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216, 219 (1971); Wrigrt v. Denato, 178 N.W.2d 339, 342 (Iowa, 1971); State *ex rel.* Moats v. Janco, 180 S.E.2d 74, 83 (W.Va. 1971); Stevenson v. Holzman, 254 Ore. 94, 458 P.2d 414, 417 (1969); *In re* Smiley, 58 Cal. Rptr. 579, 427 P.2d 179, 184 (1967); State v. Borst, 278 Minn. 388, 154 N.W.2d 888, 895 (1967).

119. While all defender systems share the same conceptual basis (a salaried attorney providing the indigent accused with defense on a regular basis) there exist numerous variations of applying the concept. Defender systems may vary according to their funding (private, public, or public-private mix), the kinds of cases they handle (misdemeanors, felonies, juveniles, appellate actions) and as to the territory of the jurisdiction (municipal, county, regional, statewide). *See generally* L. SILVERSTEIN, *supra* note 76, at 39-61.

120. Argersinger v. Hamlin, 407 U.S. 25, 38 (1972).

121. 1 L. SILVERSTEIN, *supra* note 76, at 15.

122. The reader's attention to the operation of the assigned system in North Dakota is directed to a study of the Burleigh County, North Dakota Bar Association, *Providing Counsel for the Indigent Accused, A Regional Study* (January 1, 1970). It is notable that the study recommends the adoption of a form of public defender system within North Dakota.

This system has caused numerous problems. Appointment of counsel often occurs so late in the proceedings that the defendant lacks the advice of an attorney at the most critical stage of litigation. Often counsel is unable to properly investigate the case prior to entering a plea.[123] The method of selecting a private attorney is in many cases unfair to both the attorney and the defendant. Courts often excuse a number of attorneys for various private conflict reasons, thus placing the burden on the younger and less experienced members of the bar.[124] Appointed counsel are not usually reimbursed for their out-of-pocket expenditures and in most cases are forced to act as their own investigators.[125] Since they are often young attorneys or others who lack experience in criminal law, failing preparation and investigation often places them at the mercy of the prosecuting attorney.[126] In most cases if the client is convicted, the assigned counsel's duties end with the sentencing. This leaves the defendant who desires to file an appeal on his own.[127]

Because of such difficulties, several states have looked for alternatives that will fulfill the constitutional requirement.[128] In search of a solution, North Dakota has experimented with the concept of a regional public defender.[129]

B. METHODOLOGY

The experimental defender project currently in operation in a ten-county region in the state of North Dakota involves the counties of Burleigh, Morton, Emmons, Kidder, Sheridan, McLean, Sioux, Grant, Oliver, and Mercer.[130] The material presented in this section was compiled through visits to the Public Defender Office in Bis-

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> Actual experience is the most convincing test of the desirability and the feasibility of a public defender system. The committee believes the public defender should be put to the test.

Id. at 38.1.

123. *See, e.g.*, Note, *The New Jersey Public Defender*, 5 COLUM. J. L. & SOC. PROB. 153, 154 (1969); Note, *The Representation of Indigent Criminal Defendants in the Federal Districts Courts*, 76 HARV. L. REV. 579, 588 (1963).

124. 1 L. SILVERSTEIN, *supra* note 76, at 32.

125. *See, e.g.*, Simeone, *The Missouri Public Defender Bill*, 13 ST. LOUIS U.L.J. 284, 285 (1969); Comment, *Implementing Justice: National Public Defenders Project*, 1 VAL. U.L. REV. 320, 321 (1967); 1 L. SILVERSTEIN, *supra* note 76, at 29, 32.

126. *See, e.g.*, Note, *Implementing the Right to Counsel in New Jersey—A Proposed Defender System*, 20 RUTGERS L. REV. 789, 809-10 (1966). *See generally* 1 L. SILVERSTEIN, *supra* note 76, at 20.

127. *See, e.g.*, Note, *The New Jersey Public Defender*, 5 COLUM. J. L. & SOC. PROB. 153 (1969); 1 L. SILVERSTEIN, *supra* note 16, at 139-141.

128. *See generally* L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN THE AMERICAN COURTS (1965).

129. *See* Appendix I for states that have implemented a full time public defender system.

130. The Public Defender serves as counsel for indigent defendants in all actions except for those concerning municipal and federal cases.

marck, personal interviews with the Defender and his staff and statistical analysis of cases handled by that office.[131]

C. ORGANIZATION AND OPERATION

1. *Inception and Organization*

The Regional Public Defender Office was established in April, 1971, under a grant from the North Dakota Combined Law Enforcement Counsel.[132] The project's purpose was

> to amass experience and statistics in the area of the defense of the criminal indigent and to establish a model alternative to the present system of randomly appointed defense counsel.[133]

The Bismarck Defender hoped that at the project's inception each county in the region would be willing to contract to bear a certain fixed percentage of the total grant, based on the average criminal activity in their respective counties over a five-year period.[134] It was anticipated that

> . . . the consolidation of defense cases should permit economies of experience, uniformity and scale . . . [and] that the counties will be willing to enter into a cooperative joint contract as a hedge against widely varying and unpredictable expenditures for appointed counsel.[135]

This plan was rejected by several of the smaller counties, which necessitated billing each county for services actually rendered on a case by case basis. Subsequent developments have shown that the original plan would have been more effective.[136]

The grant is projected for a three year period subject to annual review and funding. The original $30,000 budget was increased during the second year to $48,000 and an assistant Public Defender was added.[137]

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131. Much of the factual information contained in this section was gained from the interviews and records provided by Kent Higgins, Public Defender. We wish to acknowledge and thank Mr. Higgins for his assistance.

132. LEAA Grant number A-0117. Burleigh and Morton Counties contributed 40 per cent of the funds for establishment of the Public Defender with federal funds accounting for 60 per cent.

133. *Id.* at 4.

134. *See* Appendix II.

135. LEAA Grant number A-0117 at 6.

136. An illustration is Kidder County. After three years of negligible expenses it incurred a bill of over $2500 relative to a murder which never reached trial. Under the contract theory, Kidder would have been assessed $600 per year for defense services.

137. *See* Appendix III for comparative budgets.

The project is to be supervised by the Judges of the Third, Fourth, and Sixth Judicial Districts and Judges of the County Courts of Increased Jurisdiction of Burleigh and Morton Counties. It should be noted that it is entirerly within the discretion of the presiding judge to determine whether the Public Defender should be appointed.[138]

2. *Operations*

The Public Defender is usually appointed to a case only after the defendant has made his initial appearance in court. At this time, the accused is informed of the charges against him, advised of his right to counsel and the availability of a court appointed attorney at public expense after a determination of indigency.[139] The vast majority of clients are contacted while in jail and only in rare instances does an individual approach the Office of the Public Defender prior to his arrest.

Since the Regional Defender's Office is composed of only two attorneys, the procedure for assigning cases presents little difficulty. Each of the two lawyers are assigned cases as they come to the attention of the Office of the Defender with relatively little formality. The self-imposed requirements are that: (1) an effort is made to maintain approximate equality in their respective case loads; (2) each attorney handles clients whom he has represented in the past; and (3) the Assistant Public Defender assumes the responsibility for cases arising at the State Penitentiary.

A file is established in the Defender Office at the time the Public Defender is appointed by the court to represent an accused. Both the Public Defender and his Assistant are responsible for establishing a file on each case they are assigned. When the client is interviewed, he completes an extensive personal information form and gives a taped oral statement to the Defender which is later transcribed and placed in the client's file.

When the Defender is contacted, the first action taken is to assign a file number and place a small notecard with the client's name and number upon the office status board. The system provides easy reference to the status of every 'live' case being handled. Through the use of colored pins the attorney is able to indicate the type of offense (felony, misdemeanor) and the whereabouts of the client (jail, penitentiary or released). The card remains on the board until the case is finished and a billing is sent out.

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138. As an example the Juvenile Commissioner of Burleigh County refuses to utilize the Public Defender in any actions in his court.

139. *See* note 110 *supra* and accompanying text. *See also* Appendix IV for an example of an indigency form.

Upon the conclusion of a proceeding by a plea of guilty, dismissal, or an acquittal, the file is closed. If sufficient grounds exist the case will remain open pending the outcome of an appeal.

The Public Defender receives a salary of $15,000 (which is an increase of $1,000 over the salary in the first year of the operation) while his assistant is paid $14,000. The positions are regarded as full-time employment and for this reason the attorneys who fill these positions are not permitted to engage in private practice, either civil or criminal. Both counsel currently employed are in their early 30's and have less than five years of experience.

The Public Defender Office employs the services of a private investigator retained on a monthly salary of $150.00, calculated on the basis of 30 hours of investigatory time. Because the Defender has neither the budget nor the case load to afford or warrant the employment of its own exclusive investigator, one is shared with four private law firms.

D. *Statistics*

The counties involved in the regional program cover an area of 14,195 square miles, encompassing parts of three judicial districts. The distance by highway from Bismarck to all the county seats is no greater than 77 miles and on the average is approximately 50 miles.[140]

Appendix VI analyzes cases handled during the first year in the respective counties according to the type of action and their disposition. During this period 204 cases were processed through the Bismarck office and a corresponding amount are expected for the current year. As is to be expected, the greatest number of cases originate in the population centers within the region. Burleigh County accounts for 53 per cent of the activity while Burleigh and Morton counties together contribute 74 per cent of the total.

While it is difficult to gauge the effectiveness of one system in comparison to another, the five indices appearing in Appendix VII offer a basis for a cursory evaluation.[141] The number of dismissals in proportion to the total dispositions is indicative of the effect of the presence of counsel at early stages in a criminal prosecution.[142] The North Dakota Regional Defender procures a significantly higher

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140. *See* Appendix V.

141. Benjamin and Pedeliske, *The Minnesota Public Defender System and the Criminal Law Process, A Comparative Study of Behavior at the Judicial District Level*, 4 LAW & SOC'Y REV. 279, 291-93 (1969); Note, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C.L. REV. 705, 714 (1971).

142. Note, 49 N.C.L. REV., *supra* note 141, at 714.

percentage of dismissals than the assigned or public defender systems in either of the two comparison states.[143]

A high proportion of guilty pleas to total dispositions seem to imply a lack of adequate defense.[144] However, it might also indicate a satisfactory plea bargain change that fluctuates with the type of offense. Here also the North Dakota study compares favorably, especially in the defense of misdemeanants.[145]

The proportion of cases going to trial connotes a willingness on the part of the defense attorney to challenge the state to prove its case.[146] The wide variance between the percentage of cases going to trial in the felony and misdemeanor categories tends to show that the pressure to reach a pre-trial settlement increases with gravity of the offense. As Silverstien notes, a high percentage of cases tried does not necessarily indicate the most effective defense.

> In order to gain trial experience young lawyers who serve as assigned counsel are more likely to advise their clients to plead not guilty than are retained counsel.[147]

From a defense attorney's perspective, probation or a suspended sentence is more favorable than incarceration. A plausible explanation for the high figures of the North Dakota Public Defender might be his ability to successfully negotiate with the county prosecutors for reduced sentences.[148]

A high percentage of acquittals reflects upon the attorney's evaluation of the case in its initial stages as well as his ability in the courtroom. The acquittal ratio in the State Regional Program was generally lower than in the other sample states.[149] In most instances after extensive plea bargaining between the Public Defender and the State's Attorney, the cases actually going to trial are those weighing heavily in favor of one of the parties. A sure case lessens the spirit to compromise, and this explains the lower figure.

In three of the five categories, the Bismarck Defender's Office was superior to the assigned system in the two comparison states.[150] In the other two indices neither system demonstrated a marked

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143. *See* Appendix VII.
144. 49 N.C.L. REV., Note *supra* note 141 at 714.
145. *See* Appendix VII.
146. 49 N.C.L. REV., *supra* note 141 at 714.
147. 1 L. SILVERSTEIN, *supra* note 76, at 25.
148. *See* Appendix VII.
146. 49 N.C.L. REV., Note *supra* note 141 at 714.
149. *Id.*
150. *Id.*

superiority.[151] While it would be impossible to assign relative values to each index, the performance of the Regional Public Defender Program in the areas tested appeared to be more effective.[152]

A cost analysis is presented in Appendices VIII-XI. Appendix VIII consists of a cost breakdown for the Public Defender's Office as well as each county within the region. A comparison is made with the expenses incurred by Grand Forks[153] in providing representation through the assigned counsel system. Appendix IX shows the volume of cases and types of actions in which counsel was appointed.[154] Appendices X and XI represent a cost study which may be validly compared to figures drawn from the Burleigh County program. Eight of the counties within the Public Defender Region recorded an average per capita cost less than that expended in Grand Forks County.[155] It is notable that the average per capita cost for the ten county area was half that of the assigned system operating in Grand Forks. An equally telling statistic relates to the average cost per offense. The expenditures in Grand Forks county for 1971 and 1972 are significantly higher than those within the Defender Region. Based on this data the Public Defender system seems much more economical to operate than the assigned counsel program.

IV. CONCLUSION

The statistics presented in this note, although certainly not exhaustive, do reflect favorably on the overall effectiveness and the relatively low cost of the Public Defender program. Such results justify continued evaluation and consideration. The Defender System provides a feasible alternative to the assigned counsel system and has in its short existence in North Dakota proved to be a realistic means of providing legal services to indigents.

Several further observations can be made about the mechanics to be considered in the implementation of either a statewide or regional defender program. In light of *Argersinger*, and the high volume of misdemeanor cases tried in municipal courts, extension of the Public Defender Program to municipal cases might be merited. Also, due to the wide distribution of North Dakota's small population, any state wide defender program would have to be admin-

151. *Id.*
152. *Id.*
153. Figures from Grand Forks made available through the courtesy of Judge Kirk Smith of the County Court of Increased Jurisdiction.
154. Due to the unavailability of statistics from the District Court it was impossible to make a disposition analysis.
155. Sioux County had no costs as it did not require the services of the Public Defender. The cost in Grant County may be explained by an unusually high felony rate for the year.

istered on a regional basis. As in the Bismarck experiment, the Defender should operate out of a major city and function as a circuit rider in the surrounding counties.

If the state elects to establish the public defender system, the costs presently borne by the federal grant would have to be assumed by the state or local governments. Although an exact dollar amount for such an extension is not presently determinable, the effect would be to increase the expense of the program as measured by per capita costs and average costs per offense at the existing regional office. However, even with such an increase it is anticipated that the Public Defender program would still compare favorably with the assigned counsel system.

North Dakota's Forty-Third Legislative Assembly considered a bill (H.B. 1038) which would have established a statewide public defender system. This proposal was indefinitely postponed by the North Dakota House Judiciary Committee. The principle reason was a lack of statistical research and emperical data. It is hoped that this note will fill part of that void.

ROBERT J. ERICKSON
JAMES S. HILL

APPENDIX I

PUBLIC DEFENDERS—STATE-WIDE BASIS

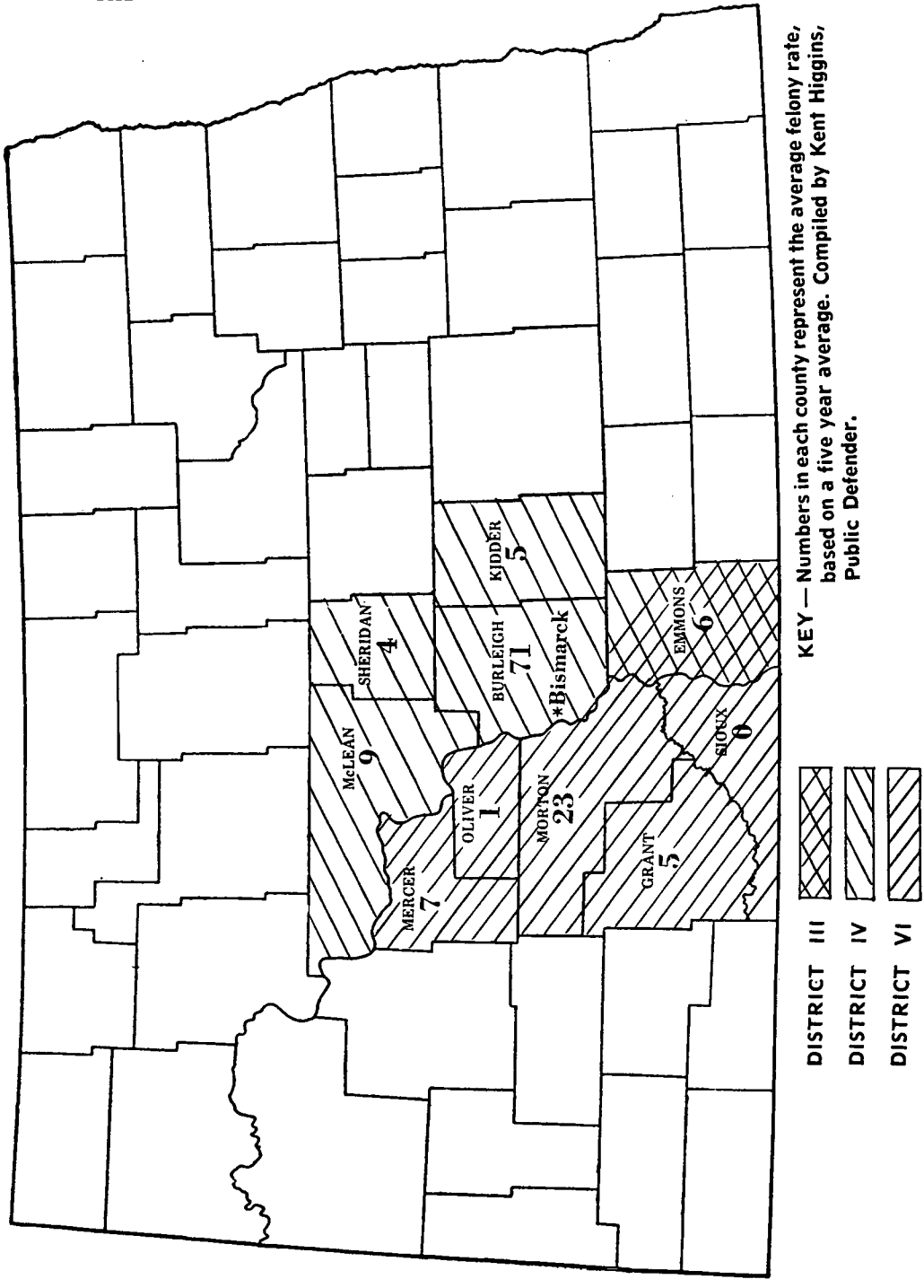
State	Population (1970)*	Program Cost*	Cost per Capita
Alaska	302,000	$500,000	$1.65
Colorado	2,207,000	$1,273,000	$ .57
Delaware	548,000	$219,000	$ .39
District of Columbia	757,000	$1,210,000	$1.59
Florida	6,789,000	$2,399,000	$ .35
Hawaii	770,000	$68,000	$ .08
Maryland	3,922,000	N/A	N/A
Massachusetts	5,689,000	$1,130,000	$ .19
Minnesota	3,805,000	$209,000	$ .05
Nevada	489,000	$470,000	$ .96
New Jersey	7,168,000	$5,370,000	$ .75
Oregon	2,091,000	$283,000	$ .13
Rhode Island	950,000	$145,000	$ .15
Wisconsin	4,418,000	$61,000	$ .01

*Figures rounded off to nearest thousand

Statistics are based on a nation-wide survey of Public Defender Systems prepared by the South Carolina Law Enforcement Assistance Program. (1972).

APPENDIX II

THE REGIONAL APPROACH—OFFICE OF THE PUBLIC DEFENDER



APPENDIX III

ITEMIZED BUDGET FOR THE OFFICE OF THE PUBLIC DEFENDER

	1971-72 Applicant's Share	1971-72 Federal Share	1972-73 Applicant's Share	1972-73 Federal Share
A. PERSONNEL				
Public Defender	12,000	2,000	12,000	3,000
Assistant Public Defender	N/A	N/A		14,000
Administrative Assistant		6,000		7,200
Total for Category	12,000	8,000	12,000	24,200
B. TRAVEL				
In State Transportation Mileage, 10,000 Miles at 10c per mile		1,000		1,000
Out-of-State Per Diem, at $15.00 per day		375		300
Tuition, etc. (workshops & training courses)				500
Transportation		525		500
Total for Category		1,900		2,300
C. OTHER				
Equipment Purchases, IBM, Dictation Equipment & Type.		1,506		
Rent, Office and Parking Space		1,740		2,500
Furniture Purchases		800		750
Telephone and Answering Service		1,500		1,500
Books, Supplies, Postage & Reproduction		854		350
Investigation		1,700		1,800
Office Equipment				600
Books & Miscellaneous (Research Materials)				2,000
Total for Category		8,100		9,500
GRAND TOTAL of Categories A, B, C	12,000	18,000	12,000	36,000

APPENDIX IV

STATE OF NORTH DAKOTA COUNTY OF GRAND FORKS STATE OF NORTH DAKOTA,	)	IN COUNTY COURT
vs.	)	
Plaintiff,	)	AFFIDAVIT OF FINANCIAL RESOURCES
_____,	)	CRIMINAL CO_____
Defendant.	)	

The above-named Defendant, being first duly sworn, deposes and makes under oath the following statement regarding his personal and financial circumstances:

1. Name of Charge:_____Date of Arrest:_____

2. Marital Status:
   a. Single____Married____Separated____Divorced____.
   b. Number of dependent children____.
   c. Other dependents____.
   d. Age_____Date of Birth_____.

3. Residence:
   Street_____
   City_____State_____Phone_____

4. Employment:
   Name of employer_____Employer's Phone_____
   Address of employer_____
   Nature of employment_____
   What is Defendant's job?_____
   _____
   How long has Defendant been employed by present employee?_____

5. Finances:
   Income $_____per month or $_____per week.
   Cash on hand $_____Cash in bank $_____.

Dated at_____, North Dakota this _____ day of _____, 19____.

_____
Defendant's signature

Subscribed and sworn to before me this _____ day of _____, 19____.

_____
Officer administering oath

_____
Title

Original—Clerk of District Court
Copy—Defendant
Copy—Magistrate

DC Form "A" 1M 0970

APPENDIX V

COUNTY STATISTICS

County	Square Miles	Population *	County Seat	Population of County Seat	Distance by Hwy.—Co. Seat to Bismarck**	Judicial District
Burleigh	1,649	40,714	Bismarck	34,703	—	4th
Emmons	1,546	7,200	Linton	1,695	64	3rd
Kidder	1,377	4,362	Steee	696	41	4th
Sheridan	995	3,232	McClusky	664	63	4th
McLean	2,090	11,251	Washburn	804	39	4th
Morton	1,933	20,310	Mandan	11,093	6	6th
Sioux	1,124	3,632	Fort Yates	1,153	77	6th
Grant	1,664	5,009	Carson	466	64	6th
Oliver	720	2,322	Center	619	40	6th
Mercer	1,097	6,175	Stanton	517	64	6th
TOTALS	14,195	104,207		52,410		

*Latest census figures (1970)

**Average Distance from County Seats to Bismarck—50.55 miles

APPENDIX VI

CASELOAD BREAKDOWN FOR THE YEAR BEGINNING APRIL 1, 1971 TO MARCH 31, 1972 IN THE OFFICE OF THE PUBLIC DEFENDER

	FELONIES												MISDEMEANORS												JUVENILES				MENTAL HEALTH				PAROLE VIOLATIONS				EXTRA	TOTAL
	No Trial			Court Trial			Jury Trial						No Trial			Court Trial			Jury Trial																			
	X	D	P	I	A	P	I	D/A	P	I	D	F/P	I	A	P	I	A	F/P	I	X				D	P	I	X	D	P	I	X	D	P	I	X		
BURLEIGH	3	20	19	15				1		3	13	12	4		3					1				3	7		3	2	1	1		2	2	1		3	119
MORTON	1	3	10	9					1		7	6	1	4	3					3						4		1		1						55
MCLEAN		4	2	2								1			2					1					1											1	13
KIDDER	4		4	1								2																									11
EMMONS			1																																		1
OLIVER															1											1											2
MERCER			1												1	1									3												6
GRANT		3	3							1			3		5																						15
SIOUX																																						0
SHERIDAN			1																																			1
TOTAL	8	30	41	27	0	0	0	1	1	4	20	21	8	4	10	6	0	0	0	5				6	8	5	3	3	1	2	0	2	2	1	4	223

Key:

D — dismissed

P — probation

I — incarcerated

A — acquittal

F — fine

X — other dispositions — or no disposition at all

	North Carolina—1970 Judicial Districts*			Minnesota—1968 *		North Dakota—March 31, 1971-April 1, 1972	
	Assigned Counsel 14th	Public Defender 18th	Public Defender 12th	Public Defender	Assigned Counsel	Public Defender Felony	Public Defender Misdemeanor
Dismissals as a proportion of total dispositions	10.3%	17.4%	23.7%	8.5%	18.1%	26.8%	27.0%
Guilty please as a proportion of total dispositions (minus dismissals)	85.5%	83.6%	73.3%	85.8%	85.5%	73.9%	53.7%
Proportion of total dispositions going to trial	12.9%	13.5%	20.6%	12.8%	14.5%	5.3%	33.8%
Proportion of covictions given probation or suspended sentence	38.9%	43.2%	57.6%	49.5%	62.8%	57.5%	68.8%
Proportion of criminal trials terminated in acquittals	12.5%	43.0%	51.0%	31.3%	22.5%	16.3%	20.0%

*Figures taken from: Analysis and Comparison of the Assigned Counsel and Public Defender System, 49 N.C.L. Rev. 705, 714 (1971).

APPENDIX VIII

COST ANALYSIS OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE PERIOD APRIL 1, 1971 TO MARCH 31, 1972

County	Unbillable	Number of Offenses	Total Cost Billed	Average Cost Per Capita	Average Cost Per Offense
McLean	—	13	$ 683.39	$.07	$ 52.56
Sheridan	—	1	$ 139.26	$.04	$139.26
Mercer	—	6	$ 259.72	$.04	$ 43.29
Emmons	—	1	$ 264.41	$.04	$264.41
Oliver	—	2	$ 135.49	$.06	$ 67.75
Kidder	2	11	$ 388.36	$.09	$ 35.31
Grant	—	15	$1,750.33	$.35	$116.68
Morton	10	55	$3,494.60	$.16	$ 63.54
Burleigh	7	119	$9,318.29	$.23	$ 78.31
Sioux	—	—	—	—	—
Other	16	—	—	—	—
	35	223	$16,433.85*	$.12	$ 73.69

COST ANALYSIS OF THE OFFICE OF THE PUBLIC DEFENDER BASED ON THE TOTAL ANNUAL GRANT FUNDING

	Grant Allocation	Average Cost Per Capita	Average Cost Per Offense
April 1, 1971—March 31, 1972	$30,000	$.29	$134.53
April 1, 1972—March 1, 1973	$48,000	$.45	$215.25†

*Figure indicates amount bill for cases commenced within one year period, therefore amount over $12,000 represents billings on cases completed during second year.

†Based on an estimate of the same number of offenses as during the first year of operation.

APPENDIX IX

GRAND FORKS COUNTY COURT OF INCREASED JURISDICTION
ASSIGNED COUNSEL—VOLUME & CLASSIFICATION OF ACTIONS

1971 (total cases—475)

Felonies—71	
Dispositions	
1. Bound over to District Court	59
2. Dismissed	10
3. Incarcerated	1
4. Suspended sentence	1
	71
Misdemeanors—9	
Dispositions	
1. Dismissed	3
2. Incarceration	2
3. Fine & Suspension	4
	9
Extradition—2	
Dispositions	
1. Waived	1
2. Bound over to District Court	1
	2

1972 (total cases—545)

Felonies—30	
Dispositions	
1. Bound over to District Court	25
2. Dismissed	4
3. Other	1
	30
Misdemeanors—27	
1. Dismissed	9
2. Fine/Suspension/Deferred	6
3. Incarcerated	9
4. Other	3
	27
Extradition—3	

APPENDIX X

COUNTY LEGAL FEES PAID FOR SERVICES BY COURT APPOINTED COUNSEL TO INDIGENT DEFENDANTS

GRAND FORKS COUNTY

COUNTY	
1970	$2,037.63
1971	3,317.22
1972	5,812.04
DISTRICT	
1970	7,423.51
1971	7,928.86
1972	7,440.53
JUVENILE	
1970	3,687.64
1971	2,595.95
1972	3,311.21

1970	1971	1972
2,037.63	3,317.22	5,812.04
7,423.51	7,928.86	7,440.53
3,687.64	2,595.95	3,311.21
13,148.78	13,842.03	16,563.78

APPENDIX XI

GRAND FORKS COUNTY LEGAL FEES PAID TO ASSIGNED COUNSEL FOR DEFENSE OF THE INDIGENT ACCUSED

	Cost	Year
Cost per capita (1970 census, 61,102)*	$.22	(1970)
	$.23	(1971)
	$.27	(1972)

	Year	Number of Offenses	Average Cost
Cost per Offenset	1971	82	$137.15
	1972	60	$220.88

*Includes expense of appointments for district court, county court of increase jurisdiction, and juvenile court.

†Based on appointments made in the county court increased jurisdiction, for cases heard in that court or bound over to district court only. For this reason the expenditure for assigned counsel in juvenile court has been deducted.