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AN ANALYSIS OF DEFENSE COUNSEL IN THE PROCESSING OF FELONY DEFENDANTS IN DENVER, COLORADO*

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The original study examined the role of defense counsel in processing criminal cases in Denver, Colo., and San Diego, Cal. The results of the Denver study are presented in this article. The San Diego findings were published in 49 DENVER L.J. 233 (1972).

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I. BACKGROUND

A. *Right to Counsel*

THE right of the indigent defendant to be provided effective counsel and the historical development of that right have been well-covered elsewhere.¹ Of interest here is the system used for representation of the indigent in felony cases in Denver, Colorado and the comparison of public defender representation with that provided by retained counsel.

All systems for representation of the indigent have been subjected to much criticism when compared to the defense available to persons who are financially able to retain counsel. It is frequently stated that retained counsel essentially manipulate the system in order to minimize the effect of the system on their clients, whereas court-appointed counsel provide in-

¹ See, e.g., Craig, *The Right to Adequate Representation in the Criminal Process*, 22 SW. L.J. 260 (1968); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Siegal, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. CRIM. L.C. & P.S. 73 (1968); Note, *The Right to Effective Counsel: A Case Study of the Denver Public Defender*, 50 DENVER L.J. 45 (1973); Note, *Judicial Safeguards of the Rights of Indigent Defendants*, 41 NOTRE DAME LAW, 982 (1966); Note, *The Right to Effective Counsel in Criminal Cases*, 18 VAND. L. REV. 1920 (1965).

ferior defense for the indigent because of such things as inexperience, high case loads, and inadequate investigative services. These criticisms are usually based either on the personal experience of those who have acted as defense counsel² or on observations of the system in operation.³ Since inferences about performance of counsel can be supported by the selective use of cases, samples, observations, and opinions of participants in the system, potential error arises from observation of the system with a predisposition for or against defense counsel, either in their appointed or retained role.

A better approach is to examine statistically the result of the representation of criminal defendants, both the indigent and those capable of retaining private attorneys. This study has sought to do this, drawing comparisons over systemic- and defendant-related variables to measure the performance of the Denver Public Defender (P/D) against that of retained counsel in Denver (R/C).

B. *Description of the Denver Felony Defense System*

Persons charged with committing a felony in Denver are processed through county court for preliminary matters and district court for trial. In both courts, the state is represented by prosecutors from the office of the District Attorney for Denver. The court appoints the P/D to represent defendants financially unable to obtain counsel; only in the event of conflict is a member of the practicing bar appointed.

Colorado is unique among states with public defender systems in that it uses full-time public defenders exclusively. The Denver office had approximately 19 full-time assistant and deputy public defenders and four investigators in 1970. The inexperienced P/D's were assigned to misdemeanor and juvenile cases; the more experienced, to felony cases. At least three P/D's were assigned to county court to handle felony advisements and preliminary hearings. At the district court level, two P/D's were assigned to each of the four court divisions that process felony cases filed in that court. In addition, there was at least one P/D available to fill in at the district court level. When the case of an indigent defendant was filed in district court and assigned to a division, one of the P/D's in the division handled the case from that point on.

² Seegal, *Some Procedural and Strategic Inequities in Defending the Indigent*, 51 A.B.A.J. 1165 (1965).

³ Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOCIAL PROBLEMS 255 (1965).

Under this system, an indigent defendant whose case was processed through both county and district courts had at least two different P/D's involved in the case.⁴ This number could increase due to illness, schedule conflict, or turnover in the P/D office.

The defendant may choose to retain his own counsel, or it may be determined that he is not indigent and therefore must engage his own attorney. There are a large number of lawyers who represent felony cases in Denver. For example, in one sample examined, there were 150 different lawyers involved in representing about 325 defendants. In another sample, there were 43 lawyers for 76 defendants. On the average, there are about two defendants per lawyer in these samples. However, as in most jurisdictions, a large bulk of the defendants are represented by a few lawyers. In these samples, between 15 and 20 percent of the lawyers were retained by about half of the defendants. However, in contrast to many urban areas in the country, Denver does not have the "courthouse lawyer"; instead, the lawyers who handle the bulk of the cases operate from well-established and well-maintained offices.

C. *Study Objective and Perceptions of Counsel*

Specifically, the objective of this study is to examine the processing of felony defendants by P/D and R/C in order to:

- (1) develop a quantitative description and comparison of defense counsel in the processing of criminal cases, and a quantitative measure of the interaction of defense counsel with the criminal justice system,
- (2) measure time between steps in the processing of cases and determine how these times vary with the type of counsel, and
- (3) develop models of felony processing that take into account the type of defense counsel and other relevant factors which may be useful components in a study of the total criminal justice system.

Since the major focus of this study is a comparative analysis of defense counsel in the processing of felony cases, some of the viewpoints and subjective evaluations that persons in the Denver criminal justice system hold concerning retained counsel and the public defender system are summarized here. Many of these cannot be substantiated or refuted without case-by-case

⁴ This system changed in late 1971. Cases are now assigned a P/D at the county court level and this same P/D follows the case through the district court when it is bound over.

observation and evaluation. This was not the approach taken in this study. However, some of these viewpoints will be evaluated in light of the results discussed in the following sections.

Generally, the assistant and deputy public defenders are held in high regard by actors in the criminal justice system.⁵ Although not all P/D's are held in equally high regard, some P/D's are considered as fully competent as the best R/C's. On the other hand, some persons feel that if a defendant can afford private counsel, he may be represented by an attorney of higher quality than those in the offices of public defender and district attorney.

Many consider the P/D superior to R/C because he is a criminal law specialist with skills comparable to those of a district attorney. By practicing daily in the criminal system, the P/D is currently aware of cases, practices, and procedures. On the other hand, he has a heavy case load (between 150 and 200 district court defendants per year)⁶ which affects the amount of time and attention he can devote to individual defendants. This heavy case load may be the underlying reason for the common complaint about the infrequency with which clients of the Denver public defender are seen,⁷ as well as the charge that the P/D generally pleads his client out with poorer "deals" than would the R/C in similar circumstances.

The P/D is viewed by some as working more for causes than for the client. Some perceive retained counsel as expediting cases faster than the P/D. Perhaps the R/C, with lighter case loads, can get into the case faster, investigate it, and get quicker dismissals and pleas to lesser offenses—if the fee is forthcoming—while the P/D is hampered by a high case load and limited investigatory support.⁸

But on the other hand, it is commonly believed that R/C sees delay as an advantage and benefit for his client. This can be accomplished through motions and trial date continuances.

As mentioned earlier, a P/D client in 1970 would have at

⁵ Note, *The Right to Effective Counsel: A Case Study of the Denver Public Defender*, 50 DENVER L.J. 45, 63 (1973).

⁶ Based on the representation in the data base of 1970 filings, the P/D represented 1,138 defendants. This would be an average of approximately 125 defendants for each of the eight P/D's assigned to district court. If carry-over cases from previous years are added, the yearly case load increases at least to 150 and probably higher.

⁷ The ten P/D's with heaviest district court case loads recorded a total of 2,175 jail visits and 700 office visits during 1970. This covers prior year filings; therefore, the average visits (jail and office) would be less than three per defendant outside of courtroom contacts.

⁸ Note, *supra* note 5, at 61-81.

least two different attorneys — one at county court and another at district court. The most frequent complaint about the Denver public defender is the number of different P/D's involved in a case prior to disposition. A defendant could have up to 10 different P/D's involved in his case. As noted earlier, action was taken in 1971 to remedy this situation.

A number of other observations were made; e.g., the defendant feels that since the P/D is paid by the state, he must be working with the state. This becomes important because many defendants believe it. Also, the attitude of the bar regarding criminal practice has changed in recent years. The court-appointed counsel system in Denver prior to 1966 was generally considered unsatisfactory to the bar; today, however, some feel that it could be operated effectively.⁹

D. *Methodology, Analysis, and Data Sources*

Major areas examined in this study of the processing of felony defendants are (1) type of disposition, including trial and nontrial disposition, (2) sentencing, and (3) time to disposition. The approach systematically investigates the relationship of type of defense counsel in each of these areas and accounts for a set of defendant-related and system-related factors. Such defendant-related variables as plea, offense, prior record, and bail/jail status are considered. System-related variables include continuances, motions, level of activity in the case, and time.

By comparing these factors or variables, hypotheses are suggested that seek to account for the differences in performance between R/C and P/D. Where significant differences remain between R/C and P/D on a two variable analysis, three and even four variables are used in an attempt to understand the relative activity of R/C and P/D. Court organization, procedures, practices, and rules are introduced when appropriate to interpret results. Statistical techniques permit analyses of the interaction between the qualitative variables and an assessment of the statistical significance of the interactions. (In this study the .95 and .99 confidence levels are used unless otherwise specified.¹⁰)

⁹ The Denver Bar Association has recently initiated a program whereby its members will volunteer their services and represent up to two indigents accused of crimes free of charge in order to relieve financial and case load problems of the P/D.

¹⁰ Confidence level refers to the probability that the results obtained were not due to chance. In this case, there is only a 5 percent probability at the .95 level, or a 1 percent probability at the .99 level that the findings are due to factors other than those postulated.

The findings relative to defense counsel processing of felony cases in Denver are based on the following data sources:¹¹

- a) A sample of defendants charged with burglary in 1970 who were processed for preliminary matters in county court and bound over to district court for disposition.
- b) All felony filings in Denver District Court during calendar year 1970. Those charged with offenses against the person, property, or public health and safety form the basis for much of the analysis. The cases were traced to disposition or until November 30, 1971, if still pending.

II. DETAILED ANALYSIS OF FINDINGS

A. *Defense Counsel in Denver County Court*

With the exception of dangerous drug cases, the preliminary processing of persons charged with a felony occurs in Denver County Court. At the first advisement, the defendant is given the reason for his arrest and is advised of his rights; bail and the date for second advisement are set. At the second advisement, the defendant is notified of the charge in the complaint, and is given 10 days in which to file for a preliminary hearing. If the defendant waives the preliminary hearing, the case is bound over to district court on the complaint which serves as the information. Dismissals may result from the preliminary hearing or from other matters prior to the preliminary hearing. Also, the charge may be reduced to a misdemeanor as a result of negotiations between prosecution and defense, the case then being disposed of at the county court level.

A sample of 135 defendants charged with burglary was examined to determine manner of processing and associated time spent in county court according to type of counsel. The P/D represented approximately 75 percent of the defendants in this sample; R/C represented about 22 percent. Four defendants switched from R/C to P/D between the advisement period and the time of the preliminary hearing.

Eighty-six percent of the defendants represented by R/C made bail, and eight out of 10 of these defendants made bail within 7 days of its being set. Only half of the defendants represented by the P/D made bail during the course of the case, and

¹¹ Basic individual case data on Denver District Court cases were obtained through the cooperation of the Colorado State Court Administrator's Office. This was supplemented with additional information from case jackets for selected samples of cases with the assistance and cooperation of members of the District Court Clerk's Office.

only 25 percent of these defendants made bail within 7 days of its being set. The most frequent bail was in the \$1,000 to \$2,500 range regardless of counsel. The fact that the defendant can make bail (other than personal recognizance¹² probably relates to and is a part of the determination of indigency and eligibility for counsel appointment.

The median time between first advisement and bind-over to district court is 6 weeks for all defendants. The median time for defendants represented by R/C is 8 weeks, compared to a median time of 6 weeks for defendants represented by P/D. When a preliminary hearing is held, the median elapsed time remains at approximately 6 weeks regardless of the type of counsel. The rate of waiver of the preliminary hearing is approximately 42 percent for both types of counsel. When waiver occurs, the median elapsed time for defendants with R/C is 10 weeks; for defendants with P/D, it is 5.5 weeks.

In general, defendants represented by R/C have longer median times between steps; in particular, between (1) first and second advisement, (2) second advisement and preliminary hearing, and (3) second advisement and bind-over to district court when the preliminary hearing is waived. Although the reasons for these differences are not certain, it is clear that continuances and counsel changes do not account for the different time intervals for the two types of counsel during the time that the case is being processed in county court.

There are two time intervals where the median times for R/C are shorter than P/D: (1) between arrest and first advisement, and (2) between arrest and entry of counsel. First advisement was held on the day of arrest or within one day of arrest for 56 percent of the total sample. However, first advisement was held within this period for 72 percent of the R/C defendants as compared with 50 percent of the defendants with P/D. Both first appearance and entry of counsel represent critical events from the defendant's point of view. Presumably, the defendant with R/C contacts his attorney early in the process. His attorney may then be a factor in quickly setting the first advisement where bail can be set so that the defendant may arrange for bond and be released from jail.

Although a delay of 2 days between arrest and first advisement may be caused by a weekend, this does not explain a delay of 3 or more days. Without considering the extreme cases (*i.e.*,

¹² Of all the defendants on bail, about 25 percent were on personal recognizance; this percentage was the same for both R/C and P/D defendants.

the five defendants in the sample whose first advisement occurred 20 or more days after arrest), there was a period of 3 to 11 days between arrest and first advisement for 17 percent of the defendants represented by P/D. Only one defendant with R/C had a delay beyond 2 days.

This problem is obviously related to the fact that the P/D is usually not appointed until there is an indigency determination which is generally made at the second advisement. For 87 percent of the defendants who were represented by P/D, appointment was not made until second advisement.¹³ These defendants were without representation for a median of 8 days after arrest. Furthermore, 84 percent of these defendants were in jail during the period that they were without representation. Initially, processing of the indigent and appointment of counsel in 1970 was slow compared to that of defendants who could afford counsel. After this initial period, the processing times appear to have been faster for P/D defendants.

The advisement procedure is such that the date for preliminary hearings may not be set for 2 to 3 weeks after arrest. In many cases the preliminary hearing is not held until 1 month after it is set. The effect these time periods have on negotiation and bargaining cannot be measured here because the cases in this sample were bound over to felony trial court. However, for those incarcerated defendants (i.e., most P/D clients), this processing time is very long compared to the 7 day period recommended by the President's Crime Commission.¹⁴ Furthermore, when the time in district court is added to the time in county court for the sample defendants, the overall median time between first advisement in county court and final disposition in district court is 6 months. Median times are the same for both types of counsel, and are three times longer than the maximum recommended by the President's Crime Commission.¹⁵

¹³ The P/D in advisement court generally sees the defendant without counsel when he is brought for first advisement. He talks to the defendant at this time; however, between first and second advisement when a P/D is appointed, the defendant was unrepresented in 1970 in the strict sense of the word. This situation changed in 1971. Now, at the time of arrest, the law enforcement officer is to put the defendant in contact with a lawyer of his choice. If he has none, the P/D must be called in. This assists in obtaining information for indigency as well as providing the defendant with legal counsel. Since late 1971, the P/D has had a jail check team consisting of a lawyer, two investigators, a secretary, and a paralegal person. This team is responsible for the accused who is without R/C between arrest or first advisement and second advisement, when the P/D is assigned.

¹⁴ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 155 (1967).

¹⁵ *Id.*

Although these observations are based on a sample of defendants charged with burglary, it is not expected that the offense should be a principal factor in either the time between proceedings or the procedures followed in the processing of felony defendants in county court. The P/D did not assume an active role in these cases, nor probably in others, until second advisement.

B. *Defense Counsel in Denver District Court*

In the calendar year 1970, there were 1,890 felony cases involving approximately 2,425 defendants filed in the Denver District Court. These totals include extraditions, insanity re-hearings, and consolidated cases that were deleted from the data base for this study. The cases of the remaining 2,129 defendants and their status as of November 30, 1971, (shown in Table 1) form the basis for this examination of case proceedings as a function of defense counsel. Unless otherwise stated, the analyses consider defendants rather than cases.

TABLE 1 Status and Representation of Defendants Whose Cases Were Filed in District Court in 1970

Counsel	Number of Defendants					
	Terminated		Pending		Total	
	No.	%	No.	%	No.	%
R/C	768	41.2	127	47.9	895	42.0
P/D	1033	55.4	105	39.6	1138	53.5
Appointed	39	2.1	4	1.5	43	2.0
None	23	1.2	26	9.8	49	2.3
Unknown	1	0.1	3	1.2	4	0.2
Total	1864	100	265	100	2129	100
Percent	87.6		12.4		100	

Forty-two percent of these defendants were represented by R/C; 53.5 percent were represented by P/D. Where conflict or other cause arises in a case represented by P/D, a private attorney is appointed to represent the defendant. This occurred with 2 percent of the defendants. Due to the small size of this latter group, all of the analyses and discussions in this article relate only to R/C and P/D. Only terminated defendants are examined in this study. Pending defendants — a small group — are not discussed.¹⁶ The analysis is organized around three major

¹⁶ Of the 265 pending defendants, one-third were in a fugitive status (a bench warrant had been issued by the last court action recorded as of November 30, 1971), 22 percent were awaiting sentence after guilty plea or trial, 30 percent were awaiting action on the trial date, and 15 percent were on deferred prosecution. The latter is an action in which prosecution is postponed to give a defendant an opportunity to make restitution or exhibit good behavior. After a specified time period, charges will be dismissed if there has been compliance with the court's directive.

considerations: type of disposition, sentence, and time to disposition. The approach is to proceed from two-variable analysis, to three-, and finally to four-variable analysis to examine the associations or relationships that may exist, to identify differences, and to draw inferences and suggest models that fit the data wherever possible.

1. Retained Counsel Compared to Public Defender: Type of Disposition

The first set of comparisons is the guilty/not guilty disposition of defendants by type of defense counsel. Using this categorization, the frequency of guilty/not guilty dispositions is independent of type of counsel.¹⁷ The data in Table 2 shows that the not guilty rate for defendants represented by R/C is 35.4 percent; for the P/D, 32.3 percent. The frequencies do not differ significantly from what might be expected if there were no association between type of counsel and the guilty/not guilty dispositions.

TABLE 2 Disposition by Defense Counsel

	R/C		P/D		Total	
	No.	%	No.	%	No.	%
Not Guilty	270	35.4	331	32.3	601	33.6
Guilty	492	64.6	695	67.7	1187	66.4
Total ^a	762	100	1026	100	1788	100

^a The totals are less than the previous table because 13 defendants whose dispositions do not fit in the categories of guilty/not guilty were not included here: those where there was a mistrial (3), the defendant was found insane (1), writ denied (1), case consolidated (2), and other (6).

Considering dispositions in this gross guilty/not guilty classification does not account for the gradations of the two classifications. Within the not guilty classification there are four subclassifications: dismissed, dismissed/nolle prosequi (hereinafter referred to as dismissed/nolle), acquitted, and not guilty by reason of insanity. The dismissed category represents charges dismissed as opposed to defendants dismissed — in general, the defendant has pleaded guilty or been sentenced in a different case on another charge.¹⁸ On the other hand, dismissed/

¹⁷ Chi square = 2.0 with one degree of freedom. This is not significant at the .05 level.

¹⁸ This category does, however, include defendants who have successfully completed a time period of good behavior under the deferred prosecution action and have had their cases dismissed. These are mostly narcotics and dangerous drug cases. There were 14 defendants represented by R/C and two by P/D whose cases were dismissed after deferred prosecution. In addition, there were five defendants whose cases were dismissed after preliminary hearings in the district court.

nolle generally occurs in cases where the prosecution cannot prove the case beyond a reasonable doubt (perhaps because of a successful motion to suppress) or the complaining witness does not wish to prosecute.¹⁹ Acquittals are the result of a trial. Not guilty by reason of insanity generally results from a bench trial consisting mainly of a psychiatrist's testimony and lasting less than an hour. In summary then, the not guilty category consists mainly of (1) dispositions where the accused is released (dismissed/nolle and acquittals), (2) dispositions where the charge is dismissed but the defendant remains in the system, and (3) dispositions where the defendant is found not guilty by reason of insanity and committed as criminally insane.

Since the guilty category indicates that the defendant has been convicted of an offense charged in the filed case, it is more uniform. But this category also has gradations. The defendant may be convicted of (1) the felony as charged, (2) a lesser felony, or (3) a misdemeanor. Furthermore, the conviction may result from a guilty plea at arraignment, a change of plea during the processing of the case, or a guilty verdict following trial.

An examination of the gradations in the guilty and not guilty categories for the two types of defense counsel is shown in Table 3. The results of this analysis lead to a rejection of the hypothesis that type of counsel and disposition are independent of each other. The R/C has a high percentage of defendants dismissed/nolle when compared to the P/D. The R/C has a low percentage of clients pleading guilty to a felony when compared to the P/D. Finally, when compared to the P/D, a high

TABLE 3 Types of Disposition by Defense Counsel

Type of Disposition	R/C		P/D		Total	
	No.	%	No.	%	No.	%
Not Guilty:						
Dismissed	176	23.1	215	20.9	391	21.9
Dismissed/Nolle	78	10.2	60	5.8	138	7.7
Acquitted	11	1.4	12	1.2	23	1.3
Not Guilty/Insanity	5	0.7	44	4.3	49	2.7
Guilty:						
Felony/Trial	7	0.9	9	0.9	16	0.9
Misdemeanor/Trial	5	0.4	5	0.5	8	0.4
Felony/Plea	224	29.4	407	39.7	631	35.3
Misdemeanor/Plea	258	33.9	274	26.7	532	29.8
Total	762	100	1026	100	1788	100

¹⁹ This category does include seven defendants dismissed after deferred prosecution and 10 dismissals after preliminary hearing.

percentage of the R/C defendants plead guilty to a misdemeanor when originally charged with a felony. On the other hand, the P/D has a higher percentage of defendants found not guilty by reason of insanity.

It is of interest to note that the two types of counsel do not differ on trial disposition (acquitted and convicted). Trial dispositions represent a small fraction of total dispositions and yet represent a different kind of workload for both counsel and the court. Because there are so few trials, the subsequent analyses will consider these separately from nontrial dispositions (dismissals and guilty pleas). The not guilty by reason of insanity dispositions fall somewhere between the true adversary trial and the plea or dismissal dispositions, in terms of trial time and nature of the outcome. These will be discussed along with trials in the following section; the remaining discussion will examine nontrial dispositions.

2. Retained Counsel Compared to Public Defender: Trial Dispositions

A total of 106 defendants were disposed of at trial. This includes dismissals at the time of trial,²⁰ defendants found not guilty by reason of insanity, acquittals, convictions, and mistrials. The trial disposition rate is 5.7 percent of the total dispositions. Excluding the 49 defendants found not guilty by reason of insanity, the remaining 57 defendants represent 3.1 percent of the total dispositions.

a. *Not Guilty by Reason of Insanity*

Ninety percent of the defendants found not guilty by reason of insanity were represented by the P/D. They included all types of defendants, although the majority involved defendants charged with murder, rape, kidnapping, robbery, and burglary. The 10 percent of the defendants represented by R/C were charged with murder, kidnapping, and robbery.²¹

The differences in disposition rates between P/D and R/C are not readily explained. However, since the P/D represents indigents and has a higher rate of defendants found not guilty by reason of insanity, the results suggest that the indigent defendant population is more likely to have mental dis-

²⁰ There were seven dismissals at the time of trial.

²¹ All trials in 1970 represent 8 percent of all dispositions in that year, regardless of date of filing (177 trial dispositions; 2183 total dispositions). Fifty-three of these trial dispositions were not guilty by reason of insanity (NG/I); the remaining trial dispositions represent 5.8 percent of the dispositions (124 defendants disposed of by trial other than NG/I; 2130 defendants disposed of in 1970 without NG/I).

orders. Some outside evidence supports this theory — a higher incidence of schizophrenia has been reported among the low income, the lower educated, and the blue collar worker population when these latter are measured in terms of census tract characteristics.²²

b. *Other Trial Dispositions*

Retained counsel represented 24 defendants and P/D represented 34 defendants of those cases terminated at trial.²³ This represents respectively 3.1 and 3.3 percent of the terminated defendants represented by R/C and P/D.²⁴ The similarity of these rates does not support the opinion of some in Denver that the P/D goes to trial in a higher percentage of cases than does R/C. The appearance of the P/D at trial almost three times for every two times R/C appears could be attributed to a heavier case load. Additionally, this neither supports nor contradicts the opinion that the P/D goes to trial in cases where the defendant would have been "better off" accepting a prosecution offer in terms of both the offense of which the defendant was convicted and the sentence received. An evaluation of that opinion would require a knowledge of the prosecution's offers which were unavailable for this study.²⁵ Furthermore frequency of trial appearance does not, by itself, address the question of whether the P/D goes to trial because he is working for "causes" or a "philosophy," or whether he goes to trial only when he feels that course to be in the best interests of his client. On the other hand, if one postulates that R/C and P/D represent defendants who are equally likely to be innocent (and therefore this variable would not be related to economic status), then the rate of trials should be, and actually is, approximately the same.

²² C. Bodean, E. Gardner, E. M. Willis & A. K. Bahn, Socioeconomic Indicators from Census Tract Data Related to Rates of Mental Illness, Working Paper No. 17 presented at the Census Tract Conference, September 1963 (Bureau of the Census, U.S. Department of Commerce). The study used all reports on new patients during the year 1960 from inpatient and outpatient hospitals, clinics, and private psychiatrists in Rochester, New York.

²³ These are terminated cases as of November 30, 1971; for the convicted, this includes sentencing. There were two R/C and 11 P/D defendants in the pending group for whom there was a guilty verdict (to a felony) but who were still awaiting sentence as of November 30, 1971.

²⁴ If the defendants who were tried, but were awaiting sentence, are added in and the rate is based on terminations, defendants awaiting sentence, and deferred prosecution cases, the rates would be 3.2% and 4.2% for R/C and P/D respectively.

²⁵ There was documentation of four cases where the district attorney had offered lesser offenses carrying a maximum penalty of 10 years prison term; these cases went to trial and resulted in convictions of the offense with penalties of 50 years, life, and sometimes consecutive sentences.

Both counsel represented defendants at trial who were convicted of the major crimes against person, property, and public health. The acquittal and dismissal rates as a result of trial are approximately the same (R/C 50 percent, P/D 53 percent). The rates of dismissals and acquittals combined do not differ between counsel; similarly neither do guilty verdicts.²⁶

About 30 percent of the R/C trials and 46 percent of the P/D trials were held on the initial scheduled date. Overall, R/C had a higher continuance rate (1.4 per defendant) than the P/D (0.94 per defendant). In the case of trials ending in a guilty verdict (felony), the continuance rate was 2.1 for R/C and 1.5 for P/D. In the case of defendants represented by R/C, two of the continuances were requested by the prosecutor and seven were requested by the defense; the remaining 24 were unspecified.²⁷ In the case of P/D defendants, four continuances were requested by the defense, and the rest were unspecified.

More R/C defendants were on bail at the time of trial than were P/D defendants. Two-thirds of R/C defendants in jail were found not guilty; 50 percent of the P/D defendants in jail were found not guilty. The not-guilty rate for defendants on bail was about 50 percent for both types of counsel. The median time to disposition by major categories of trial dispositions is shown in Table 4.

TABLE 4 Median Time to Disposition

Trial Disposition	Median Time in Months		
	R/C	P/D	Total
Acquittal	5.5	2.5	3.0
Guilty, Misdemeanor	6.0	3.25	5.0
Guilty, Felony	11.0	8.75	8.75

It is clear that the times for P/D are shorter than for R/C. However, for both types of counsel the time gets longer as type of disposition goes from acquittal to guilty misdemeanor to guilty felony. Some of this difference can be accounted for by time between guilty verdict and sentencing. In the case of verdicts of guilty to a misdemeanor, sentencing often occurs on the day of verdict, whereas for felony convictions there

²⁶ If the defendants who were tried and awaiting sentence are taken together, the combined dismissal and acquittal rate would be 46 and 41 percent, and the guilty rate would be 46 and 57 percent, respectively, for R/C and P/D. These differences are not significant. The Chi Square for defense counsel and disposition is 0.3 with 2 degrees of freedom.

²⁷ The unspecified continuances could be due to court procedure or to the failure to identify the moving party in the court's daily minutes.

is at least 1 month, sometimes 3 to 4 months, between verdict and sentencing. The median time to sentencing for felony convictions for both types of counsel is 2 months.

3. Retained Counsel Compared to Public Defender: Non-trial Dispositions

There were 1,695 defendants terminated by November 30, 1971, either by dismissal or guilty plea.²⁸ Ninety-seven and one-half percent of these were charged with an offense against the person (358 defendants), property (628 defendants), or the public health and safety (666 defendants).²⁹ Possession of marijuana accounted for over half of the defendants in the public health and safety category; nearly two-thirds of the defendants in this category were charged with some sort of drug-related offense.

Two-thirds of the nontrial dispositions in these crime categories were guilty pleas to a felony or a misdemeanor when the original charge was a felony. This was true regardless of counsel type. However, there are significant relationships between type of disposition and counsel. Retained counsel is significantly high on dismissal/nolle, and low on guilty pleas to

TABLE 5 Nontrial Dispositions as a Function of Type of Defense Counsel^a

Disposition		R/C		P/D		Total	
		No.	%	No.	%	No.	%
Dismissed	No.	170	24	206	22	376	23
	%	(45)		(55)		(100)	
Dismissed/Nolle	No.	76	↑ 11	59	↓ 6	135	8
	%	(56)		(44)		(100)	
Plea of Guilty/Felony	No.	217	↓ 30	399	↑ 43	616	37
	%	(35)		(65)		(100)	
Plea of Guilty/Misdemeanor	No.	253	35	272	29	525	32
	%	(48)		(52)		(100)	
Total	No.	716	100	936	100	1652	100
	%	(43)		(57)		(100)	

^a Chi Square = 31, df = 3

²⁸ The analysis of nontrial dispositions is confined to defendants represented by the P/D and R/C who are charged with crimes (1) against the person, (2) against property, and (3) against public health and safety. Crimes against the person include murder, rape, assault with a deadly weapon, other assault, and robbery. Crimes against property include burglary, theft, forgery, and short checks. Crimes against public health and safety include mainly possession of narcotics (marijuana and heroin) and dangerous drugs (depressants, hallucinants, and stimulants).

²⁹ There were less than 50 defendants charged with offenses against public decency, justice and public administration, and other miscellaneous crimes.

a felony. The converse is true of P/D as can be seen in Table 5. Significant associations are shown with an arrow.³⁰

The guilty plea to a felony actually contains several gradations. The defendant may plead guilty to the most serious offense charged or to a lesser felony. When this distinction is made for defense counsel, the distribution on guilty pleas to a felony can be seen in Table 6.

TABLE 6 Distribution of Guilty Pleas by Type of Counsel^a

Guilty Plea To:	No.	R/C		P/D		Total	
		No.	%	No.	%	No.	%
Most Serious Offense	No.	89	↓ 12	182	↑ 19	271	16
	%	(33)		(67)			
Lesser Felony	No.	128	↓ 18	217	↑ 23	345	21
	%	(37)		(63)			

^a The percentages shown are of total defendants represented by the counsel.

The table shows a strong association between type of counsel and disposition including misdemeanor. The only exception is dismissal. Overall, R/C obtains fewer convictions on the most serious charge than does P/D.

Considering dismissals, pleas to a lesser felony, and pleas to a misdemeanor as a measure of successful plea bargaining,³¹ the R/C has a 77 percent success rate, the P/D a 74 percent success rate. This difference is not significant; counsel appear to be roughly equally effective. However, the association between types of disposition as shown previously is strong for each type of counsel. The following discussion addresses these relationships in the light of other factors relative to the defendant, to defense counsel activity, and to the system.

a. *Type of Offense*

The representation of defendants charged with an offense in the three major categories varies. Whereas R/C represent about 37 percent of persons charged with crimes against the person

³⁰ The Chi Square value reported in this and in all succeeding tables measures the statistical significance for the contingency table. The symbol "df" refers to the degrees of freedom employed in the Chi Square measure. In addition to computing these values, a recently developed statistical method, permitting an analysis of the interaction between qualitative variables was used to determine the significance of associations for *each cell of the table*. The results of this technique are shown in the table as follows: Whenever an arrow (↑) or (↓) appears, the association for that cell is statistically significant. An arrow pointing upwards (↑) designates a higher than expected frequency and an arrow pointing downwards (↓) a lower than expected frequency.

³¹ Dismissal/nolle is assumed to result most often from a successful suppression of evidence or loss of witnesses and is not included here.

or property, they represent over half of those charged with public health crimes (see Table 7). This disparity in representation may be explainable by an economic relationship to the public health category. Half of the defendants in this category are charged with possession of marijuana and many of these probably come from socio-economic groups who can afford counsel. On the other hand, the other two crime categories contain specific offenses that have an economic motivation such as robbery, burglary, theft, or larceny, and consequently defendants are less likely to be able to afford counsel.

TABLE 7 Counsel Representation of Major Crime Categories^a

Counsel	Crimes Against							
	Person		Property		Pub. Health		Total	
	No.	%	No.	%	No.	%	No.	%
R/C	135	↓ 38	229	↓ 36	352	↑ 53	716	43
P/D	223	↑ 62	399	↑ 64	314	↓ 47	936	57
Total	358	100	628	100	666	100	1652	100

^a Chi Square = 41, df = 2

This disparity in representation questions whether the associations discussed earlier between counsel and disposition are because *both* counsel and disposition are related to offense. Certain offenses are considered more serious than others, and the dispositions vary, as shown in Table 8, for the three offense categories. For example, dismissals are low and felony convictions are high in the category of crimes against property; the reverse is true with public health crimes.

TABLE 8 Disposition and Major Crime Categories^a

Disposition	Person		Property		Pub. Health		Total	
	No.	%	No.	%	No.	%	No.	%
Dismissed	77	21	107	17	192	↑ 29	376	23
Dismissed/Nolle	22	6	33	↓ 5	80	↑ 12	135	8
Plea of Guilty/Felony	153	↑ 43	293	↑ 47	170	↓ 25	616	37
Plea of Guilty/Misd.	106	30	195	31	224	34	525	32
Total	358	100	628	100	666	100	1652	100

^a Chi Square = 73, df = 6

When counsel, disposition, and offense are examined together, the strong associations between R/C and dismissed/nolle (high) and R/C and felony conviction (low) are partially explained; however, they remain significant. The converse associations of P/D with these dispositions also remain significant.

b. *Specific Offenses*

Within the categories of crimes against the person, property, and public health, there are five specific crimes with frequencies large enough to consider individually across several classifications. These are assault with a deadly weapon (ADW), aggravated robbery, burglary, theft, and possession of marijuana. Counsel representation of these is shown in Table 9. In the previous analyses, ADW and robbery have been included in the category of crimes against the person, burglary and theft in the category of crimes against property, and possession of marijuana in the category of crimes against the public health and safety. As shown in Table 9, the distribution of counsel varies greatly over these five crimes.³²

TABLE 9 Counsel Representation of Specific Offenses^a

	ADW		Robbery		Burglary		Theft		Marijuana		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
R/C	45	50	28 ↓	23	79 ↓	28	77	52	223 ↑	64	452	45
P/D	45	50	93 ↑	77	208 ↑	72	72	48	125 ↓	36	543	55
Total	90	100	121	100	287	100	149	100	348	100	995	100

^a Chi Square = 112, df = 4

If dispositions are examined by the specific type of offense, the interactions between type of disposition and type of counsel disappear. This can be seen in Table 10.

TABLE 10 Proportion of Defendants Represented by R/C and P/D According to Disposition and Offense^a

Disposition	ADW		Robbery		Burglary		Theft		Marijuana		Total	
	R/C	P/DR/C	P/D	R/C	P/D	R/C	P/D	R/C	P/D	R/C	P/D	R/C
Dismissed	38	62	10	90	27	73	43	57	69	31	44	56
Dismissed/Nolle	50	50	60	40	36	64	57	43	73	27	60	40
Felony	59	41	29	71	28	72	58	42	54	46	38	62
Misdemeanor	51	49	8	92	25	75	51	49	63	37	51	49
Total	50	50	23	77	28	72	52	48	64	36	45	55

^a Chi Square = 16, df = 15

For each disposition, there are large variations in the distribution of counsel across the specific offenses. However, examining for a specific offense, the counsel distribution in each disposition category is more nearly uniform. For example, the distribution of ADW defendants is 50/50 for R/C and P/D.

³² This subset of five offenses represents 60 percent of the nontrial dispositions in the three offense categories. The distribution of dispositions by counsel for all five offenses is similar to that of all nontrial dispositions.

This holds for misdemeanor convictions and dismissed/nolle dispositions. Although dismissals and felony convictions vary from this 50/50 distribution, they are not statistically significant. Similarly, other deviations from the proportions in the last row of each column in Table 10 are not statistically significant when considering the entire table.

Certain offenses tend to have higher R/C or P/D representation, but these offenses are associated with distributions of dispositions, those distributions being independent of representation. For example, if a person is charged with ADW, the odds are 0.45 that he will be convicted of a misdemeanor whether represented by R/C or P/D. On the other hand, if one is charged with burglary, the odds are 0.59 he will be convicted of a felony regardless of defense counsel. There is a 32 percent chance that the marijuana charges will be dismissed and a 50 percent chance of a misdemeanor conviction, again regardless of counsel.

Thus, within specific crimes there appears to be no strong relationship between counsel and disposition. However, 40 percent of the nontrial dispositions are not included here because their frequency is too small to consider individually. Therefore, the next sections will again examine the gross categorization of the three types of crimes using additional variables, namely, characteristics of defendants, counsel, and the court system.

c. *Bail Status*

Two-thirds of the defendants were on bail at the time of disposition.³³ Whereas defendants on bail are represented about equally by both types of counsel, over 80 percent of the defendants in jail have the P/D as counsel (see Table 11). It is of interest to note that about one-fourth of the P/D defendants who are on bail are on personal recognizance bonds as compared to 16 percent of those represented by R/C. The percentage obtaining release on money bond as a function of the amount set varies of course greatly between counsel; R/C consistently have a higher proportion that make bail in each category. This is understandable in view of the fact that bail status is a function of many factors. On the one hand, bail status probably affects the court's finding of indigency and appointment of P/D; on the other hand, R/C express some reluctance to represent defendants in jail because of the time they

³³ There were 82 defendants, or 5 percent of the defendants with nontrial dispositions whose bail status was unknown.

would have to expend in visiting the defendant in jail, the inability of the defendant to help in preparation of the case, and the fact that rehabilitation of the defendant cannot commence prior to sentencing. However, the defendant who is able to post bond will not necessarily have sufficient funds to retain counsel, considering that fees may range into thousands of dollars.

TABLE 11 Bail Status of Defendants by Type of Counsel

Counsel	Bail		Jail		Total	
	No.	%	No.	%	No.	%
R/C	569	53	88	18	657	42
P/D	500	47	413	82	913	58
Total	1069	100	501	100	1570	100

The distribution of bail/jail status of defendants by offenses is not uniform. Forty-eight percent of the defendants charged with offenses against the person were free on bail, 67 percent of the defendants charged with offenses against property were free on bail, and 80 percent of the defendants charged with crimes against the public health and safety were free on bail. Sixty-eight percent of all defendants in the sample were free on bail.

There is a strong relationship between favorable disposition and the status of being free on bail. Seventy-six percent of those defendants who were dismissed/nolle and 79 percent of those defendants who were convicted of a misdemeanor were on bail. Only 59 percent of those convicted of a felony were on bail.

d. *Prior Felony Convictions*

The information on the number of prior felony convictions was not available for all of the defendants in the data base. Since the probation report is the major source for this item, the records of defendants whose cases were dismissed or who pleaded guilty at arraignment and requested immediate sentencing did not contain this information.³⁴ But the records of a sufficient number of nontrial convictions did contain this information, and this subgroup was used to determine what relationship exists between counsel, disposition, offense, and prior felony convictions.

The results indicate that given the offense, defendants'

³⁴ Even for the sample of burglary defendants in which court records were examined in detail, the prior felony record could not be determined for 29 percent of the defendants.

prior record, and distribution of defendants between counsel, the disposition will not differ significantly from the proportional representation by counsel (see Table 12). This proportional representation exists whether the conviction is for a felony or for a misdemeanor when originally charged with a felony. As shown in Table 12, the proportion of counsel representation changes as prior felony convictions go from zero to one to two or more. But these defense counsel proportions are the same for level of conviction within a prior record category and an offense category. The deviations are not statistically significant.

TABLE 12 Proportion of Defendants Represented by R/C and P/D According to Offense, Guilty Disposition, and Defendants' Prior Felony Convictions

		Person		Property		Pub. Health	
		R/C	P/D	R/C	P/D	R/C	P/D
		%	%	%	%	%	%
No Prior Felony Convictions	Felony	43	57	37	63	49	51
	Misdemeanor	45	55	40	60	62	38
	Total	44	56	38	62	57	43
One Prior Felony Conviction	Felony	26	74	19	81	40	60
	Misdemeanor	33	67	15	85	0	0
	Total	28	72	18	82	40	60
Two or More Prior Felony Convictions	Felony	36	64	20	80	17	83
	Misdemeanor	33	67	57	43	37	63
	Total	35	65	25	75	25	75

Defendants with prior records are more likely to be in jail prior to disposition. Unfortunately, because of the lack of prior record information on all the defendants, the relationship between prior record, bail, and all dispositions (dismissals as well as convictions) cannot be determined.³⁵

³⁵ Another important variable is age. When this variable is used with counsel and disposition, an acceptable hypothesis is that each of these is related to offense but is independent of each other. Unfortunately, information on age is missing for 30 percent of the defendants and this alone could bias the data such that the result would not be an accurate reflection of the true situation. Even in the burglary sample where court records were examined closely, age was missing from 12 percent of the records.

e. *Continuances*

A counsel-related activity that may have a bearing on disposition is continuances. It may be postulated that the more often the trial date is continued, the higher the probability that witnesses will tire of appearing or the better the deal that can be made with the prosecutor. Thus, there should be a relationship between dismissal or level of conviction rates as a function of the number of continuances. Defense counsel are frequently regarded as seeking continuances in order to delay the proceedings for better results, or in the case of R/C, for both better results and to obtain the fee prior to conclusion of the case. Although the P/D might see continuances as a means of improving the outcome, fee collection would not be a factor. To the extent that case load affects continuances, it probably exists for both types of counsel.

In nontrial dispositions, over one-fourth of the defendants were disposed of without a trial setting, 44 percent had a trial set with no continuance, and the remainder (29 percent) had one or more continuances. Counsel distribution shows that R/C has a higher percentage of defendants whose cases have been continued one or more times; however, this is not significant when compared to P/D (see Table 14). There is a difference between counsel with respect to no trial date set and a trial date set with no continuances. Within these categories, there is a strong relationship between R/C and no trial setting (high) and trial date set only once (low). The reverse is true of the P/D. In the cases where there is no trial date set, either the defendant has pleaded guilty at the arraignment, or the judge has continued the case at the time of the arraignment to provide the parties time to negotiate. Consequently, there may be a guilty plea or the case may be dismissed without the case having been set for trial.

Retained counsel has a high number of defendants with no trial settings relative to his proportion of total defendants. There is also a strong association between R/C and dismissals (high) and felony pleas (low) (see Table 13). The reverse is true for the P/D. This is in part because R/C has a high case load of public health crimes with their associated high dismissal rates. On the other hand, P/D representation is high on crimes against person and property where felony convictions are high. Although earlier results indicated that defense counsel do not differ significantly on types of disposition, given bail status and offense, the fact that P/D has a high plea rate with-

out trial setting reflects the fact that he is processing these cases faster.

TABLE 13 Disposition of Defendants Without a Trial Date Setting

	R/C		P/D		Total	
	No.	%	No.	%	No.	%
Dismissed	70	62	43	38	113	100
Dismissed/Nolle	33	70	14	30	47	100
Felony	52	33	106	67	158	100
Misdemeanor	59	48	63	52	122	100
Total	214	49	226	51	440	100

Before examining continuances and their effect on disposition, it should be noted that the defense counsel is not the moving party for all continuances. A few are at the request of the prosecutor and many cases are continued because they cannot be processed on the scheduled date. The moving party was identified for about one-third of the continuances,³⁶ the remaining two-thirds were unspecified. Some of these could have been on the part of the defense or prosecution, however a large part are probably because of over-scheduling on the date set.³⁷ Thirty-one percent of all continuances were at the request of the defense, 2 percent were by the prosecution, and 67 percent were unspecified. There are more continuances requested by and granted to R/C than to the P/D (37 percent versus 26 percent). The frequency of trial resettings in any one case varied between one and six.

TABLE 14 Proportion of Defendants Represented by R/C and P/D According to Continuances and Disposition

	Set Only		Reset Once		Reset Twice	
	R/C	P/D	R/C	P/D	R/C	P/D
Dismissed	31	69	45	55	51	49
Dismissed/Nolle	40	60	64	36	53	47
Felony	29	71	47	53	47	53
Misdemeanor	47	53	48	52	54	46
Total	37	63	48	52	51	49

Examining the defendants by type of disposition, number of continuances, and type of counsel reveals some significant interactions. As mentioned earlier, R/C is low on "set only," and the P/D is high in this category (See Table 14). However,

³⁶ This information is recorded in the daily minutes of each court division and the moving party is not uniformly recorded among divisions.

³⁷ There is a tendency to pack the individual calendar, scheduling upwards of 10 cases for the same trial date in an effort to induce pleas. If a plea is not forthcoming and the defense wants a trial, all but one case will be continued by the court to another date, usually 2 to 4 months hence.

there is no strong association with type of counsel and one or two or more continuances. Furthermore, there is no significant interaction with defense counsel and type of disposition. Thus, although it appears that R/C is using continuances more often, there is no significant association between type of counsel and type of disposition for cases where there were continuances.

f. *Motions to Suppress*

The most frequent hearing on a motion recorded in the data base is on a motion to suppress evidence.³⁸ Seventy-one such motions were heard for all 1970 defendants terminated by November 30, 1971; these were on behalf of 67 defendants, or less than 4 percent of all defendants.³⁹ Based on all nontrial dispositions, the R/C rate of hearings was 4 percent and the P/D rate was 3 percent. The majority of the motions occurred in narcotics and dangerous drug cases (largely possession of marijuana). Using dismissal/nolle as a measure of success for the defendant's motion, R/C has a 45 percent and the P/D a 41 percent success rate. There is no relationship between case disposition (guilty/not guilty) and type of counsel for those defendants in whose cases a motion to suppress was heard.⁴⁰

g. *Activity*

As a measure of activity in the case from the time of filing in district court to final disposition, the number of court-related events that were recorded in each case was counted. This includes, in addition to the previously discussed trial settings and resettings and associated motions for continuances, all other motions,⁴¹ preliminary hearings (in district court), bench warrants, continuances for mental observation, and a few other infrequently recorded events. The number of such activities ranged from one to 14 for all cases.

Of interest in this study was whether R/C generated more activity than the P/D, and whether this activity was related to type of disposition. One can postulate that the more activity

³⁸ Hearings on motions for discovery were not being recorded in 1970. Based on the burglary, ADW, and robbery subsamples, the rate of filings for motions for discovery is approximately 8 percent. About three-fourths of these are heard.

³⁹ This is the same as the rate of filing of motions to suppress in the samples of ADW, robbery, and burglary defendants, namely less than 4 percent. Measured in terms of hearings on motions to suppress, the rate was closer to 3 percent which is lower than the total data base. This is because the total base includes public health crimes where motions to suppress are used more frequently.

⁴⁰ Chi Square = 2.5, df = 2.

⁴¹ This includes a few motions to sever, withdraw, and dismiss in addition to the previously discussed motions to suppress.

in a case, the better the outcome from the defense point of view, and that R/C would be more likely to engage in heavier activities. However, when the frequency of activities is examined, there is no significant difference between counsel.⁴² About 60 percent of all cases had two or less activities regardless of type of counsel. About 30 percent of the cases had three to five activities, again, with no difference in type of counsel. Comparisons for higher numbers of activities per case yielded similar results. The low activity rate is strongly associated with dismissals. None of the other activity rates are significantly associated with types of disposition. Insofar as court activity is concerned, R/C and P/D are similar; there is no strong association between activity and type of disposition, with the exception of dismissals, where activity is low. Since dismissals include a large proportion of defendants who are terminated in another case, activity understandably is low in such cases.

4. Retained Counsel Compared to Public Defender: Sentences

A major step in the processing of a felony case is the determination of guilt. For those found innocent, the verdict is essentially the end of the process; however, for the convicted group, sentence lies ahead. Defense counsel view their input into sentence determination as a major part of their role in representing the defendant. When the case against the defendant is indisputable, the defense counsel's role is one of preparing the defendant for the sentence, while at the same time working with the prosecution, judge, and probation personnel to present the defendant in the best perspective in order to reduce the sentence.

The sentence may be a part of the plea bargaining process. However, in Denver there was no clear indication of the role of either prosecutor or judge in the sentence negotiations. It was reported that the district attorney took no part in the sentencing, and only rarely at the time of sentencing would he object to or suggest a sentence. Similarly, some judges reported that they would make no commitments and would not negotiate sentences. On the other hand, defense counsel reported that there were judges who would forewarn counsel as to severity of sentence.

As discussed previously, the two levels of conviction studied are felony and misdemeanor from an original felony charge.

⁴² Chi Square = 5.1, df = 3.

The former carries a prison term, the latter a year or less in jail. At either level, the sentence may be suspended⁴³ or the defendant placed on probation for a specified period of time. These sentence levels are examined in the next two subsections by type of counsel; first comparisons are for felony convictions, and second comparisons are for misdemeanor convictions. The analysis will utilize categories of sentence — penitentiary/reformatory,⁴⁴ probation, and suspended sentence — without distinction as to length of sentence because finer breakdowns result in too many zero entries for statistical analysis.⁴⁵

a. *Felony Convictions*

There is a strong relationship between counsel and sentence as shown in Table 15. Retained counsel is high on probation and low on prison/reformatory. The converse is true for the P/D. Using the major offense categories and examining type of counsel and sentence does not explain this relationship between sentence and type of counsel. Although there is an

TABLE 15 Sentences of Defendants Convicted of a Felony^a

Sentence	R/C		P/D		Total	
	No.	%	No.	%	No.	%
Penitentiary/Reformatory	63 ↓	30	210 ↑	54	273	45
Probation	122 ↑	57	125 ↓	32	247	41
Suspended Sentence	28	13	55	14	83	14
Total	213	100	390	100	603	100

^a Chi Square = 39, df = 2.

association between type of offense and sentence (crimes against persons and property are both high on prison terms and low on suspended sentences), there is no strong relationship between type of counsel and offense in this convicted group.

The significant relationship between counsel and sentence disappears if the defendants are distributed over bail/jail status according to sentence category and type of counsel. This is shown graphically in Figure 1. Shown at the top, Part A, is the distribution of defendants convicted of a felony by type of counsel. These are then distributed by type of sentence in

⁴³ Generally if the sentence is suspended, the defendant is placed informally under the supervision of the probation department. Although they are treated separately in the analyses, the categories of probation and suspended sentence are similar in operation.

⁴⁴ Reformatory is included with the prison grouping because the entries there are too small to be treated separately.

⁴⁵ It is of interest to note that of the 160 defendants convicted of a felony and sentenced to the penitentiary, the median of maximum sentences was 6 years. This median was the same for both R/C and P/D.

Part B. A comparison of A with B shows the disparity of sentences and counsel shown in Table 15. The defense counsel/sentence combinations are then spread over the bail/jail categories in Parts C and D. Now, comparing the bars across the sentences with the pair of bars on the right which represents proportion of defendants on bail (C) and in jail (D) represented by each type of counsel, sentence distributions resemble the bail distribution in C and jail distribution in D. The major deviations occur in the penitentiary/reformatory and probation categories for defendants on bail; however, these counsel/sentence associations are not significant when considered over all combinations of defense counsel and sentence.

A model may be suggested as follows: Given the defendants convicted of a felony and on bail, their distribution by counsel in the three sentence categories will be essentially the same as distribution by counsel for bail. A similar statement is valid for defendants in jail. For example, if the representation ratio of convicted felons in jail at the time of disposition is 15 percent R/C and 85 percent P/D, the representation of defendants in each of the three sentence categories will be the same (see Figure 1, Part D). Thus, sentence is not strongly associated with type of defense counsel, but rather it is associated with the bail/jail status of the defendant.

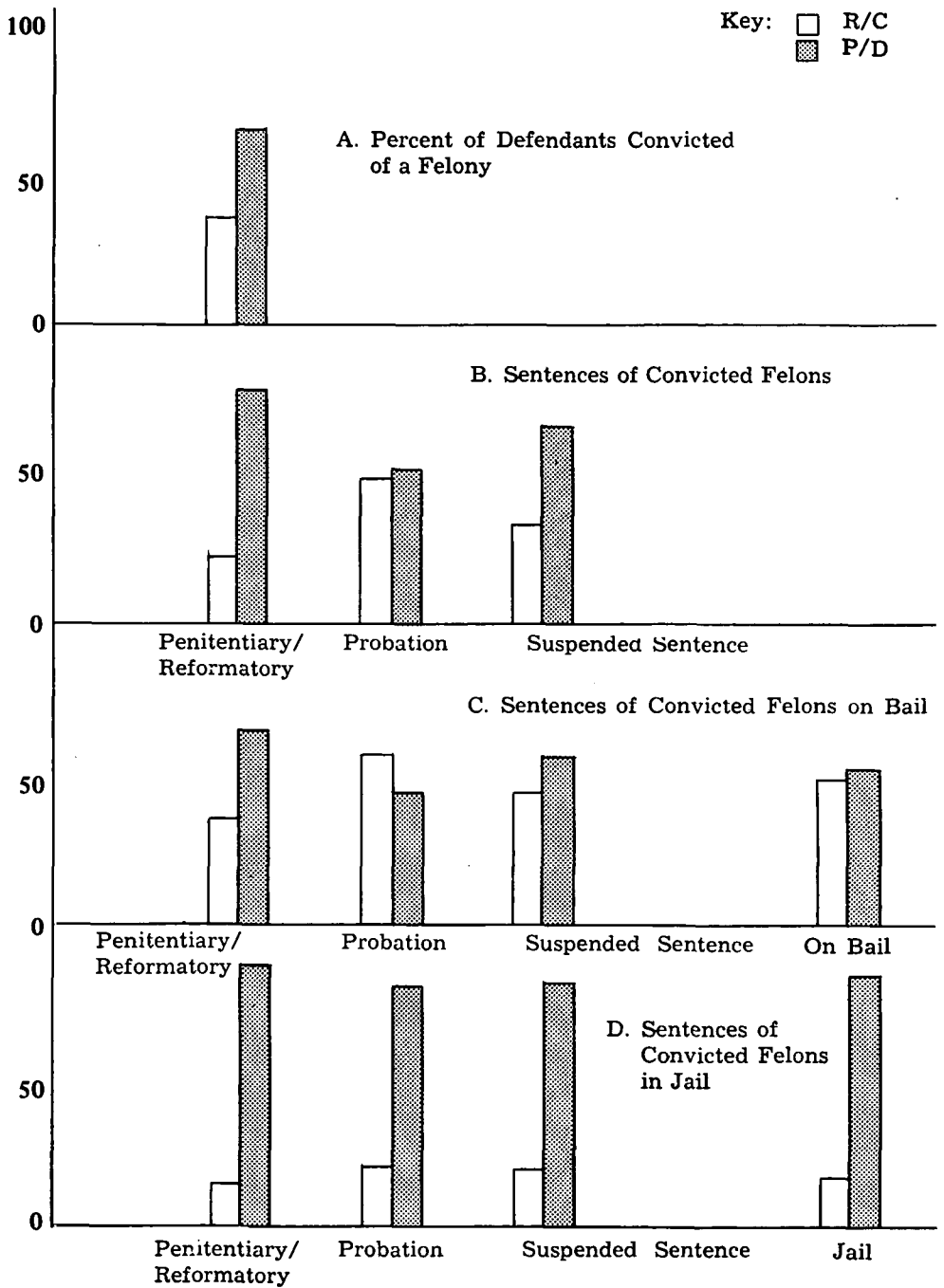
Among other variables, a strong association between prior felony convictions and sentence exists. This is not surprising. Those with no prior record more often receive probation or suspended sentence; those with two or more felony convictions generally receive prison sentences.⁴⁶ When sentences and prior record are considered by type of counsel, there is a strong relationship between counsel and sentence, and between sentence and prior record, but counsel and prior record are independent of each other—each has a similar distribution of defendants with no record, and with one or two or more prior felony convictions.

b. *Misdemeanor Convictions from Original Felony Charge*

Examination of the sentences of defendants convicted of a misdemeanor when originally charged with a felony yields results different from those described above for felony convictions. The strong association between counsel and sentence is not

⁴⁶ Defendants with two or more prior felony convictions are reportedly not eligible for probation; with few exceptions, this appears to be the case in the data base.

FIGURE 1 Sentences of Defendants Convicted of a Felony



completely explained by any of the variables considered. This association is shown in Table 16. Retained counsel is high on probation and suspended sentence and low on jail;⁴⁷ the opposite is true for the P/D. When these counsel/sentence combinations are considered for the three major crime categories, the strong counsel/sentence associations are decreased. In fact, the interactions between counsel and suspended sentence are no longer significant. However, significant interactions remain in the jail and probation categories.

TABLE 16 Sentences of Defendants Convicted of a Misdemeanor^a

Sentence	R/C		P/D		Total	
	No.	%	No.	%	No.	%
Jail or Reformatory	16	↓ 6	84	↑ 31	100	19
Probation	163	↑ 66	112	↓ 42	275	53
Suspended Sentence	69	↑ 28	74	↓ 27	143	28
Total	248	100	270	100	518	100

^a Chi Square = 59, df = 2.

Although the addition of the bail/jail variable either alone or together with offense, further reduces these interactions, they continue to be significant. Not only do the significant relationships remain, but bail/jail status is related to each of the three variables (counsel, offense, sentence) independently. Therefore, unlike the result with felony convictions, the bail/jail variable does not completely explain the strong counsel/sentence association.

Thus, with the exception of the suspended sentence/counsel combination, the strong relationship of defense counsel and sentence of misdemeanants cannot be explained by the variables considered. Although bail status and prior felony convictions each and together with offense reduce the strong association between R/C and probation (high) and jail (low), this association is not completely accounted for. There are undoubtedly activities connected with negotiation with the prosecution, circumstances relative to the crime, or characteristics of the defendant that affect the sentences of defendants who were charged with a felony, pleaded guilty to a misdemeanor, and are sentenced as a misdemeanant.

5. Retained Counsel Compared to Public Defender: Time to Disposition

With the exception of a few early dismissals of R/C de-

⁴⁷ Reformatory is combined with jail because there were few (26) defendants convicted of a misdemeanor who were committed to the reformatory.

defendants, P/D defendants are disposed of at a faster rate than R/C defendants. The median times are generally 6 weeks shorter for the P/D, with the exception of dismissals where the difference is 2 weeks. It should be noted that felony and misdemeanor dispositions include the time from guilty plea to sentencing which can be zero (sentencing on the date of plea) or several months (when probation reports have to be prepared and counsel schedules met).

The time distributions examined as a function of bail status of the defendant show that both types of counsel dispose of cases where the defendant is in jail at a more rapid rate than where the defendant is on bail; however, whether on bail or in jail, the P/D generally has shorter median times. The distributions for both counsel are quite similar for defendants on bail who plead guilty to a felony or to a misdemeanor. On the other hand, there is a great disparity for jailed defendants in these two convicted categories — median times for the P/D are about 2 months shorter than for R/C.

Thus, disposition and bail/jail variables do not explain the relationship between type of counsel and time to disposition. Furthermore, when these three variables (counsel, type of disposition, and time) are examined as a function of the three crime categories, time and offense are independent of each other. Therefore, offense is not a factor in explaining these time differentials.

a. *Trial Settings and Continuances*

One of the factors cited most often as contributing to delay is trial date continuances. As seen earlier, there was no significant difference between type of counsel and number of continuances once the case was set for trial. However, R/C is high on no settings, and the P/D is high on setting for trial with no continuances. When the case is not set for trial, the P/D has a faster rate of disposition than R/C. This faster rate is especially strong for guilty pleas to a felony. A similar result pertains to those cases that were set for trial and disposed of without continuances.

It is interesting to note the results in time and disposition as a function of counsel when there *are* trial date continuances. Among those defendants whose cases were set and continued once, there were no significant associations between any of the variables (type of counsel, type of disposition, or time). This is shown in Table 17. The proportion of defendants is very similar

in each type of disposition, time, and counsel category. As a group then, cases that are continued once have a longer average time between filing and disposition, but this is not related to type of counsel or type of disposition.

TABLE 17 Proportion of Defendants with One Continuance According to Time, Counsel, and Disposition

Time (Mo.)	Dismissed		Felony		Misdemeanor		Total	
	R/C	P/D	R/C	P/D	R/C	P/D	R/C	P/D
0-4	48	52	35	65	45	55	44	56
4-8	42	58	48	52	45	55	45	55
>8	57	43	51	49	55	45	55	45
Total	48	52	47	53	48	52	48	52

When the case is continued two or more times a significant association between type of counsel and time appears. Retained counsel take longer, but this is independent of type of disposition. In other words, if R/C are seeking continuances in anticipation of a better type of disposition, it appears to be to no avail. This can be seen in Table 18. Whereas the proportion of defendants in each time slot varies with type of counsel, the distribution in type of dispositions (last row of table) by counsel is not significantly different from the distribution of counsel in the total group (51/49).

TABLE 18 Proportion of Defendants with Two or More Continuances According to Time, Counsel, and Disposition

Time in Months ^a	Dismissed		Felony		Misdemeanor		Total	
	R/C	P/D	R/C	P/D	R/C	P/D	R/C	P/D
0-8	30	70	33	67	47	53	36	64
>8	70	30	54	46	55	45	59	41
Total	53	47	47	53	54	46	51	49

^a The 0-4 and 4-8 month categories were combined because of low frequencies.

b. Activity in the Case

The same measure of activity in the cases discussed earlier under dispositions was examined to determine its relation with time, type of disposition, and counsel. As expected, there is a strong association between time and the number of actions recorded in a case — fewer activities are associated with shorter time. There is a very strong association with five or more activities and cases with a disposition time of 12 months or more. However, these activities and times are independent of type of counsel.

III. SUMMARY OF FINDINGS

A. *Defense Counsel in Denver County Court*

The median time between first advisement in county court and bindover to district court in the burglary sample was 6 weeks. Whereas the P/D achieved this median, R/C took 2 weeks longer. Waiver of preliminary hearing occurs in about 40 percent of the cases regardless of counsel. However, the time to bindover for R/C is 10 weeks when preliminary hearing is waived as opposed to 5.5 weeks for P/D. That shorter times are not related to waiver is because waiver generally occurs on the date set for preliminary hearing.

In general, defendants represented by R/C have longer median times between steps in the process; in particular, between (1) first and second advisement, (2) second advisement and preliminary hearing, and (3) second advisement and bindover when preliminary hearing is waived. Continuances do not account for these differences; instead the time set for these procedures appears to be longer for R/C. There are two time intervals that are shorter for R/C than for P/D: (1) the period of time between arrest and first appearance before the magistrate where the defendant is advised of the reason for his arrest, advised of his rights, and bail is set; and (2) the time between arrest and entry of counsel. These both represent critical steps from the defendant's point of view.

B. *Defense Counsel in Denver District Court*

The P/D represented 53.5 percent and R/C represented 42 percent of the felony defendants whose cases were filed in district court in 1970. The guilty/not guilty dispositions do not differ with counsel. Furthermore, when trial dispositions (which represent less than 6 percent of dispositions) are considered separately from nontrial dispositions, both R/C and P/D have the same trial rate and outcome, with the exception of not guilty by reason of insanity, where the P/D rate is higher.

However, within the guilty/not guilty categories for non-trial dispositions there is a disparity: retained counsel has high rates of dismissal/nolle and guilty pleas to a misdemeanor and a low rate of guilty pleas to a felony. The reverse is true of P/D.

There is also a disparity of representation according to offenses and the bail status of the defendant. When these two characteristics of the defendant are used along with counsel and disposition, an acceptable hypothesis is that counsel and disposition are independent of each other. The relationships that

exist are between counsel and offense and counsel and bail; additional relationships emerge between disposition and bail and offense. These results indicate that it is not counsel which is the primary factor in the outcome of the case (except to the extent he affects bail), but rather characteristics of the crime, the defendant, and perhaps the system.

These results are obtained when the offenses are categorized: (1) against the person, (2) against property, and (3) against the public health and safety. When individual crimes are examined, the relationship between counsel and disposition disappears. Certain crimes tend to have higher R/C or P/D representation, but these offenses are associated with certain distributions of disposition. This association is independent of representation for the offenses examined (assault with a deadly weapon, robbery, burglary, theft, and the possession of marijuana). Prior felony convictions also relate to level of conviction (felony versus misdemeanor from an original felony charge) and offense, but once prior convictions are accounted for, there is no significant relationship between counsel and level of conviction.

Although R/C appear to use continuances more often (perhaps in part to collect fees), there is no significant association between type of counsel and type of disposition for cases where there were continuances. Furthermore, there is no relationship between type of counsel and type of disposition (guilty/not guilty) for those defendants' cases in which a motion to suppress was heard.

There is a strong relationship between counsel and sentence of defendants who plead guilty to a felony. Whereas R/C is low on defendants committed to the penitentiary or reformatory and is high on probation, the reverse holds for the P/D. However, if one examines the defendants convicted of a felony who are on bail, their distribution over sentences (prison, probation, suspended sentence) by type of counsel is essentially the same as the distribution by counsel for all defendants on bail. Similarly, distribution over sentences by type of counsel is essentially the same as the distribution by counsel for all defendants in jail during trial court processing. The median felony conviction prison sentence (6 years) was the same for both types of counsel.

Unlike the case of felony convictions, the strong relationship between counsel and sentence of defendants who plead guilty to a misdemeanor when originally charged with a felony

cannot be explained by the variables considered. Although bail status and prior felony convictions each singly and together with offense reduce the strong association between R/C and probation (high) and jail (low), this relationship is not completely accounted for. Nor is the P/D and probation (low) and jail (high) reverse relationship completely explained.

Although R/C and P/D achieve essentially the same results in disposition and sentences when viewed in the context of the defendant-related and system-related variables studied, this is done in significantly different time periods. Overall, the P/D's defendants are disposed of at a faster rate than R/C's, regardless of type of disposition or bail status of the defendant. Thus, although R/C take longer, there is no variance with respect to more favorable dispositions. Of course, taking a longer time may be a consideration with respect to the collection of fees.

When time is examined relative to continuances, it is found that when the defendants' cases were set and continued once, there were no significant associations between counsel, disposition, or time. When defendants' cases were set and continued two or more times, there was a significant association between time and counsel, R/C taking longer. However, this is independent of disposition.

CONCLUSION

As stated in the beginning of this article, there are many views on the quality of defense counsel provided for the indigent. Through numerous analyses of interrelations between defendant-related and system-related factors, this study has presented a meaningful information base for destroying myths about the relative effectiveness of the public defender and retained counsel. For example, where at first blush it appeared that retained counsel was obviously superior, careful analysis often revealed some differentiating factor. For misdemeanants' sentences, variations in effectiveness could be related only to type of counsel — given the variables available in the data base, none could be found to explain the differences. Overall, however, the basic findings indicate only slight variations in performance between the public defender and retained counsel.

Generally, inferences beyond the obvious have not been made. It has not been the purpose of this article to draw conclusions about or suggest alternatives to the methods of providing counsel to indigent defendants. Obviously, the quality of defense extends beyond that revealed by statistical analyses.

