



# Bureau of Justice Statistics Special Report

## *A National Survey*

# Criminal Defense Systems

The quality of justice in the United States depends upon the effective and efficient functioning of the entire criminal justice system. The components of that system—law enforcement, prosecution, defense, the courts, and corrections—are interrelated; the smooth functioning of the system requires their coordination. Of all the components of the criminal justice system, however, the least is known, from a statistical point of view, about defense.

The defense of accused persons is constitutionally mandated and must be

provided even when such costs are borne by the public. Defense services for the indigent are provided by various systems in every jurisdiction in the United States.

Since the last national survey of indigent defense services was done in 1973, timely answers have not been available for such questions as how are defense services for the indigent provided? by whom? and at what expense?

Therefore, the Bureau of Justice Statistics funded a survey in the fall of 1981 to provide national data on public

defense system types, funding sources, costs, and caseloads. Practitioners, policymakers, and legislators will find these survey results useful in their efforts to make informed decisions about the future of the indigent defense function.

## The legal mandate

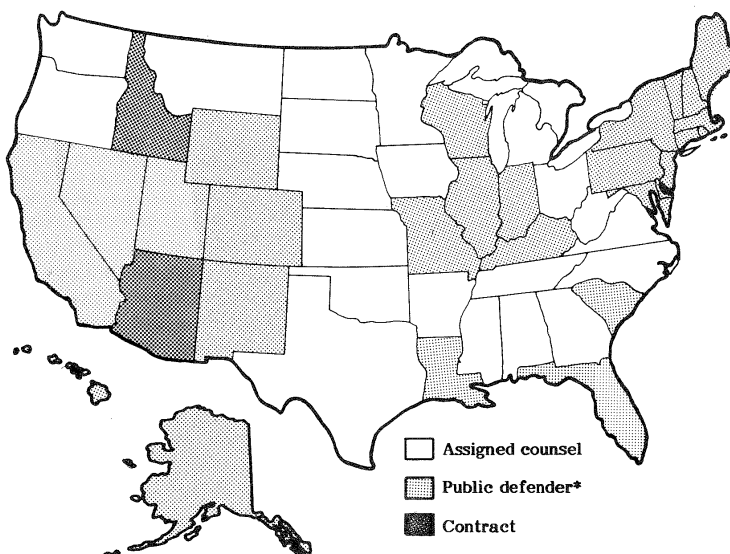
The Sixth Amendment of the Constitution of the United States provides that the accused in a criminal prosecution is entitled "to have the Assistance of Counsel for his defense." In *Johnson v. Zerbst*, 304

August 1984

This Bureau of Justice Statistics Special Report provides substantial baseline data on indigent defense services throughout the United States. Together with future statistical and non-statistical studies of public defense, these data should prove useful for an assessment of our system of providing defense services to indigents. In particular, the data presented here allow us to examine cost and caseload trends in greater detail than was possible with previously available data. The Bureau gratefully acknowledges the cooperation of the many individuals who served as State liaisons and whose generous assistance made this National Criminal Defense Systems study possible.

Steven R. Schlesinger  
Director

### States by type of defense system in majority of counties



\* Indiana and New Mexico have the same number of public defender and assigned counsel

counties. Missouri and New Hampshire changed to public defenders around the time of survey.

U.S. 358 (1928), the Supreme Court held that the Sixth Amendment requires the appointment of counsel to assist an indigent defendant in a Federal criminal prosecution. The Sixth Amendment Counsel Clause had not then been held applicable to the States; but in Powell v. Alabama, 287 U.S. 45 (1932), the Court held that the Due Process Clause of the Fourteenth Amendment required a State court to appoint counsel for indigent defendants who were charged with a capital offense and were incapable of making their own defenses adequately. Subsequently, however, the Court held in Gideon v. Wainwright, 372 U.S. 335 (1963), that the Sixth Amendment right to counsel is applicable to the States, through the Due Process Clause, in all felony prosecutions. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court further extended the right to counsel to those misdemeanor cases that actually lead to imprisonment. (See Scott v. Illinois, 440 U.S. 367 (1979).)

The Court also determined in a long series of decisions that the right to counsel is not limited to the criminal trial itself, but extends to all critical stages in the prosecution, such as arraignment, preliminary hearing, entry of a plea, and sentencing. In addition, relying on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, rather than the Sixth Amendment, the Court has held that an indigent defendant is entitled to the assistance of counsel on his first appeal as a right, Douglas v. California, 372 U.S. 353 (1963), although not in seeking discretionary reviews in a State court or the United States Supreme Court. (See Ross v. Moffitt, 417 U.S. 600 (1974).)

Juveniles were also accorded the right to counsel by the Court in In re Gault, 387 U.S. 1 (1967), when it held that Fourteenth Amendment due-process protections must be extended to all juveniles in delinquency proceedings that may result in commitment to an institution.

Gideon, Argersinger, and Gault provide the broad constitutional mandate for counsel in criminal cases. Implementation of these decisions has been left to the States, and it is the manner of the State's implementation, either by statute or State Supreme Court decision, that affects local programs and expenditures.

#### Survey of indigent defense services

This survey of the State and local programs responding to the mandate to provide indigent defense services found that:

State	Total number of counties in the State	Public defender	Assigned counsel	Contract
<b>Total</b>	<b>3,082</b>	<b>1,048</b> (34%)	<b>1,833</b> (60%)	<b>201</b> (6%)
Alabama	67	6	61	—
Alaska	4	4	—	—
Arizona	14	2	5	7
Arkansas	75	18	57	—
California	58	49	—	9
Colorado	63	63	—	—
Connecticut	8	8	—	—
Delaware	3	3	—	—
District of Columbia	1	1	—	—
Florida	67	67	—	—
Georgia	159	19	127	13
Hawaii	4	4	—	—
Idaho	44	14	1	29
Illinois	102	74	28	—
Indiana	92	44	44	4
Iowa	99	15	84	—
Kansas	105	6	99	—
Kentucky	120	55	28	37
Louisiana	64	49	15	—
Maine	16	—	16	—
Maryland	23	23	—	—
Massachusetts	14	12	2	—
Michigan	83	5	41	37
Minnesota	87	42	45	—
Mississippi	82	20	62	—
Missouri	114	20	94	—
Montana	56	4	37	15
Nebraska	93	26	62	5
Nevada	17	15	—	2
New Hampshire	10	4	6	—
New Jersey	21	21	—	—
New Mexico	32	16	16	—
New York	62	55	7	—
North Carolina	100	14	86	—
North Dakota	53	—	50	3
Ohio	88	30	58	—
Oklahoma	77	2	66	9
Oregon	36	13	20	3
Pennsylvania	67	67	—	—
Rhode Island	5	5	—	—
South Carolina	46	39	7	—
South Dakota	66	2	64	—
Tennessee	95	4	83	8
Texas	254	2	252	—
Utah	29	17	—	12
Vermont	14	8	—	6
Virginia	104	5	99	—
Washington	39	6	31	2
West Virginia	55	—	55	—
Wisconsin	72	47	25	—
Wyoming	23	23	—	—

<sup>1</sup>Numbers of counties under each system type are weighted estimates based on survey responses. Counties are classified according to the predominant system of service delivery; other systems may supplement the primary system.

- In 1982 close to \$625 million were spent on indigent defense services in nearly 3.2 million cases tried in this Nation's State and local courts.
- Assigned counsel systems continue to dominate service delivery patterns with 60% of U.S. counties using assigned counsel (though use of this system decreased from 72% of counties in 1973); 34% public defender; and 6% contract attorneys.
- Public defender systems, however, are the dominant form in 43 of the 50 largest American counties, and overall serve 68% of the United States population.

- Within public defender operations, local defenders operate autonomously in 32 States and the District of Columbia, while 15 States have a State-administered defender program.
- The majority of States and close to half of the counties providing primary defense services have formal indigency criteria, though these criteria vary from State to State.
- Of all counties reporting, 75% had some form of recoupment requiring defendants to repay a portion of their defense costs; but 25% of these counties reported no payments received in 1982.

● More than half of the case assignments to attorneys representing indigent defendants were made within 48 hours of arrest.

These represent only a few of the findings from the first national survey of public defense systems in more than 10 years.

The sample size, methodological improvements, and response rates of this survey yield the most accurate picture of the status of indigent defense services currently available. The data described herein are particularly noteworthy because they are the only national-level data collected since States have taken measures to comply with the mandate of Argersinger v. Hamlin.<sup>1</sup>

## TYPES AND CHARACTERISTICS OF INDIGENT DEFENSE SYSTEMS

There are three primary systems by which indigent defense services are provided throughout the country:

- **Public defender programs** established as public or private non-profit organizations with full-time or part-time salaried staff;
- **Assigned counsel systems** where private attorneys are appointed by the courts as needed from a list of available attorneys; and
- **Contract systems** in which individual attorneys, bar associations, or private law firms contract to provide services for a specified dollar amount.

In 1973, The Other Face of Justice<sup>2</sup> reported that in the majority of counties (72%) the primary method of providing defense representation was through an assigned counsel system. Results of the current survey indicate that reliance on assigned counsel has diminished, although the majority of counties (1,833 or 60%) continue to rely on the assigned counsel system. Table 1 describes the predominant type of indigent defense system in use in the country's 3,082 counties; table 2 shows associated percent of population in the United States.<sup>3</sup>

<sup>1</sup>The last major survey of indigent defense, conducted by the National Legal Aid and Defender Association, was fielded between August 1972 and April 1973: The Other Face of Justice, National Legal Aid and Defender Association, 1973. Argersinger v. Hamlin was decided on June 12, 1972.

<sup>2</sup>See footnote 1.

<sup>3</sup>The difference between 3,082 sample units and 4,137 counties in the U.S. results primarily from not using the census area and borough in Alaska as a sampling unit and not treating all independent cities in Virginia as individual sampling units. Variations between the numbers reflected in this table and those in the narrative are a reflection of the changes that occurred between the beginning and the end of the survey.

**Table 2. Summary characteristics of indigent defense system by region, 1982**

Region	Public defenders		Assigned counsel		Contracts		Caseload (in thousands)	Per capita cost
	Percent counties	Percent of U.S. population	Percent counties	Percent of U.S. population	Percent counties	Percent of U.S. population		
<b>Overall</b>	<b>34%</b>	<b>68%</b>	<b>60%</b>	<b>27%</b>	<b>6%</b>	<b>5%</b>	<b>3,187</b>	<b>\$2.76</b>
Northeast	83	95	14	4	3	1	706	2.88
North Central	30	64	66	32	5	4	635	1.96
South	23	45	72	52	5	3	892	1.80
West	55	82	26	3	19	15	954	5.38

### Public defenders

Statewide public defender programs and local public defender programs should be distinguished. Under Statewide public defender systems, an individual is designated by statute as the State public defender and is charged with developing and maintaining a system of representation for each of the counties in the State. In such systems, there is usually a governing board that shares responsibility with the State public defender for the operation of the program. Most Statewide systems are part of the executive branch, but others may operate as part of the judicial branch, as independent State agencies, or as independent non-profit organizations. Fifteen States (Alaska, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin, and Wyoming) have some type of Statewide public defender system.

Some Statewide public defenders have established branch offices to provide defense services in each of the State's counties. Other States, as a result of a legislative mandate or for purposes of efficiency, will provide representation in some counties through part-time public defenders or through an agreement with members of the private bar.

By contrast, local public defenders operate autonomously and do not have a central State administrator. For example, in Florida, elected public defenders operate separately in each of the 20 judicial circuits in the State. In Pennsylvania, a local public defender is legislatively mandated in each of the State's 67 counties. In Illinois, there is the same requirement for all counties with a population of more than 30,000.

Local public defenders are scattered throughout 32 States in the Nation. Most local public defender programs are part of county government, and the public defender is selected by the local board of supervisors, county council, or other governing board. In a few cases, the local public defender system is organized as an independent, nonprofit corporation.

Public defenders are the primary defense service provider in only 34% of all counties in the country, but they serve 68% of the Nation's population. In fact, 43 of the largest 50 counties in the Nation are served predominantly by a public defender program.

When examined on a regional basis, public defender systems are concentrated in the Northeast and the West. Table 2 shows the regional breakdown by type of representation, percent of population served, caseload, and per capita cost.

In the majority of counties served by public defender programs, the chief public defender is employed on a full-time basis (78% of all counties—table 3). Generally, as county population increases, so does the likelihood that the chief public defender will be full-time. Salaries of chief public defenders begin as low as \$6,000 and go as high as \$66,000. Most frequently, the chief

**Table 3. Summary of public defender system characteristics**

Characteristic	Percent of counties that have public defenders
<b>Affiliation</b>	
County government	38%
State executive agency	25
Judiciary	23
Independent non-profit organizations	8
Other	6
<b>Attorney staffing</b>	
Chief public defenders	
Full-time	78
Part-time	22
<b>Number of full-time staff attorneys</b>	
0	24
1-6	59
7-20	10
21 or more	7
<b>Support staff</b>	
Secretaries	86
Investigators	58
Administrative assistants	18
Law students	16
Paralegals	10
Social workers	9
Fiscal officer	6
Training director	3
<b>Salaries of full-time chiefs</b>	
Extrem range	\$6,000 - 66,000
Average range	\$20,000 - 30,000

defender earns between \$20,000 and \$30,000. In only 11% of the counties do chief public defenders earn \$50,000 or more a year.

The number of staff attorneys employed by public defenders ranges from 1 to more than 50. Approximately 75% of all counties served by public defenders employ three or fewer full-time attorneys. Of 321 public defender programs in this survey's sample, a total of 4,428 lawyers are employed on a full-time basis and 659 are employed part-time. Public defender programs reporting part-time staff were typically found in counties where the population was under 250,000.

The majority of public defender programs employ investigators and secretaries; they do not typically employ social workers, paralegals, administrative assistants, fiscal officers, or training directors. As county population size increases, there is greater likelihood of finding support staff in the latter categories.

### Conflict and unavailability

Early survey responses from a number of public defender programs revealed an important change in service delivery patterns. A growing number of cases were no longer being handled by public defenders, primarily because of the increasingly strict definition of what constitutes a conflict of interest.

While historically the code of professional ethics has prohibited one attorney from representing co-defendants when a conflict of interest has been found, the U.S. Supreme Court and other appellate courts recently have been applying a more strict interpretation of what constitutes a conflict.<sup>4</sup> Because all attorneys employed in a public defender's office are considered to be members of the same firm, if a conflict exists between co-defendants, the office cannot represent both defendants. Under these circumstances, the court must appoint a private member of the bar, thus essentially creating a second indigent defense program in the county. There is less of a problem if the primary program is not a public defender program, since the court can simply assign another private attorney, though the cost implications remain.

As court decisions have more strictly interpreted conflicts of interest among co-defendants, many public defenders have begun as a matter of policy to declare a conflict of interest in every case involving co-defendants. This practice can have serious cost

implications, since it is estimated that there are co-defendants in approximately 25% of all adult felony cases.<sup>5</sup>

A second development has also added to the problem. Traditionally in public defender counties, individual judges have been empowered to appoint the public defender in all cases except obvious conflicts. Such appointments are often made without regard to overall funding levels and resource constraints. As case appointments have increased, public defenders in some instances have been unable to keep up with the caseload and have been looking for ways to deflect some of the cases.

A few programs have been able to negotiate a fixed caseload level with their funding sources; others have been relieved of assignments through informal agreements with local judges; and others have been successful in limiting caseload through litigation. This latter process is commonly referred to as a "declaration of unavailability." Whatever the method employed, the result is to add substantially to the volume of cases in public defender jurisdictions handled by private attorneys already charged with representing co-defendants in conflict cases.

Both of these problems began to surface 2 to 3 years ago. A preliminary examination of the survey data revealed that the number of secondary public defense programs has increased. Since this increase may have a significant impact on questions of caseload and cost, the survey effort was expanded to collect data on secondary programs designed to handle conflict-of-interest cases and cases where the public defender had declared unavailability.

In about 60% of the public defender program counties, there was in fact a distinct and separate program to handle the overflow of cases from conflicts and unavailability; while in the remaining 40%, the cost of conflict and unavailability cases was built directly into the public defender's budget, and the second program was administered by the public defender.

Out of the 208 separate conflict or unavailability programs that were iden-

<sup>5</sup> A Proposed Statewide Public Defender System for the State of West Virginia, Criminal Defense Technical Assistance Project (CDTAP), Abt Associates, Inc., February 1980, Cambridge, Massachusetts. San Diego County Office of Defender Services: Evaluation and Recommendations, CDTAP, Abt Associates, Inc., July 1981, Cambridge, Massachusetts. Improving Indigent Defense Services in South Carolina: A Cost Estimate, Criminal Defense Group, Abt Associates, Inc., January 1983, Cambridge, Massachusetts.

**Table 4. Circumstances under which separate counsel are appointed to co-defendants**

	Percent of counties
In every instance	34%
At attorney's request	50
At defendant's request	26
At court's discretion	38
Never	1

<sup>1</sup>Total exceeds 100% since separate counsel may be appointed under several circumstances.

tified, questionnaires were completed for 147, or 71%. Expenditure data were available from a secondary source for 56 of the missing 61 programs. In 1982 well over \$81 million (12% of the total expenditures for indigent defense) was devoted to conflict or unavailability cases.

Separate counsel are most frequently appointed at the defense counsel's request (table 4). The appointment may also occur either at the court's discretion or at the defendant's request. About a third of the counties reporting stated that separate counsel were appointed in every case involving co-defendants. The largest counties are more likely to declare a conflict in every instance, whereas smaller counties are more likely to do so only upon request (table 5).

**Table 5. Appointment of separate counsel for co-defendants by region**

Region	Percent of counties appointing separate counsel in all cases of co-defendants
All counties	34%
Northeast	75
North Central	33
South	18
West	46

### Assigned counsel systems

Assigned counsel systems exist in almost two-thirds of the counties in the United States. However, they predominate in small counties with fewer than 50,000 residents where typically there are too few cases to support the cost of a salaried public defender program. In fact, assigned counsel systems serve only about a third of the Nation's population. At the time the survey began, only three States (Maine, North Dakota, and West Virginia) relied on assigned counsel systems in all of their counties. In addition, Texas relied on assigned counsel systems in 252 of its 254 counties; and by the survey's completion, North Dakota had assigned counsel in 50 of its 53 counties.

There are two main types of assigned counsel systems. **Ad hoc assigned**

<sup>4</sup>Holloway v. Arkansas, 435 U.S. 475 (1978)



**counsel systems** are those in which individual private attorneys are appointed by individual judges and provide representation on a case-by-case basis. Approximately 75% of the assigned counsel programs surveyed fall into this category. The second type of assigned counsel system is the **coordinated assigned counsel system** with an administrator who oversees the appointment of counsel and develops a set of standards and guidelines for administration of indigent defense services.

Typically, under an assigned counsel system, a list of eligible and willing attorneys is developed by the court. In 88% of all counties served by assigned counsel, such a list is maintained. Generally, lawyers on the list are not categorized by specialty. Where specialization does exist, it usually is based upon the seriousness of the case. The criteria used for creating lists of attorneys for assigned counsel systems vary. In almost half of the counties served by assigned counsel, all lawyers who volunteer are placed on the list. In about one-third of the counties, volunteers must go through a qualifying procedure or participate in a training program. Only 15% of the assigned counsel counties reported having any formal procedures for removing lawyers from the list.

In more than two-thirds of the assigned counsel counties, judges are responsible for the actual appointment of private bar members. In the remaining counties, the responsibility for appointment is given to the public defender, a court clerk or the administrator of the assigned counsel system.

Members of the private bar are compensated for indigent defense work according to a variety of fee schedules. Almost 75% of all counties reported paying attorneys on a separate out-of-court and in-court hourly basis. Other less frequently used methods include the payment of a flat fee per case, payment by type of appearance, and flat fee by type of appearance.

Rates for assigned counsel are established in a variety of ways (table 6). In a number of States, legislation requires only that private attorneys receive "reasonable compensation" for work performed. Usually, this permits judges wide discretion. Some jurisdictions reported that judges in the same court set different fees for the same type of cases. Other methods of establishing assigned counsel fees are by statute, by Statewide court rule, and by the public defender.

Hourly rates for out-of-court work in both felony and misdemeanor cases

**Table 6. Summary of features of assigned counsel compensation**

Method of establishing fees		Number of States <sup>1</sup>
Judicial discretion		34
Statute		27
Statewide court rule		11
Public defender		9
Custom in jurisdiction		23
Type of fee schedule used		Percentage of assigned counsel counties
Separate out-of-court/in-court hourly rates		70%
Flat fee per case		11
Type of appearance		7
Flat fee per appearance		3
Other		9
Maximum amount stipulated		
Felonies		40%
Misdemeanors		50
Hourly fees	Range	Most frequent
For felonies		
In-court	\$12.50 - 65	\$30 - 40
Out-of-court	\$10 - 50	\$20 - 30
For misdemeanors		
In-court	\$12.50 - 50	\$30 - 40
Out-of-court	\$10 - 50	\$20 - 30
Maximum fees		
Felonies (not including capital case)	\$200 - 2,500	\$500 - 1,000
Misdemeanors	\$100 - 2,500	\$200 - 500

<sup>1</sup>Because the survey question permitted multiple responses, the number of States exceeds 50.

range from \$10 to \$50 an hour, with \$20 to \$30 an hour being the most common fee. At the time of the survey, the maximum hourly fee for in-court misdemeanor work was \$50 an hour, whereas for felonies it was \$65 an hour. In both types of cases, the typical in-court fee was \$30 to \$40 an hour.

Maximum fees were established in 40% of the counties for felony cases and in 50% of the counties for misdemeanor cases. Maximum fee limits can have a major impact on the costs of a system, independent of hourly rates. For example, hourly rates for in-court work in Arkansas were very high at \$50 an hour. However, the total compensation in any case could not exceed \$350. Generally, the maximum fee for felony cases fell between \$500 and \$1,000; for misdemeanors it was between \$200 and \$500.

### Contract systems

Although assigned counsel systems still outnumber public defender programs, results of this survey revealed the emergence of a new, previously unreported system. About 6% of all counties (201 counties) provide representation through a contract system. The majority of such counties are small (under 50,000 in population).

Because the contract system is a relatively new and emerging phenomenon, it is sometimes difficult to distinguish it from a public defender or assigned counsel system. For purposes of the survey, the contract system was distinguished from a public defender program by whether the lawyers were salaried by the county or the State. If

the lawyers were on salary with the State or county, the program was considered a public defender program. If private attorneys received their appointments directly from a judge and then submitted their vouchers to the funding source, they were classified as assigned counsel. If they negotiated directly with the county for a fixed sum or "block grant," they were considered to be on a contract program.

Almost a fourth of the counties served by contract defense programs provided primary defense services through a public defender system and reported that the contract program was designed exclusively to handle conflict and unavailability cases.

County agencies are usually responsible for making contract awards (table 7). Judges and public defenders, however, make award decisions in some counties. Competitive bids are solicited in half of the counties providing representation through contracts. A few programs report that competition includes cost as a selection criterion, but the vast majority state that competition centers on the qualifications of the bidders and the methods by which they propose to provide quality representation. Frequently, however, there is only one bidder. In the remaining half of the counties, where competitive bidding is not solicited, the county simply negotiates its contract with a single lawyer or law firm.

Four distinct groups of private lawyers may participate in a contract system:

- individual practitioners,
- a law firm or group of attorneys who

Table 7. Summary of contract system features

System features	Percent of contract counties
<b>Awarding agency</b>	
County	56%
Judge	22
Public defender	19
Other	3
<b>Type of bid</b>	
Competitive	50
Sole source	50
<b>Types of groups awarded contracts</b>	
Individual practitioners	62
Law firms	30
Bar associations	3
Nonprofit organizations	2
Other	3
<b>Types of contracts awarded*</b>	
Block grant	54
Fixed price	35
Cost plus fixed fee	11
Other	7

\* More than one type of contract was reported in some counties.

join together for the purpose of securing a contract,

- a bar association, or
- a nonprofit organization.

Most contracts are awarded to individual practitioners; this occurs in almost two-thirds of the contract counties. Law firms are the second most likely group to be awarded contracts (30% of contract counties). The few remaining counties with contract systems engage a bar association or nonprofit organization.

Contract terms also differ. Block grants are the most common type of contract awarded. Private lawyers entering into a block grant agree to provide representation in all cases for a fixed amount. If the volume of cases exceeds their estimate, they are obligated to provide representation until the contract ends. Fixed price contracts, reported by approximately a third of all contract counties, are the second most common type of award and are used most often by larger (over 500,000 population) contract counties. Under fixed price contracts, lawyers agree to provide representation in a specified number of cases for a fixed amount per case. A third, but less frequently used, type of contract is labeled cost-plus-fixed-fee. Under this arrangement, representation is provided at an estimated cost per case until the dollar amount of the contract is reached. At that point, the contract may be renegotiated, but the lawyers are not obligated to take new cases.

The contract type of indigent defense system is growing in this country. However, that growth appears to center on the handling of public defender conflict or unavailability cases and can most often be found in the less populated counties.

Table 8. Total expenditures for indigent defense, 1982

State	Total expenditures	State expenditures	County expenditures	Other funding <sup>1</sup>
<b>Total</b>	<b>\$624,649,851</b>	<b>\$207,384,419</b>	<b>\$408,966,008</b>	<b>\$8,299,424</b>
Alabama	4,238,266	4,238,266	0	0
Alaska	3,525,100	3,525,100	0	0
Arizona	8,621,239	0	8,613,624	7,615
Arkansas	1,634,030	0	1,614,030	20,000
California	166,761,094	10,778,000	150,874,178	5,108,916
Colorado	8,468,313	8,468,313	0	0
Connecticut	4,524,870	4,524,870	0	0
Delaware	1,848,605	1,759,700	88,905	0
District of Columbia	8,291,000	0	8,291,000	0
Florida	38,180,296	28,499,973	9,680,323	0
Georgia	5,672,712	0	5,672,712	0
Hawaii	3,500,000	3,500,000	0	0
Idaho	1,833,935	0	1,833,935	0
Illinois	25,210,312	3,000,000	22,057,917	152,395
Indiana	5,551,430	793,286	4,758,144	0
Iowa	6,387,056	267,208	6,119,848	0
Kansas	3,511,993	2,595,032	916,961	0
Kentucky	5,169,752	4,516,700	539,052	114,000
Louisiana	6,012,986	0	5,925,256	87,730
Maine	1,088,653	1,088,653	0	0
Maryland	10,270,310	10,270,310	0	0
Massachusetts	13,092,198	13,092,198	0	0
Michigan	23,401,431	1,873,100	21,378,331	150,000
Minnesota	10,416,724	851,358	9,463,006	102,360
Mississippi	2,134,112	0	2,134,112	0
Missouri	4,408,413	4,408,413	0	0
Montana	1,399,785	0	1,399,785	0
Nebraska	2,708,986	0	2,708,986	0
Nevada	3,829,489	189,927	3,578,686	60,876
New Hampshire	2,146,999	2,146,999	0	0
New Jersey	19,681,656	19,681,656	0	0
New Mexico	3,981,763	3,981,763	0	0
New York	76,429,521	17,595,074	58,834,447	0
North Carolina	11,004,038	10,968,213	0	35,825
North Dakota	947,633	571,000	376,633	0
Ohio	18,096,333	9,597,422	8,498,911	0
Oklahoma	2,991,953	240,000	2,652,820	99,133
Oregon	12,639,051	582,000	12,057,051	0
Pennsylvania	21,335,197	0	21,235,197	100,000
Rhode Island	1,299,684	1,299,684	0	0
South Carolina	3,398,353	1,708,244	1,690,109	0
South Dakota	1,352,047	0	1,352,047	0
Tennessee	3,732,880	2,054,782	1,529,560	148,538
Texas	19,286,780	0	19,286,780	0
Utah	1,800,067	32,500	1,605,667	161,900
Vermont	1,873,264	1,873,264	0	0
Virginia	8,776,311	8,751,353	0	24,958
Washington	14,675,794	727,625	12,022,991	1,925,178
West Virginia	2,951,655	2,951,655	0	0
Wisconsin	13,350,200	13,350,200	0	0
Wyoming	1,205,582	1,030,578	175,004	0

<sup>1</sup>Other funding includes: municipalities, Federal, private.

## THE COST OF INDIGENT DEFENSE

In 1976, the National Study Commission on Defense Services reported that a conservative estimate of the total amount being spent annually in this country for indigent defense was \$200 million.<sup>6</sup> The most recent prior estimate, made in 1980, but based in part on limited data, projected an annual expenditure of approximately \$435 million.<sup>7</sup>

<sup>6</sup>National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States*, Report of the National Study Commission on Defense Services, Washington, D.C.: NLADA, 1976.

<sup>7</sup>Norman Lefstein, *Criminal Defense Services for the Poor*, American Bar Association, May 1982. Estimates from fiscal data 1980-81.

This survey revealed national expenditures to be far greater than even the most generous adjustments of the 1980 estimate. Total U.S. expenditures for defense of indigents in State courts were almost \$625 million in 1982.

The survey disclosed that in 18 States the State government provided all of the funding; in 21 States and the District of Columbia all of the funding was provided by the county; and in 11 States the funding was shared by the State and the county.

Although the number of States that fund through a county or State system was roughly equal, county governments contributed \$409 million (65%), by far

the larger share. State contributions made up a third of the total expenditures: \$207 million. The remaining 2% came from a combination of other sources: from cities, towns, the Federal Government, recoupment, court costs, and private foundation support.

Very little change has occurred in the sources of funding for indigent defense services over the past 5 years. In only two States have major changes been made. Oregon has shifted totally from county to State funding; North Dakota has shifted its felony costs from the counties to State government.

#### Per capita costs

Table 8 displays State, county, and other sources of expenditures for each of the 50 States and the District of Columbia. Table 9 shows the total expenditures, per capita cost, case-loads, and per case cost by State. The per capita and per case cost are also ranked by State. Per capita costs range from a low of \$0.71 in Arkansas to \$13.00 in the District of Columbia. The mean for the Nation is \$2.76 and the median for all the States (and the District of Columbia) is \$1.94.

There is a great deal of regional variation. The West has the highest per capita cost at \$5.38, with the Northeast at \$2.88, the North Central at \$1.96 and the South at \$1.80. However, much of the high cost in the West is attributable to California's per capita cost of \$7.05. Excluding California, the balance of the Western region is reduced to \$3.36 per capita.

Analysis of the 50 largest counties in the Nation, where 69 million people or about a third (31%) of the population lives, reveals that they account for 43% of the Nation's total expenditure for indigent defense. Almost \$269 million was spent on indigent defense services in 1982 by the 50 largest counties. In 27 of these counties, 100% of the funding is provided by county government and in another 12 counties, the cost is shared by the county and the State. Finally, per capita costs for the largest 50 counties are substantially higher than the national per capita average. Overall, the 50 largest counties exceed the national per capita figure by 40%—\$3.87 to \$2.76.

#### Comparisons with other justice system expenditures

State per capita spending for indigent defense and State spending for all justice services appear to be related. States that devote substantial resources to indigent defense are also likely to

Table 9. Per capita cost and average cost per public defense case, 1982

State	Total expenditures	Per capita cost	Ranking of per capita cost	Caseload estimates	Average cost per case	Ranking
<b>Total</b>	<b>\$624,650,000*</b>	<b>2.76</b>		<b>3,187,000*</b>	<b>196*</b>	
Alabama	4,238,000	1.09	42	29,000	145	35
Alaska	3,525,000	8.77	2	10,000	338	4
Arizona	8,621,000	3.17	11	43,000	199	23
Arkansas	1,634,000	0.71	51	14,000	115	46
California	166,761,000	7.05	3	661,000	252	12
Colorado	8,468,000	2.93	14	39,000	216	18
Connecticut	4,525,000	1.46	35	43,000	105	50
Delaware	1,849,000	3.11	12	11,000	175	30
District of Columbia	8,291,000	13.00	1	19,000	434	2
Florida	38,180,000	3.92	7	226,000	169	31
Georgia	5,673,000	1.04	44	43,000	131	39
Hawaii	3,500,000	3.63	9	6,000	567	1
Idaho	1,834,000	1.94	26	15,000	121	44
Illinois	25,210,000	2.21	23	194,000	130	42
Indiana	5,551,000	1.01	45	42,000	131	41
Iowa	6,387,000	2.19	24	23,000	283	7
Kansas	3,512,000	1.49	34	19,000	181	27
Kentucky	5,170,000	1.41	38	31,000	168	32
Louisiana	6,013,000	1.43	37	54,000	111	49
Maine	1,089,000	0.97	47	10,000	112	47
Maryland	10,270,000	2.44	20	78,000	131	40
Massachusetts	13,092,000	2.28	22	74,000	177	29
Michigan	23,401,000	2.53	19	91,000	258	11
Minnesota	10,417,000	2.56	18	47,000	222	17
Mississippi	2,134,000	0.85	49	17,000	123	43
Missouri	4,408,000	0.90	48	32,000	138	38
Montana	1,400,000	1.78	29	5,000	266	9
Nebraska	2,709,000	1.73	30	23,000	117	45
Nevada	3,829,000	4.79	5	17,000	227	15
New Hampshire	2,147,000	2.33	21	7,000	319	6
New Jersey	19,682,000	2.67	16	54,000	362	3
New Mexico	3,982,000	3.06	13	17,000	237	13
New York	76,430,000	4.35	6	363,000	211	20
North Carolina	11,004,000	1.87	27	59,000	187	25
North Dakota	948,000	1.45	36	5,000	206	21
Ohio	18,096,000	1.68	31	94,000	192	24
Oklahoma	2,992,000	0.99	46	35,000	85	51
Oregon	12,639,000	4.80	4	45,000	282	8
Pennsylvania	21,335,000	1.80	28	141,000	151	34
Rhode Island	1,300,000	1.37	39	5,000	259	10
South Carolina	3,398,000	1.09	43	20,000	167	33
South Dakota	1,352,000	1.96	25	6,000	216	19
Tennessee	3,733,000	0.81	50	26,000	144	36
Texas	19,287,000	1.36	40	137,000	141	37
Utah	1,800,000	1.23	41	10,000	181	26
Vermont	1,873,000	3.67	8	9,000	205	22
Virginia	8,776,000	1.64	32	79,000	111	48
Washington	14,676,000	3.55	10	81,000	180	28
West Virginia	2,952,000	1.51	33	13,000	223	16
Wisconsin	13,350,000	2.84	15	58,000	230	14
Wyoming	1,206,000	2.57	17	4,000	332	5

\*Average calculated on unrounded data.

provide substantial resources for justice spending overall. The most recent per capita justice expenditure data shows that per capita justice spending was roughly \$101 for 1979.<sup>8</sup> Undoubtedly, with inflation and other forces raising costs, the \$101 figure would be even higher in 1982. The comparable figure for indigent defense based on the survey was \$2.76 in 1982. Thus, on a per capita basis, indigent defense spending represents less than 3% of all justice spending.

#### Caseload and cost per case

Case weights<sup>9</sup> were assigned each State based on data reported by the programs in the sample; the national estimate of indigent defense caseload in the State courts totaled an estimated 3.2 million cases for 1982. The average cost per case in the country was \$196; Hawaii had the highest cost per case at

<sup>9</sup>The survey responses for each sample county were weighted to make the sample representative of all counties in the U.S. and to allow for the estimation of totals (e.g., total indigent caseload in the U.S.). Weights were computed as the reciprocal of the probability of selection of each sample county, and were adjusted for the fact that responses were not obtained for a small number of sample counties.

<sup>8</sup>Report to the Nation on Crime and Justice: The Data, Bureau of Justice Statistics, NCJ-87068, October 1983.

\$567 and Oklahoma the lowest at \$85. Tables 9 and 10 show that in most States the average cost per case falls between \$100 and \$200.

**Table 10. Summary of average costs per case for indigent defense**

Average cost per case	Number of States	Percent of States
Under \$100	1	2%
\$100 - 199	28	55
\$200 - 299	16	31
\$300 - 399	4	8
\$400 - 499	1	2
\$500 - 599	1	2

An analysis of regional costs per case reveals the same patterns as the regional analysis of per capita costs. The West was the highest at \$243 and the South the lowest at \$152. The \$200 cost per case for the 50 largest counties, however, shows only a small increase from the \$196 national average.

To obtain an estimate of the incidence of indigent defendants, the number of indigent cases reported per 1,000 population for each State was computed. On a national basis, there are slightly more than 14 indigent cases reported for every 1,000 residents. However, the incidence of indigent defendants per 1,000 population is substantially higher among the 50 largest counties (20 per 1,000 population) than it is in the Nation as a whole.

#### Variations in case processing

An attempt was made in the survey to examine a set of case processing features common to all systems of indigent defense. These included methods for determining the eligibility of indigent defendants, provisions requiring indigents to contribute towards the cost of representation, and time between arrest and appointment of counsel.

Most States have specific written criteria for determining indigency. Close to half of the survey respondents involved in providing primary defense services (331 out of 750) indicated that they had formal indigency criteria. In all but three of the Statewide public defender systems written criteria were reported to exist throughout the State. The actual application of written indigency criteria most often is decided by judges or clerks, although others—including public defenders and probation officers—are sometimes responsible for making the final determination of indigency. In a few counties, indigency screeners attached to separate agencies are responsible for making the determination.

A number of States have enacted legislation or adopted court adminis-

trative rules requiring indigent defendants to repay some portion of the cost of defense services, according to their abilities. This is commonly called recoupment. Survey results show wide variation in both the definition of recoupment and the systems for collecting payment. In some jurisdictions, recoupment requires only the repayment of attorneys' fees; in others it may include elements of restitution or attorneys' expenses. The vast majority of counties (75%) reported having recoupment requirements, but collections are obtained in only a small number of cases (25% of counties with such requirements reported no payments received in 1982—table 11). Only 17% of the counties reporting recoupment programs received any payment from 25% or more of those defendants who were ordered to pay.

**Table 11. Percent of counties by proportion of cases in which indigents made payments**

Percent of cases	Percent of counties
0%	25%
1-10	45
10-25	13
25 or more	17

Traditionally, in many jurisdictions, attorneys who provide indigent defense services are not appointed until formal arraignment. The time period between arrest and arraignment may exceed 30 days or more in some counties. One-third of all sample counties reported that counsel was appointed within 1 day of arrest. More than half of all sample counties (58%) reported appointment within 48 hours of arrest (table 12).

**Table 12. Speed of case assignment**

Entry into case	Percent of counties
Within 1 day	33%
Within 2 days	25
Within 3 days	19
Within 1 week	11
Within 3 weeks	9
After 3 weeks	3

Such early representation is most likely to occur in public defender counties (table 13); 39% of all public defender counties reported that representation was provided within 24 hours, but only 12% of the contract counties provide similar representation.

**Table 13. Early representation by type of system**

Type of system	Percent of counties reporting case assignments within 24 hours
Public defender	39%
Assigned counsel	33
Contract	12

#### Changes in methods of providing indigent representation

The survey effort attempted to detect shifts and national trends in the methods developed to provide indigent representation in counties around the country during the past 3 years.

Almost a fourth of all programs responding to the survey reported such changes. Of the 750 primary program respondents, 183 (24%) reported changes. Of the 147 conflict or unavailability programs that responded to the survey, 41 (29%) reported change.

Several States made a substantial statewide system change:

- **Missouri** and **New Hampshire** adopted statewide public defender systems.
- **Kansas** and **West Virginia** developed central administrative components in an effort to develop uniform standards for local program operations.
- **Massachusetts** shifted from an assigned counsel system to a private bar contract system for misdemeanor and juvenile representation in 11 of its 14 counties.
- **Oregon** shifted from total county funds to total State funds for all programs in the State on January 1, 1983.
- **North Dakota** established a State commission to develop standards and guidelines for local program operation throughout the State.

Apart from the statewide changes listed above, local county program changes were reported in another 27 States. Most counties that reported a system change indicated that they did so in an attempt to save costs. Of the 58 counties reporting a system change in their primary delivery system, the following table summarizes the variations.

Original system	System changed to		
	Assigned counsel	Public defender	Contract
Assigned counsel	...	28	18
Public defender	1	...	7
Contract	2	2	...

Apart from these system changes, programs reported a wide variety of other changes including increases in the fee schedule for the private bar, increases in the size of public defender staff, a broadening of the scope of required representation, and new methods to provide early entry into indigent defense cases.



## Summary

Survey results have shown that there has been modest change over the past 10 years in the types of systems providing representation to indigent defendants around the country. There has been little change in the sources of funding. However, the dollar amount for indigent defense services has increased substantially.

The National Criminal Defense Systems Study now provides substantial baseline data on indigent defense services throughout the country. These data can be used along with future survey findings and other studies of public defense to make accurate judgments of the growth and change in indigent defense services. These data can also be used to examine costs and caseload trends across system types in more detail than previous studies have permitted.

## Methodology

A stratified approach to data collection was employed to assure reasonable statewide estimates as well as adequate regional and national coverage. Data collection activities were divided into five phases:

- sampling plan,
- survey development,
- respondent identification,
- survey fielding and follow-up, and
- data compilation and analysis.

The county was selected as the unit of analysis. A State-stratified sample was selected. The sampling plan was designed to allow for the selection with certainty of the largest counties in each State; the remaining counties were sampled with probability proportional to size. In States with fewer than 20 counties, all were selected. In the remaining States the average sample size was 16 counties. The final sample consisted of 718 counties.

Two sets of survey instruments were developed. The first set was designed to collect information on the cost of defense services from county officials in each of the sample counties where indigent defense services received county funds. The second set of questionnaires was designed for the primary indigent defense program in each of the 718 counties. This form was designed to collect cost and caseload data as well as more detailed information on service operation such as: availability of investigative and expert witness services, indigency determination process, private bar appointments and rates of compensation, training programs, the

use of recoupment, methods of representation in conflict cases, and the availability of early entry by defense counsel.

To ensure a high response rate, extra resources were devoted to identifying appropriate respondents. After the county and program questionnaires were mailed, several follow-up telephone calls and telephone interviews were made to check whether the correct individuals received the questionnaires, to verify responses, and to fill in key missing data. Volunteers in each State greatly assisted the data collection effort by identifying appropriate respondents and in some cases, collecting and forwarding completed questionnaires from all counties within their States.

In all, 494 of the 718 counties were determined to provide some county funds for indigent defense services; 490 (99%) of the county questionnaires were completed. Out of the total sample of 777<sup>10</sup> program questionnaires, 750 (97%) were completed. In the majority of States (33), the program response rate was 100%; in another 13 States, only 1 response was missing.

## Limitations of the data

The availability of data on indigent criminal defense services varies from jurisdictions that collect little caseload data and unreliable cost data to the most sophisticated jurisdictions with automated management information systems that collect extensive, reliable caseload, cost and other management-related data. Unfortunately the former case is the more prevalent—in all too many jurisdictions, the desired data are simply not routinely collected and centralized. While the stratified approach to data collection employed in this survey has resulted in collecting more information from the areas of the country and the types of programs that are typically difficult to access, the sometimes sketchy or "soft" nature of the only available data imposes some inherent restrictions on the survey results.

These limitations notwithstanding, this survey methodology has overcome many of the flaws in past data collection efforts. The stratified sampling plan provided a representative sample of counties around the country. The two-stage data collection process, incorporating both mail surveys and telephone followup, provided for an exceptionally high response rate with

<sup>10</sup> Although the total number of program respondents (777) exceeds the total number of counties in the sample (718), there are a few counties with more than one primary defense service program.

99% completed county questionnaires. The analysis of these data provides the most reliable description of present program operations and system trends available to date and a sound foundation for future research.

## Further reading

The full 400-page text of the report on which this one was based, **A National Survey of Criminal Defense Systems**, is available free in microfiche (order no. NCJ-94702) from the National Criminal Justice Reference Service, Box 6000, Rockville, Md. 20850. It includes a 250-page appendix, **State Profiles of Indigent Defense Services**, which provides the following for each State:

- the court organization indicating the jurisdiction of each court level;
- legislation authorizing the establishment and operation of indigent defense services and a brief description of how services are provided;
- expenditures for each State by source(s); and
- legislation relating to and exact fees for assigned counsel.

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