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Report on Indigent Defense Services in Oregon and Multnomah County

City Club of Portland (Portland, Or.)

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Report on
**INDIGENT DEFENSE SERVICES IN OREGON
AND MULTNOMAH COUNTY**

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NOTE: This report replaces the Indigent Defense Services report published in Vol. 69, No. 42 dated March 17, 1989.

The City Club membership will vote on this report on June 16, 1989. Until the membership vote, the City Club does not have an official position on this report. The outcome of the membership vote will be reported in the City Club Bulletin (Vol. 70, No. 5) dated June 30, 1989.

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EXECUTIVE SUMMARY

Indigent defense is an accused person's constitutional and statutory right to have the state provide a lawyer in a criminal prosecution if that person is found unable to pay for one. According to a recent study, Oregon ranks fourth nationally in per capita spending for indigent defense services. Although attention focuses on cost, providing these services raises important issues of constitutional rights, social values, and allocation of scarce resources.

The City Club appointed a committee to describe indigent defense services in Multnomah County, identify the key players, analyze data gathered by a national consulting firm, and make recommendations to improve the system.

The committee expressly recognizes that many of the problems with providing indigent defense services are largely created by other decisions in the criminal justice system as a whole. However, state and local policymakers can take steps to improve the system while assuring accountability to taxpayers.

The committee recommends that the **Oregon Legislature:**

- o reestablish an independent Indigent Defense Board or Commission;
- o require partial payment of defense costs from indigent defendants where possible; and
- o adequately fund a centralized system of uniform data collection and reporting.

The committee further recommends that the **Indigent Defense Board or Commission:**

- o apply and verify indigence guidelines;
- o establish and administer local screening programs which recommend diversion as appropriate;
- o initiate a contribution system;
- o develop a systemwide method of evaluating the cost effectiveness and quality of indigent services;
- o recommend standardized compensation levels for attorneys;

- o consider the social implications versus cost of narrowing indigent defense requirements, restricting defense services for appeals, and decriminalizing some offenses;
- o develop a method to account for systemwide decisions on the cost of indigent defense services; and
- o work to increase public awareness of the interrelationship between indigent defense services and the criminal justice system.

The committee also recommends that **local governments:**

- o expand the availability of diversion, drug and alcohol treatment programs, non-incarcerative alternatives and dispute resolution programs, and
- o establish screening of defendants for placement in appropriate programs.

Report on
INDIGENT DEFENSE SERVICES IN OREGON
AND MULTNOMAH COUNTY

To the Board of Governors,
City Club of Portland:

I. INTRODUCTION

The Oregon Supreme Court recently stated that "one of the most perplexing problems currently confronting the criminal justice system in this state" is "how adequately to provide and pay for appointed counsel for indigent defendants charged with violations of state criminal laws." State v. Longjaw, 307 Or. 47,49 (1988).

"Indigent defense," an accused person's right to have the state provide an attorney in a criminal prosecution if the accused is found unable to pay for representation, is rooted in the United States Constitution and the Oregon Constitution and statutes.

A recent national study by the Bureau of Justice Statistics shows that only two other states and the District of Columbia spend more money per capita for representation of indigent criminal defendants than Oregon. From 1982 to 1986, Oregon spent \$8.31 per capita; the national average was \$4.11. The high cost has not gone unnoticed by Oregon's policymakers, and increasing public attention has been focused on this constitutionally mandated service. Concerns about the quality of representation, fair compensation for providers, and the growing demand are other issues that have been raised. While cost gathers much attention, indigent defense raises broad issues of social policy and constitutional law.

Aspects of these issues include:

- * Oregon's lack of a consistently applied standard definition of indigence, which may result in a greater number of "indigents" who receive free representation;
- * A high number of offenses in Oregon with penalties sufficiently severe to trigger the right to counsel;
- * Limited options to divert accused indigents from incarceration and therefore ease demands for indigent defense services;
- * A large demand for indigent defense services in appealing convictions;
- * An indigency rate among felons of between 80 to 90 percent, higher than a national average of about 75 percent;

- * The vast increase in the number of criminal defense filings.

Your Committee was charged to: 1) describe the provision of indigent defense services in Multnomah County; 2) identify the key players in indigent defense and those who affect it, including their interests and biases; and 3) analyze activities and issues surrounding indigent defense in the 1987 legislative session. Your Committee also was to review the data gathered by the Spangenberg Group, a national consulting firm hired by the state to evaluate indigent defense services statewide, and identify any concerns overlooked by the Spangenberg study. Your Committee was requested to make recommendations to improve indigent defense.

Although the charge limited the study to Multnomah County, many issues of indigent defense are statewide. This report addresses those issues. The charge also limited the study to problems related to the legal defense required by law for indigent adults, thus the study does not examine indigent defense for juveniles.

II. HISTORICAL PERSPECTIVE AND BACKGROUND

A. Legal Mandates for Providing Indigent Defense

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right ... to have the assistance of counsel for his defense." In Gideon v. Wainwright, 372 U.S. 335 (1963), the U.S. Supreme Court held that each state must provide appointed counsel to indigent criminal defendants. Federal case law currently applies the right to appointed counsel to all prosecutions that may result in imprisonment for any period of time. Argersinger v. Hamlin, 407 U.S. 25 (1972); L. Tribe, American Constitutional Law, 2d Ed. (1988) p. 1634.

The Oregon Constitution similarly states that the accused in a criminal proceeding "shall have the right ... to be heard by himself and counsel". (Or. Const. Art. I, §11) The Oregon Supreme Court has interpreted this language to be broader, however, than that in the federal Constitution. In the 1977 case of Brown v. Multnomah County District Court, 280 Or. 95 (1977), the Oregon Supreme Court held that the right to counsel may exist even in cases in which imprisonment is not a potential penalty. In other words, the Oregon Constitution requires an inquiry into several factors, including the nature of the penalty, in determining whether the right to counsel exists. City of Pendleton v. Standerfer, 297 Or. 725 (1984).

In Oregon, a crime is an offense for which a sentence of imprisonment is authorized. Crimes include both felonies and misdemeanors. Felonies are crimes that can result in a sentence of more than one year's imprisonment, a fine of more than \$2,500, or both. Misdemeanors can result in a

sentence of up to one year in county jail, a fine of up to \$2,500, or both. An infraction is a violation or infringement of a minor law, such as a traffic ordinance. Under the Brown case, even infractions that do not carry a possibility of a jail sentence may entitle a defendant to court-appointed counsel if the penalties are considered sufficiently severe.

Oregon statutes further provide that a person is entitled to an appointed lawyer if "it appears to the court that the defendant is financially unable to retain adequate representation without substantial hardship in providing necessities to the defendant or the defendant's family." ORS 135.050(1). The defendant must provide the court a written, verified financial statement, which includes such information as a list of bank accounts and debts, interest in real property, automobiles and personal property of significant value, and a record of earnings or other sources of income.

The right to counsel extends to an appeal of the conviction. The U. S. Constitution requires that indigents receive appointed counsel for their first appeal only. Pennsylvania v. Finley 481 U.S. ____, 95 L. Ed. 2d 539 (1987). To appeal a conviction, a defendant must provide a transcript of the trial to the reviewing court. The U. S. Constitution requires that indigent defendants receive this transcript free. An Oregon statute also continues an indigent defendant's right to court-appointed counsel on appeals. (ORS 138.500). The Oregon Constitution contains no express provision for a right to counsel on appeal. Further, if the defendant is unable to pay for the trial transcript, the state will provide the transcript free of charge. Ibid.

B. Administration of Indigent Defense

Until 1981, Oregon counties both administered and bore the cost of indigent defense. Because the state is largely responsible for defining the crimes that bring defendants into the system, however, some argued that counties should not be held responsible for indigent defense costs that were not theirs to control. Thus, the 1981 Oregon Legislature transferred the cost and some responsibility for administering indigent defense to the State Court Administrator.

The 1985 Oregon Legislature created the State Indigent Defense Board (SIDB) in response to concerns about the inherent conflict of interest in having a defense advocate system administered by an entity that is charged with being neutral. The SIDB was charged with many policy responsibilities for administration and with studying the effectiveness of indigent defense services and report to the legislature.

The Board's initial 1985-87 budget of \$34 million (increased during the biennium to \$42.3 million) was based on the limited experience of the previous biennium (the state

assumed indigent defense funding January 1, 1983). It made no provision for caseload growth including that from reinstatement (November 1984) of the death penalty.

The SIDB's duties were expansive. It was to prepare and administer the budget, develop qualification standards for appointed attorneys representing indigent defendants, establish a minimum fair fee schedule for appointed counsel, establish contract standards and procedures, and develop plans for delivering services. The Board, with only one full and one half time staff, made repeated requests for additional funds and, absent that funding, was unable to fulfill its duties.

The 1987 Legislature abolished the Indigent Defense Board and returned responsibility for indigent defense to the State Court Administrator (SCA). The legislature appropriates funds for indigent defense, which are isolated from other funds appropriated to the SCA to prevent a drain on funds for the costs of the court system.

The SCA's duties include entering into contracts with lawyers who handle indigent defense cases in each county. The selection of those lawyers is based upon the advice of county judges, prosecutors, and local court administrators, using criteria established by the SCA. The SCA also disburses funds to providers of indigent defense services according to policies and procedures it has developed for this purpose.

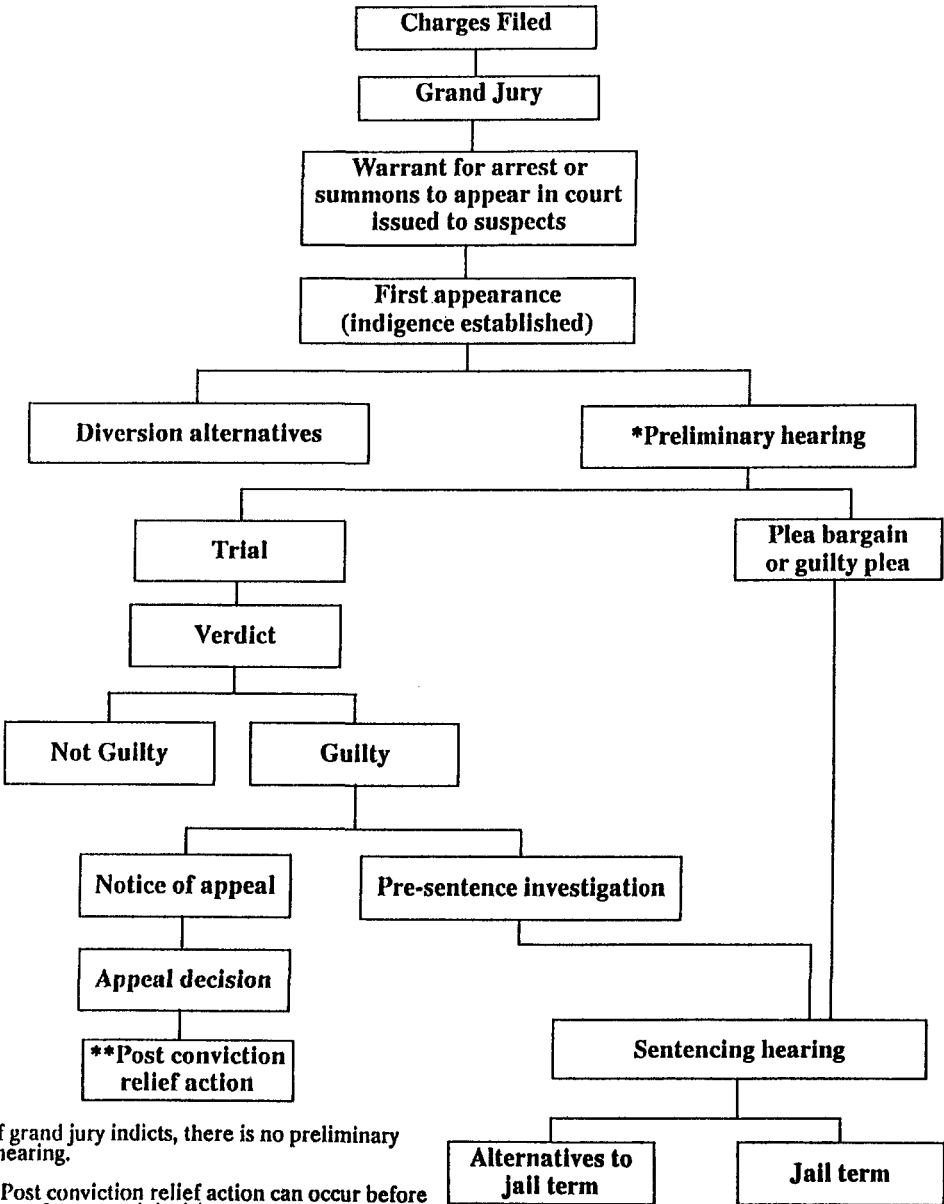
Other steps undertaken by the SCA since 1987 include the issuance of a recommended standard for determining indigence and the establishment of a comprehensive data collection system. The data base includes information on over 80,000 indigent defense cases, including case appointment, case disposition and payment. The SCA staffs administration of the indigent defense program with six positions, a significant increase over the one and one-half allowed the SIDB.

C. How a case works through the system

In Multnomah County, most felony prosecutions are referred to the grand jury. A grand jury indictment or the filing of an Information (the charging document) marks the beginning of a court case. (See Chart 1). Any person arrested and brought before the court or issued a summons to appear in court may declare indigence at a first appearance before the presiding judge. The judge will then appoint an attorney to represent the defendant.

In 1987, district attorneys were given authority to downgrade misdemeanors so that the defendant could be charged with a violation, which generally does not entitle an indigent to a court-appointed attorney. District attorneys can exercise their discretion in deciding how to proceed against persons charged with property or morality

CHART 1: SIMPLIFIED FLOW CHART FOR CRIMINAL CASE INDIGENT DEFENSE SYSTEM IN MULTNOMAH COUNTY



* If grand jury indicts, there is no preliminary hearing.

** Post conviction relief action can occur before or after appeal decision.

crimes such as forgery, credit card misuse, or gambling, yet DAS also respond to community values, such as concerns about drug-related crimes.

Oregon law allows for diversion from prosecution by either courts or DAS. (ORS 813.200 et seq.; ORS 135.881-135.901). With diversion, criminal charges against a defendant are dropped so long as the defendant complies with the terms of a diversion agreement. Diversion alternatives include restitution; community service; residence in a halfway house or similar facility; employment; and participation in medical, educational, vocational, social and psychological programs or other rehabilitation services. District attorneys are allowed to enter into diversion agreements:

- * with first-time offenders;
- * on offenses that do not cause injury to persons;
- * in cases where it appears that diversion would benefit the community; and
- * if there is a probability that the defendant will cooperate with and benefit from alternative treatment.

District attorneys have the option of reinstating the charges and proceeding with prosecution if the defendant does not comply with the diversion program.

If diversion does not occur, the case may proceed to a preliminary hearing at which the prosecution must establish probable cause that a crime was committed and that the defendant is the person who committed it. No preliminary hearing is held if the grand jury returns an indictment. The rulings of the court following the evidentiary hearing(s) on pretrial motions (such as motions to suppress items seized or confessions) can affect the prospects for plea bargaining. A plea bargain, in which the court may accept a guilty plea to lesser or fewer charges, eliminates the trial. The court then sentences the defendant.

If a plea bargain does not occur, the case proceeds to trial. The trial determines the defendant's guilt or innocence. When a guilty verdict is returned on a felony, a presentence investigation may occur. During this investigation the defense may argue for non-incarcerative alternatives which include fines, community service, halfway houses, electronic monitoring or restitution centers. Alternative sentencing may also include incarceration along with an educational requirement. The court may choose any of these options or any term of imprisonment up to the maximum authorized by statute.

The defendant has a right to appeal: (1) the conviction, (2) adverse orders made before or during the trial, and (3) the sentence imposed upon conviction, including any conditions of probation. These are termed direct appeals.

A defendant may also assert claims for post-conviction relief, challenging the legality of a conviction or sentence after there is no longer a right to a direct appeal. In Oregon, the right to court-appointed counsel exists at all of these stages so long as the defendant is indigent.

D. Options for Providing Counsel

States provide indigent defense services in a variety of ways. In general, indigent defendants receive representation from: (1) **private law firms, including non-profit firms, which enter into contracts** with the jurisdiction to handle a set number of cases; (2) **private attorneys appointed by the court for individual cases;** and (3) **public defenders, who are attorneys employed as civil servants in a government agency charged with providing indigent defense services.** Approximately 85 percent of Multnomah County's trial level indigent defense cases are handled by contract with various attorneys and firms. The remaining 15 percent is by court appointment.

Multnomah County does not have a government-employed public defender office. There is a state public defender office in Salem which handles most appeals by indigent defendants. Private attorneys handle other appeals.

1. Private Contractors

Contracting for indigent defense services is fairly common throughout the United States. In Oregon, private and non-profit firms compete for contracts which are administered by the State Court Administrator. The largest contract firms in Multnomah County include the Metropolitan Public Defender, Multnomah Defenders, and the firm of Rieke, Geil and Savage. Contractors are private attorneys, not employees of the state or county. Generally, they handle a large volume of cases each year. The contracts specify the number and kinds of cases to be handled during the biennium and the total amount of fees to be paid. Courts typically assign cases to contract attorneys first, according to a weekly quota based upon the number of cases contracted for the biennium.

2. Court-Appointed Attorneys

Attorneys in private practice may agree to take indigent defense cases on an hourly basis. These attorneys submit their names to the local courts and are selected by judges from a list. Oregon law requires that an attorney appointed by the court "be paid fair compensation for representation in the case," with a statutory minimum of \$30 per hour; however, higher hourly rates are possible only if pre-authorized by the SCA. By contrast, the federal government pays twice that amount. An appointed attorney also is entitled to reimbursement of preauthorized "reasonable" costs including travel, telephone calls, photocopying and any investigators or expert witnesses hired by the attorney.

Oregon judges and court administrators may, in their discretion, lower the number of hours an attorney bills if they find the time charged is unreasonable. For example, if an attorney submits a bill for \$900 (30 hours) defending a shoplifting charge, the judge may consider 25 hours to be more reasonable and reset the payment at \$750.

Individually appointed private attorneys function as a "safety valve" for the contract providers. If contract attorneys have met their quota of cases, court-appointed lawyers may assume the remainder. The circuit court also appoints private attorneys when codefendants (two or more people charged with the same crime) require separate counsel or to avoid other conflicts-of-interest.

Four counties in Oregon do not have lawyers on contract and rely solely on individual appointments. Your Committee heard anecdotal evidence of shortages of lawyers willing to take individual appointments in some counties. While your Committee heard that, in Multnomah County, about 250 private attorneys are available to take indigent defense cases, others disputed this and suggested the number of attorneys willing to take these cases was eroding.

3. Publicly Employed Public Defenders

A third common way to provide indigent defense services is through a publicly employed public defender, the defense equivalent to the district attorney. In some states, public defenders are elected; in others, they are appointed by the governing body. Their only role is to provide indigent defense services.

Multnomah County does not have a publicly employed public defender. The Metropolitan Public Defenders and Multnomah Defenders mentioned above are private non-profit organizations which contract with the State Court Administrator.

The Oregon State Public Defender, located in Salem, is a state agency that handles almost all indigent felony appeals and post-conviction cases and, since April 1987, nearly all misdemeanor appeals as well. In a biennium, the public defender's office handles approximately 2,400 appeals. The public defender handles some, but not all, death penalty appeals. Death penalty cases are subject to mandatory appeal directly to the State Supreme Court. According to witnesses, these appeals require such an extraordinary amount of time and effort that they cannot always be handled by the public defender's office.

E. Volume and Cost

In 1984, 4,819 felony crimes were charged in Multnomah County. By 1987, that figure jumped to 7,142 and the Multnomah County district attorney expects the 1988 total to surpass 8,000, with more than 80% requiring court-appointed defense.

According to one defense attorney, active felony cases with assigned trial dates in Multnomah County Circuit Court rose from 2,500 in 1972 to over 6,000 in 1988. New criminal cases rose from 3,300 in 1975 to 6,001 in 1987.

In 1980, the State Court Finance Action Committee revealed that state indigent defense costs were \$6.5 million in 1978-79 and \$8.9 million in 1979-80. Of these totals, Multnomah County costs were \$2.4 million in 1978-79 and \$3.1 million in 1979-80.

Data available from the State Court Administrator's Office show a large increase in statewide costs for indigent defense after 1980. In the 1983-85 biennium, the state spent \$31.8 million, or about \$16 million per year, and in the 1985-87 biennium, \$42.3 million, or about \$21.2 million per year.

The 1987-89 initial budget appropriation was slightly lower at \$42,219,000 (the SIDB had requested 48 million), even though felony cases have increased by six to seven percent. Subsequent funding has increased the appropriation to \$46 million. According to figures published by the Administrator's office, actual expenditures for 1987-88 were \$23.4 million for the year (55 percent of the total biennial budget). Of this total, Multnomah County received \$8.1 million, or 34.6 percent.

F. The Role of Indigent Defense in the Overall Criminal Justice System

Indigent defense is but one piece of the entire criminal justice system by which society attempts to discourage certain types of behavior. Decisions on what behavior to label a punishable offense and how to prevent, prosecute, and punish it will affect the demand for indigent defense services. For example, decisions to decriminalize certain offenses or successful efforts to prevent crime will result in fewer persons accused and qualified for indigent defense services. Punishment that succeeds in reform will reduce recidivism and, again, lessen the flow of defendants, indigent or otherwise, into the system. Decisions in the prosecution stage may also affect the demand for and the cost of indigent defense services.

The players, goals, priorities and resources below demonstrates the complex interrelationship between the criminal justice system and indigent defense services.

- * **The public at large** makes contradictory demands. The public wants a tough response to crime provided it costs little. For example, measures to increase jail capacity generally fail, but Oregon recently reinstated the death penalty and required incarceration for repeat felony offenders. Both of these increase the demand for and cost of indigent defense services.

- * **The Legislature** defines offenses. Every offense carrying sufficient penalties will require the court to appoint counsel for an accused indigent. Decriminalization or a lessening of penalties may be politically risky.
- * **Citizen groups**, with special interests in certain offenses, such as Mothers Against Drunk Driving, oppose reducing penalties or outright decriminalization that could remove the need for indigent defense counsel. The indigent accused have no comparable special interest group among the citizenry.
- * **Law enforcement officials**, according to their resources and priorities, identify and arrest persons suspected of committing offenses. The number of indigent persons among the suspects may vary depending on the offenses chosen as priorities. They are also responsive to public pressure to "crack down" on certain crimes.
- * **District attorneys** decide whether and how to charge arrested persons, determine when to pursue pretrial alternatives, and may recommend dismissal, or decide if a plea bargain is appropriate. These decisions, which are independent of statutory definitions of offenses, directly affect the number of persons requiring indigent defense services and the extent of the services required. District attorneys, as elected officials, are also attuned to public opinion and special interest groups.
- * **Judges** exercise discretion in sentencing, and attorney fees. Inconsistencies in sentencing, may affect the cost of an indigent's defense by increasing the number of appeals.
- * **Defense attorneys** possess varying degrees of ability to provide effective indigent defense services. Payment by the hour or the case may also influence costs in each case.
- * **Defendants** are entitled to adequate defense under the Constitution. Lack of responsibility for their costs may diminish indigents' motives to contain the cost, especially regarding appeals.
- * **State, county and local governments** each administer overlapping components of the criminal justice system including the courts, corrections facilities, diversion opportunities, and alternatives to incarceration. The different political priorities and resources of these governments affect who enters the criminal justice system,

the length of the stay, and likelihood of return to the system, or recidivism.

III. DISCUSSION AND ANALYSIS

Both the demand for and cost of indigent defense services are growing. Many witnesses questioned whether Oregon's provision of indigent defense is either effective or efficient.

Your Committee was not charged to, and did not attempt to find solutions to the many ills of Oregon's criminal justice system. While confining this report to solutions for the rising cost of indigent defense services, however, your Committee would be remiss not to emphasize the limitations of our suggestions given the role of indigent defense in the overall criminal justice system. Addressing problems such as substance abuse requiring treatment, rather than as crimes requiring punishment, would significantly lessen demands for indigent defense services.

In this section, your Committee focuses on the problems of indigent defense. The problems, and their solutions, break generally into the categories of:

- o controlling demand,
- o controlling cost, and
- o creating accountability.

The emphasis in this discussion on cost containment should not be read to imply that cost is the only issue in indigent defense. This aspect of the criminal justice system involves broad questions of constitutional rights and social policy. This report primarily addresses the costs of the right to counsel because the broader issues often exceeded the charge to your Committee.

A. The Demand for Indigent Defense Services

Your Committee identified four major contributors to the demand for indigent defense services. First, Oregon's constitutional right to counsel is quite broad. A large number of offenses carry sufficient penalties to entitle an accused to defense services. Efforts at decriminalization, thus reducing demand, are of limited success if they remove only incarceration, and leave other significant penalties intact.

Second, Oregon courts do not appear to apply a consistent definition of indigence, resulting in a broader application of the right to counsel than might otherwise exist.

Third, the demand for indigent defense services at the appellate level is high.

Fourth, a lack of sufficient diversion opportunities, non-incarcerative sentencing alternatives and dispute

resolution centers results in higher recidivism and ultimately a greater demand for indigent defense services. While this last contributing cause exceeds the specific boundaries of this report, we include it because of the importance ascribed to it by many of the witnesses before your Committee.

Discussion of each of these problems and solutions follows.

1. Definition of Offenses

The number of offenses with punishment severe enough to trigger a constitutional right to counsel throughout a case directly affects the demand for indigent defense services. As noted earlier, the Oregon constitutional requirement is broader than the federal constitutional requirement. While a federal right to counsel arises when the charged crime carries a possible prison sentence, Oregon's right to counsel may exist without the possibility of incarceration if the penalties are otherwise severe. The Oregon Legislature cannot change the constitutional requirement; only the voters may. This can occur by a Constitutional amendment being referred to the people by the legislature and approved by a majority of voters. The Legislature may, however, attempt to remove offenses from triggering a right to counsel by removing the possibility of incarceration and lessening other penalties.

During the 1987 session, the legislature passed several bills designed to reduce the penalties for certain crimes, which potentially will reduce the demand for indigent defense services. Among them:

Oregon Laws Chapter 730 (House Bill 3059) makes driving with a suspended license an infraction instead of a misdemeanor, provided the offender was not driving recklessly, was not intoxicated, and was not committing a crime involving operation of a vehicle, had not injured anyone, and is not a habitual offender. The bill also decriminalizes driving with a suspended license if the suspension was for driving uninsured.

Oregon Laws Chapter 907 (House Bill 2552) raised the minimum definition of felony theft from \$200 worth of stolen property to \$500.

Oregon Laws Chapter 783 (House Bill 2384) permits the court to reduce any misdemeanor to a violation before asking how the defendant pleads to the charge, if the district attorney does not object.

Additional decriminalization is possible. Your Committee was told, for example, that one statute defines interference with duck-hunters as a felony. The Legislature could lessen the penalties for Driving Under Influence of Intoxicants (DUII) and Driving While Suspended (DWS) or could

require diversion. One witness estimated that indigent defense cases would decrease by 30 percent if DUII and DWS were taken out of the criminal justice system. The SCA, however, estimated that 15.4 percent of indigent cases statewide are DUII and DWS cases. Taking these cases out of the criminal justice system could bring substantial savings where defense counsel is paid on a cost-per-case contract. The Multnomah County district attorney suggested that the legislature address some offenses through a deprivation of a right or of an ability other than liberty, similar to the suspension of the license to drive. The legislature could also permit confiscation of guns, vehicles or fishing boats in fish and game cases, in lieu of criminal charges.

Decriminalization also is possible through discretion exercised by local district attorneys. The Multnomah County DA states that his office has "decriminalized" approximately 17 percent of crimes to violations, independent of legislative action. Further decriminalization may be possible for certain drug-related cases. He stated that, in his opinion, decriminalization and alternate penalties are more appropriate for morality crimes, gambling crimes, and some property crimes such as shoplifting.

2. Definition of Indigence

The determination of indigence is a key point in any evaluation of indigent defense. Regardless of the statutory requirements for a financial statement, in practice judges determine indigence by asking a defendant about his or her ability to meet defense costs. Defendants receive little or no information on which to base a response, the likely cost involved and the feasibility of paying the legal fees over a period of time. If the defendant declares an inability to pay, he or she receives a court-appointed attorney.

According to the State Court Administrator, the Chief Justice of the Supreme Court issued recommended indigence guidelines based on the federal food stamp qualifications in November 1987. These guidelines also provide a "retainer schedule" for minimum anticipated costs of retaining counsel. While these guidelines have been sent to every court, your Committee heard little testimony of their use. Beginning July 1988, the legislature funded four indigency verification positions, including one in Multnomah County.

Using this standard would appear to have several advantages. Eligibility for food stamps provides at least some evidence of inability to pay for legal representation. Food stamp application forms require a listing of income and assets, and information sheets distributed along with the application explain the criteria for verification of the information presented. Adoption and consistent application of this standard in each county, including Multnomah, could address much of the problem of properly identifying those who should receive indigent defense services.

The federal poverty guidelines could also provide criteria for determining indigence. However, it was reported to your Committee that when Lane County began using the poverty guidelines, it found that the number of persons considered indigent increased rather than decreased.

In addition to developing criteria for determining indigence, the appropriate individuals to apply the criteria should be identified. Defense lawyers should not do so because it could require a violation of the counsel/client relationship. DAs are adversaries. Judges may not be in the best position to pursue the screening. The individuals responsible for "screening" services discussed later may be the most appropriate persons.

3. Appellate Level

The U.S. Constitution does not require a state to grant a defendant a right to appeal a criminal conviction. If the state does grant such a right, the state must provide indigent defendants appointed counsel for the first direct appeal. Douglas v. California, 372 U.S. 353 (1963). There is no federal constitutional right to appointed counsel in discretionary appeals or in post-conviction proceedings.

By statute, Oregon allows appointed counsel for many types of appeals for which the federal Constitution does not require appointed counsel. Those include post-conviction relief, habeas corpus (a writ claiming unlawful restraint), parole revocation hearings, appeal of disciplinary measures taken against an inmate, and appeals of termination of parental rights.

Chief Judge George Joseph of the Oregon Court of Appeals reported that, as a result of the broad right to appointed counsel, Oregon appellate courts receive more criminal appeals per capita than do courts in California. In fiscal year 1987, California produced 5,093 criminal appeals; in calendar year 1987 Oregon produced 2,720.

Because all defendants have a right to appeal their convictions, the state cannot refuse to finance appeals for indigent defendants, regardless of the merit of the appeals. The state public defender estimated that, in 90 percent of the cases in which the office handles an appeal, the Court of Appeals grants no relief. He noted that the state incurs cost not only for counsel, but also for trial transcripts in all cases.

One witness suggested that indigent defendants abuse the system by pursuing frivolous appeals. For example, defendants who enter a guilty plea and receive a sentence from the trial court may appeal the sentence as excessive. In fact, no defendant has ever succeeded in having his sentence decreased.

In a February 1988 report on criminal justice system appeals, Court of Appeals Judge George Joseph proposed to the Joint Interim Legislative Committee on the Judiciary, several legislative reforms. The conclusions of his report are as follows:

Many appellate requirements in the criminal system are constitutional. Many rights of appeal result only from a sense of fairness. However, neither of those requires the public to pay for abuse of the system. Changes are needed, and the goals in those should be to eliminate duplication and to provide for early disposition of frivolous appeals. With these goals in mind, these statutory changes should be explored:

- (1) Elimination or combination of avenues of appeal and restriction of the right to appointed counsel on some appeals.
- (2) Early disposition of no merit appeals. ORS 138.660 allows the court to dismiss a frivolous appeal from a post-conviction proceeding before briefing and argument. That statutory authority should be expanded to allow early disposition, at least, of appeals from habeas corpus, disciplinary review, and parole/probation revocation.
- (3) The purpose, scope, functions, functioning and financing of the public defender's office should receive close legislative attention. The legislature created and then virtually abandoned it.
- (4) Legislation being discussed by the Sentencing Committee of the Oregon Criminal Justice Council would give appellate review of sentences which are imposed according to guidelines. Early disposition of frivolous appeals from sentences should be provided for.... Appellate review of parole should be restricted or eliminated if the proposed legislation is passed.

4. Alternatives

Dispute resolution centers help resolve disputes before the victim presses charges. Diversion opportunities eliminate the criminal case after filing and may preclude the need to appoint counsel although the defendant still has the right to counsel since the defendant is still charged with an offense. Alternatives to incarceration help reduce recidivism.

All of these reduce the number of persons entering the criminal justice system and thus the demand for indigent

defense services. While your Committee heard testimony that over 50 percent of indigent defendants in Multnomah County receive diversion or alternative sentencing, the SCA states that non-DUII diversion is almost non-existent in the County.

a. Dispute Resolution Centers

Dispute resolution centers provide alternatives to the criminal justice system, ultimately lessening demand for defense services. The centers attempt to resolve disputes, whether civil or criminal, between the parties by suggesting such remedies as reimbursement, repair of destroyed property, and volunteer service to the "injured" party. While dispute resolution has strong proponents, some district attorneys, judges and other lawyers do not support it.

In Multnomah County, the Victim Offender Reconciliation Program (VORP) and the Neighborhood Mediation Center are examples of dispute resolution programs. International in organization, VORP in Portland depends on volunteers overseen by one staff person. It functions like a social service agency and helps the parties involved agree on solutions. The Neighborhood Mediation Center, located in northeast Portland in the King Community Center, is funded in part by the City of Portland's Office of Neighborhood Associations. Trained volunteers mediate neighborhood disputes between parties.

New York leads the nation in dispute resolution, with 71 per cent of criminal cases being diverted from court. Most cases are assault and battery. The average cost for dispute resolution is \$300 versus \$10,000 for court cases.

b. Diversion Opportunities and Alternative Sentencing

Recidivism is a major problem of Oregon's criminal justice system and contributes to high demand for indigent defense services.

Witnesses who appeared before your Committee explained that an effective deterrent to recidivism is one which does something for people, through treatment programs or community services. Defendants who successfully achieve a life change may remain outside the criminal justice system and save the state \$16,000 per jail bed per year.

Because 85-90 percent of the indigent defendants in Multnomah County have a drug or alcohol problem, many diversion opportunities and alternative sentences include drug and alcohol treatment.

The Multnomah County Restitution Center opened in February 1986 with 80 beds for men only. The average stay in the Restitution Center is one to six months. During that time the men receive counseling, parenting classes, financial counseling and other assistance. The men pay for room and board on a sliding scale.

One non-incarcerative alternative is use of electronic monitoring, either by a wrist or ankle bracelet. This allows their location to be known to law enforcement personnel at all times. Forty such devices are presently in use in Multnomah County, at no charge to the defendant except the cost of a telephone by which the system is monitored.

Financial restitution has been used for the injured party. In an unusual example, a Lincoln County district attorney recently received from an offender funds that the DA then distributed to local charities. Community service is another alternative to incarceration, particularly in driving under the influence cases. Halfway houses are another alternative to incarceration.

During the latter part of 1988, Multnomah County also began an experiment called the Structured Supervision Project. In this program, carefully screened offenders who have committed drug-related and burglary crimes are assigned not to jail but to an intensive program of job training, psychological counseling and drug treatment. The program is run out of a center located in downtown Portland.

A major resource center has been established in Multnomah County to provide specific information on alternatives nationwide. The Department of Corrections Resource Coordination Service opened July 15, 1988 and is organizing a resource center in Portland.

To be effective, both diversion opportunities and alternatives to incarceration require adequate screening and funding. One witness suggested that initial screening by the DA's offices in all 36 Oregon counties could identify those cases appropriate for social service agencies and dispute resolution centers. Another witness proposed that DAs hire legal assistants or non-legal personnel or volunteers to handle much of the screening and alternatives work, initial interviews, work with agencies, contacts with the family and preparation of the proposed alternative to the court.

Adequate funding is important to diversion options and non-incarcerative alternatives. Hiring and training more sophisticated and greater numbers of screeners may cost additional money. On the other hand, savings will result from the fact that those who are diverted do not require legal representation. The car registration fee has been mentioned as a possible source of revenue for diversion, since a large percentage of indigent defense cases are charged with vehicular crimes. Other possible sources of revenue include a percentage of fees already paid, such as a "lawsuit" fee used in New York. Part of the filing fee for every lawsuit filed in New York is provided to a non-profit agency for screening indigent cases.

B. The Cost of Indigent Defense Services

In addition to controlling demand, your Committee identified two problems that directly affect the cost of indigent defense services. First, no means exist to recoup any defense costs from those found indigent, even if the defendant may have some ability to pay. Second, controversy surrounds the compensation of the attorneys who provide indigent defense services. These problems, along with solutions where they exist, are discussed below.

1. Cost Recovery

Efforts to recover the cost of defense from indigent defendants fall into two primary categories: contribution and recoupment. Contribution refers to any program by which marginally indigent defendants make an up-front contribution to their defense, such as a flat \$25 payment. Recoupment refers to efforts to collect defense costs from those defendants found guilty.

The SCA reports that courts are practicing recoupment and expect to collect \$2.8 million in the current biennium statewide. The Justice Department has issued uniform collection policies and procedures and a collections pilot program is being tested. On the other hand, your Committee heard testimony that recoupment efforts are still scanty to nonexistent. The Oregon State Bar planned to propose legislation requiring additional attempts at recoupment.

A contribution system is not currently in effect anywhere in Oregon.

One witness estimated that over one-third of indigent defendants could pay a portion of their defense costs. Moreover, cost recovery efforts could play an important role in public perception by alleviating some concern about the amount of public money spent to defend people accused of crimes, especially where the defendant is found guilty. The proposals also may be important from a defendant's perspective. According to some witnesses, some responsibility for defense costs could help commit a defendant to participate actively with the court-appointed attorney and would emphasize the severity of the crime. The Spangenberg Group found that partial up front payments generally improved the attitude of defendants. Both the psychological benefits and financial commitment could improve the present system where defendants have nothing to lose if they claim indigence.

Your Committee heard several arguments against recovery efforts, however. One argument is that the cost of recovery may exceed the amount collected. The Spangenberg Group has found that collection has not been a significant cost reduction measure, given the typically high administrative costs. A program allowing its administrators sufficient flexibility to discontinue collection efforts where resources appear

negligible or nonexistent might alleviate this concern. Another argument against cost recovery is the problem of determining priority between restitution payments to the victim and recoupment of defense costs. This concern is a policy matter for legislative resolution. Finally, some argue that fines, restitution, and recoupment of defense costs would force many indigent defendants to resort to crime to meet these obligations.

Despite these concerns, your Committee heard many proposals for cost recovery. They include:

a. "Up Front" Payments: The Legislature could require all indigent defendants to pay a minimum up-front defense fee, such as \$25.

A private legal clinic in Portland demands that each potential client pay a \$15 legal intake fee. Furthermore, the clinic expects the client to pay half of the legal court costs. Over 2,000 Multnomah County residents have availed themselves of the services of this clinic, many of whom would be defined as indigent in the state system. The heavy demand on the clinic's services suggests that some accused persons are willing to pay for legal services.

b. Collection Agency Effort: The legislature could fund appropriate collection agency efforts. Private businesses have successfully recouped part of their outstanding bills through collection agencies. Ideally, the recovered defense costs could at least offset the cost of collection.

c. Liens: State liens against property or assets, and recovery from a defendant's estate, offer other means of recoupment. The Adult and Family Service Division's (AFS) programs for aged and disabled recipients employ an estate lien to obtain reimbursement of the assistance such persons receive. AFS does not use direct liens because some needy persons would decline assistance rather than have a lien on their homes. That would not apply to persons facing incarceration or other penalties such as fines.

AFS, or some other agency, could be assigned the additional task of collecting from estates of indigent defendants. If the state imposes liens as a means of collecting fines, and if the fine is likely to exceed the cost of legal defense, the lien for recovery of defense costs would appear to be the less burdensome.

d. Use of credit cards or tax refunds: The use of credit cards could eliminate costly collection mechanisms where a defendant has credit cards.

A recent tax statement showing eligibility for a refund could also suggest a source for recoupment if the Legislature authorized garnishment of tax refunds for this purpose. Recoupment could begin immediately if a cross-check of a

defendant's income tax returns and food stamp application revealed discrepancies and an ability to pay. A more extreme alternative available in the statutes is to discontinue indigent defense services if, at any point, the defendant was found no longer indigent. Other counsel, such as from private legal clinics, is then offered to the defendant. This is used rarely.

2. Compensation for Defense Counsel

As explained previously, Multnomah County attorneys who provide indigent defense services are compensated either on an hourly or a contract basis. Of the two methods, the greatest controversy surrounds the hourly method. Some witnesses claimed that the low hourly rate encourages attorneys to extend cases unnecessarily, taking them to trial rather than plea bargaining. Others said that because the \$30 per hour fee is inadequate to cover attorneys' overhead costs, indigent cases are likely to attract only the least experienced lawyers, presumably resulting in a lower quality of defense work. Some attorneys believe the \$30 hourly rate so low it is unconstitutional.

A Portland attorney, Jenny M. Cooke, recently requested the Oregon Supreme Court to review fees she was awarded by the Oregon Court of Appeals. Ms. Cooke contended that the court arbitrarily cut her fees, without a hearing, for work on several appeals for indigent defendants. In that case, State v. Longjaw, 307 Or.47 (1988), the Supreme Court held that, if the appellate court judges determine that an attorney should not receive the fee requested, the attorney must have an opportunity to submit additional documentation or explanation to the court. The court must also provide reasons for its decision to cut requested fees. The Supreme Court emphasized that fee decisions should be based on what the attorney deserves to be paid rather than "a perceived lack of funds to pay for indigent defense."

In a recent survey, the Oregon Criminal Defense Lawyers Association found that the average overhead cost for defense lawyers was \$36,648 per year. The OCDLA states that the median net income for an attorney working five days per week and billing six hours per day at \$30 per hour for 52 weeks would be \$10,152 after overhead expenses.

Contract attorneys raise different compensation questions. Some witnesses supported this compensation method on quality grounds. They claimed that, in addition to providing expertise in handling a volume of cases efficiently, the flat fees paid contract attorneys offer certainty to those planning indigent defense budgets. The bid system gives contractors an incentive to keep the overall cost low; the case-by-case compensation gives an incentive to plea bargain or keep any trial short. Your Committee also heard that contract providers offer a stable corps of attorneys who know the system and understand their clients needs.

On the other hand, prior Spangenberg studies indicate that states which have initiated a contracting system are usually happy with it for only a short time. Contractors may decrease their profit margin to receive a contract initially. But after several years, they may seek more compensation or cut services, resulting in either increased cost or lower quality work.

Because Oregon has only one public defender office which handles indigent defense appeals and consumes a small fraction of the indigent defense budget, your Committee did not have sufficient data to evaluate the costs and compensation implications of a public defender system.

The quality issues associated with indigent defense attorney compensation are addressed separately below. Several solutions for other aspects of this problem, however, were suggested. For example, your Committee heard many times that the Legislature should increase the reimbursement rate for legal counsel from its current level of \$30 per hour. Attorneys do not support the current fee schedule. Indeed, one witness representing the Oregon State Bar Board of Governors told your Committee that the \$30 hourly fee was intended as a minimum, but has become a maximum. The Bar is recommending an increase to \$60 per hour. In connection with adjusting the minimum hourly rate, the Legislature also could propose a scale of hourly rates depending on experience. Neither suggestion would lower the cost of indigent defense services.

In contrast, as a direct "funding measure", the 1987 Legislature considered a bill recommending that attorneys and doctors offer 200 hours of free legal or medical service annually. This approach raised concern about the qualifications of all attorneys (e.g., corporate, real estate) to provide criminal law counsel. Some witnesses suggested that the Bar Association should require appropriate pro bono services, not the legislature.

A statewide public defender system also was urged as a means to equalize pay levels between prosecutors and defenders and to create accountability. Your Committee received no evidence, however, whether this approach would lower or raise the financial burdens of indigent defense. It would centralize the currently decentralized defense function, enabling a more coordinated system.

C. Evaluating Indigent Defense Services

Three further problems with Oregon's provision of indigent defense services became clear to your Committee. First, obtaining accountability for the overall indigent defense system is made difficult by the lack of a data base cooperatively developed among all participants and capable of providing qualitative as well as quantitative data. Second, accountability of attorneys who provide indigent defense

services is difficult because there are no standards by which to measure the quality of the amalgam of actions and decisions that are a "defense". Third, because the legislature disbanded the Indigent Defense Board, the State Court Administrator's Office, with an inherent conflict of interest, was charged with the administrative and program responsibilities of indigent defense. Your Committee heard testimony that no one entity was charged with advocating the needs of indigent defendants nor with addressing the many complicated social and moral issues versus cost priorities of indigent defense in Oregon. Some solutions to these problems may exist, however.

1. Data Base

In 1981, the legislature transferred responsibility for the court system and indigent defense from the 36 counties to the state. Each county had its own record-keeping system and its own system for providing indigent defense services. When the State took over the indigent defense system, the estimate of costs was not based on uniform data provided by counties. In some cases, the data was inaccurate, thus the initial estimate was well below the actual cost. The budget created in 1985 was set without the benefit of prior historical data to judge the cost of defending indigents.

Efforts are underway to create an accurate data base. As previously noted, the SCA has begun collection of certain data for indigent defense cases in Oregon. Your Committee heard testimony, however, that the information is of limited usefulness to other participants in the system because they do not receive reports regularly and the type of information collected was decided without their input. Some also testified that the reporting task is burdensome to providers of indigent defense services and is becoming a significant, unreimbursed cost. Moreover, the data covers only quantitative facts. It provides no basis for assessment of more qualitative aspects of indigent defense such as the value of diversion or an alternative sentence in a particular case.

Other data collection efforts also are underway. To gather more information on the Oregon court system in general, each county has begun using a statewide data entry system called the Oregon Judicial Information Network (OJIN). Local court administrators and state judicial system employees are uniformly enthusiastic about OJIN, although problems still must be ironed out. Although it is estimated that OJIN will produce reliable statewide data in 18 to 24 months, problems still remain with its implementation. For example, OJIN system lacks uniform definitions. A "case" is a key term for indigent defense in examining such issues as the number of cases, the trend in case filings, and the cost per case. No uniform definition of a "case" exists, however. A district attorney may charge one or more defendants with one or more crimes, either in one indictment or in separate indictments for each individual or each alleged crime. One

indictment, regardless of the number of crimes charged, equals one case, while multiple indictments of one person as the result of one incident equal multiple cases.

2. Quality Legal Representation

Your Committee specifically asked witnesses whether either contract providers or individually appointed lawyers provide less than adequate representation to their clients. The responses most frequently revealed a perception that, at least in Multnomah County, individually appointed attorneys take their cases to trial more often than do contract providers whose clients more frequently plea bargain. Arguably, individual attorneys, who are paid by the hour, have an incentive to increase their fees by going to trial. Conversely, contract attorneys, paid a flat fee, have an incentive to decrease the hours spent on each case by reaching a resolution before trial. Contract attorneys, however, see more cases and may have a better sense of plea bargains and better bargaining ability.

Aside from some impressions and statistical evidence that court-appointed attorneys take more cases to trial than private contractors, your Committee found no evidence that either group of lawyers uses the system more cost effectively. Your Committee also found no specific evidence on the issue of the quality of representation.

The Multnomah County district attorney testified that a system of public defenders lends quality and stability to the indigent defense component of the criminal justice system. The district attorney did not support an exclusive public defender approach, however. The Oregon Criminal Defense Lawyers Association, a professional organization for criminal defense lawyers, supports a mixed system of contract providers and individually appointed lawyers. Some witnesses suggested that a public defenders office could provide the best quality of service. No one, however, appeared to have analyzed the cost effectiveness of one system over another.

Another solution proposed was that the Oregon State Bar establish a committee to evaluate the quality of service to the indigent and use its sanctions to ensure that reasonable quality of service is provided. The Bar also could certify competency for criminal casework.

3. Administration

The Legislature abolished the State Indigent Defense Board in 1987, just two years after creating it with a broad mission but few funds and minimal staffing. The SCA then assumed responsibility for administering indigent defense in Oregon. As the SCA itself has stated, however, the office has a "conflict of interest inherent in having a defense advocate system administered by an entity that is charged with

being the impartial and neutral forum that adjudicates an issue or matter brought by two or more adversarial parties."

Moreover, while data collection has begun, no entity currently is charged to collect or analyze data encompassing the entire concept of indigent defense. Left unaddressed are the broader issues of effectiveness, use of diversion and dispute resolution, quality of service, recidivism, and the social purpose and treatment of the underlying causes of crimes committed by indigents.

Other issues which your Committee was told needed further scrutiny include the need to:

- o analyze whether Oregon voters should alter the currently broad constitutional right to counsel that it provides indigent defendants at trial and on appeal, weighing both the cost-effectiveness and constitutional questions such a proposal would raise.
- o develop further decriminalization proposals, considering the competing social policies inherent in such measures.
- o establish procedures which cause the standards for defining indigence to be utilized uniformly throughout the criminal justice system.
- o evaluate the numerous cost containment suggestions your Committee heard, such as expanding assistant positions or clerkships in the public defender's office, establishing networks to assist attorneys with services indigent defendants require other than a legal defense, allowing private attorneys to contract to provide defense services on an individual basis or as part of a consortium, streamlining court procedures to avoid extended waiting periods for attorneys and allow telephone appearances, monitoring and controlling more closely the fees charged by non-attorneys involved in a legal defense, investigating possible insurance reimbursement of costs for eligible individuals, and setting flat fees for the defense of certain crimes.

D. The Spangenberg Study

The 1987 Oregon Legislature appropriated funds for the State Court Administrator to hire a consultant to assess 1) the state's current indigent defense service delivery system and 2) the feasibility of specific modifications or alternatives. The contract was awarded to the Spangenberg Group, a six-person private research firm generally regarded as one of the country's most experienced and knowledgeable indigent defense consultants.

The Spangenberg Group completed a draft of its report in September, 1988. In response to our charge, a summary of their findings and recommendations in this first draft is provided below, followed by a critique of their report and a discussion of its relationship to your Committee's findings.

1. Findings of the Spangenberg Group First Draft

Oregon's indigent defense system meets constitutional requirements, but the quality of service offered varies between jurisdictions depending on the providers and funds available.

Oregon is second nationally in the number of indigent cases per capita. This volume is increasing.

Because of the increase in volume and other factors, indigent defense costs are unlikely to decrease. Some containment and control is possible through efficient management of the system.

Problems with the indigent defense system are directly related to problems with other sectors of the criminal justice system. If costs are a concern, solutions will not be found solely through changes to the indigent defense system. For example, addressing the adequacy of indigent defense will not reduce the massive increase in drug-related violent crimes, nor will it assist in alleviating pressures placed on the system by the public which wants tougher enforcement of the law.

The current practice of contracting for indigent defense services causes instability and may result in inconsistent service delivery. National experience suggests that a contract system works well in the beginning, when contractors are willing to cut prices to get the work. However, in the long run this strategy cannot be sustained, resulting in more experienced firms withdrawing, leaving less qualified ones to fill the gap. In addition, Oregon's funding crisis has not allowed long-term planning and has in itself consumed valuable resources that should be devoted to providing service.

Oregon historically has sought to balance contract providers with private assigned counsel. This is threatened by private attorneys withdrawing from the system due to compensation issues and the increase in consortiums in an effort to increase compensation. The latter consist of private attorneys from different firms who join together to handle indigent defense cases.

Administration of the indigent defense system by the judiciary creates a conflict of interest. First, it is likely that the Chief Justice of the Oregon

Supreme Court could be asked to hear a case regarding the administration of the indigent defense system which is under his supervision; and second, local judges compromise their impartiality when they become involved in the selection and compensation of defense counsel.

2. Recommendations of the Spangenberg Group First Draft

o The agency which administers the system should establish guidelines for providers to guarantee adequate representation. This responsibility includes follow-up and monitoring.

o The State Court Administrator's office should change its contracting processes to include standard minimum costs per type of case, contract terms of at least two years, and provisions for administrative costs. It should also eliminate contracts based solely on percentage of cases. In doing this, the goals are to decrease inequities that exist in different areas of the state in compensation, emphasize quality of service rather than simply cost, stabilize the system, and increase its efficiency.

o The Legislature should increase appointed counsel fees, which should continue to be based on the amount of time spent on each case. Money should also be spent on support services to train these attorneys.

o The state should continue efforts to reduce the number of cases requiring indigent defense services, without jeopardizing the right to counsel.

o The state should continue efforts to increase accountability and cost-efficiency and should establish standard methods for recoupment.

o Policymakers should review the administration of the system. While centralized administration is desirable, locating administration in the judiciary causes a conflict of interest. Alternatives include an independent state commission or a public defender program.

o The legislature should fund the system at a level sufficient to meet needs, and eliminate the piecemeal release of funding that currently occurs.

3. Analysis of the Spangenberg Report

The Spangenberg Group brought a high level of experience with the issue of indigent defense to its study of Oregon's system. The group has conducted similar studies in many states and has a good vantage point from which to evaluate Oregon's particular situation. This expertise was best employed when the study used data from other states to

provide a context to Oregon's problems. It is useful to know, for instance, that states shifting recently from a county-administered to a state-based system have all reported increased costs (although it is not known whether costs are truly higher under a state-operated system or merely more thoroughly reported).

The Spangenberg Group, as did your Committee, found Oregon's indigent defense problems to be an outgrowth of larger problems in the criminal justice system. An increased number of persons entering the system and the large number of acts treated as crimes in Oregon create great demand for indigent defense services. The group went further than your Committee on this relationship and examined the effect of jail space on the demand for indigent defense services. The report's findings, however, were ambiguous. On one hand the authors state that the lack of adequate jail capacity causes persons convicted of crimes to recycle through the system frequently, committing additional offenses and demanding more defense services. On the other hand, the group concludes that an increase in jail space causes judges to hand out more and longer jail terms, which again tie up the criminal justice system.

It is strongly stated in the report that stability in funding of the system will help to bring increased efficiency, and a two-year contract with providers is recommended. "Fine-tuning" of the system, which was mentioned by the Multnomah County district attorney, is recommended, including decriminalization, use of diversion, and improved screening.

The Spangenberg Group also recommends a standard approach to recoupment, but does not encourage readers to expect a self-supporting system as a result. This conclusion is supported by other witnesses your Committee interviewed. For those who believe recoupment is the solution to the funding problem, Spangenberg corroborates your Committee's finding that it would fall short as a solution.

It is evident in the report that most of the Spangenberg recommendations will cost the state more money in the short run. One of the most powerful messages the report provides, although it does not quantify the cost, is that the good quality defense costs money. The Spangenberg Group notes that a strong indigent defense system is part of our constitutional system of government, and deserves to be funded adequately.

A key assumption of the report is that there are no "Cadillac and Ford" models for indigent defense. The Spangenberg report contains very little about containing costs, with the exception of the "fine-tuning" and recoupment recommendations. However, it is evident that the authors do identify service being provided at varying levels. For example, they find that inexperienced attorneys and administratively unsupported law firms provide lower quality service than do full-time contract firms and public defender

offices. While it is necessary for states to provide adequate representation under the law, the public's desire to provide the service at less cost causes one to question whether the Spangenberg approach truly does represent the "Cadillac" model, or whether tolerating a certain level of staff turnover and inexperience is ethically and politically acceptable.

The Spangenberg report contains some recommendations and opinions that are not explained or reinforced with data. For example, the report states that the use of private attorneys is desirable in an indigent defense system, but it does not indicate whether this might be because those attorneys have expertise not possessed by public defenders. The Spangenberg finding that the quality of service provided by contract firms tends to deteriorate in the long run did not include evidence that such deterioration in quality is occurring in Oregon.

Questionnaires and interviews with judges, attorneys, and others in the criminal justice system were relied upon heavily in preparation of the report. This is quite positive in that it allows the consultant to hear many different viewpoints and to appreciate the differences between Oregon and other states. However, the study seems excessively diplomatic in that it makes few hard-hitting recommendations backed by empirical evidence. There is perhaps too much political sensitivity and not enough hard data about what works and what doesn't in indigent defense.

Through no fault of the Spangenberg Group, the sources of useful data were quite limited. For example, specific information about recoupment problems is not, and probably cannot be, quantified until the State Court Administrator's office has had its new computer system in operation for several years. The same is true regarding the frequency of judges cutting attorneys' fees for indigent defense cases.

The Spangenberg Group was not asked to analyze or recommend a reorganization in the administration of the system. The report does give some indication of what the recommendation would be, since one of its findings is that having the system operated out of the State Court Administrator's office is a conflict of interest. A concrete recommendation would enable the system to continue to be operated on a statewide basis and avoid the conflict of interest currently being experienced.

The final conclusion of the study, that additional funding must be provided, is backed by the quote, "Democracy is an expensive proposition." It is true that the recommendations of the Spangenberg report would definitely cause costs to rise, since they include raising attorney fees, providing training, and providing ancillary support services to providers of indigent defense. There is no attempt, however, to quantify the costs of these increases.

IV. CONCLUSIONS

Your Committee found the complex issues surrounding the provision of indigent defense services in Multnomah County to be inextricably related to the criminal justice system. What is a "crime" and what is prosecuted affect both the demand for and the cost of indigent defense services. Cost is not the only issue in indigent defense. Providing indigent defense services raises important questions of constitutional law and social policy.

Oregon broadly defines the constitutional requirement for indigent defense. Offenses carrying sufficient penalties entitle an accused to defense services.

No standard definition is used consistently throughout Oregon to determine who is indigent, although recommended guidelines were issued September 1987.

Oregon allows convicted defendants to receive indigent defense services on one or more appeals regardless of the substance or the likelihood of prevailing upon appeal. This may exceed the constitutional requirement, and it increases indigent defense costs.

Oregon does not divert enough defendants, indigent or non-indigent, from the criminal justice system through diversion, alternative sentencing or dispute resolution. Many of these alternatives offer programs to help defendants overcome problems which led to criminal activity. Diversion and alternative sentences both have short- and long-term positive benefits in decreasing the demand for and cost of indigent defense services. Careful screening and diversion into appropriate treatment or rehabilitation programs could avoid costly indigent defense services, trials, and incarceration. However, neither diversion nor alternatives to incarceration can be effective if there are no sanctions for failure to perform.

Oregon has not taken enough steps to control the cost of indigent defense services. Such steps include increased cost recovery; determining the most cost-effective mix of contract attorneys, appointed-attorneys, and public defender offices; and examining other cost containment suggestions.

Your Committee found no clear evidence that there is a higher quality of indigent defense services by any of the three types of providers of indigent defense services.

Evaluating indigent defense problems is more difficult because of the lack of adequate data to determine cost and the lack of qualitative criteria to determine cost-effectiveness of all components of indigent defense, including diversion.

Your Committee found that administration of indigent defense services by the State Court Administrator is a conflict of interest. An independent agency is needed to address the many complex issues surrounding the provision of indigent defense services.

The Spangenberg Group's first draft report offers a valuable national perspective on Oregon's indigent defense problems. The report is weakened, however, by excessive diplomacy and the lack of data that plagued your Committee's efforts.

Your Committee concludes that a system lacking consistent means to qualitatively measure cost effectiveness will perpetuate the public's impression that funds are not used effectively. Lacking a sense of effectiveness in the alternative options to trial and incarceration, the public may continue to press politicians not to be "soft on crime."

V. RECOMMENDATIONS

A. The Oregon Legislature should:

1. reestablish on a permanent basis and fund at adequate levels an independent Indigent Defense Board or Commission with statutory authority to accomplish the duties listed below under the Indigent Defense Board.
2. establish necessary statutory authority and means to require a partial payment ("contribution") system to the extent that it is cost-effective.
3. adequately fund a centralized system of uniform data collection and reporting to provide an annual evaluation of the effectiveness of all services for use by the Indigent Defense Board.

B. The Indigent Defense Board should:

1. apply and verify applicability of the state-wide indigence guidelines.
2. establish and administer local screening programs which recommend diversion or dispute resolution alternatives if appropriate.
3. assess and initiate partial payments if feasible.
4. develop a systemwide method of evaluating the effectiveness and quality of indigent defense services while assessing the costs of providing those services.
5. analyze and recommend standardized compensation levels for appointed counsel to assure a reasonable quality of service.
6. recommend to the legislature the most effective methods for delivery of indigent defense services taking into account Oregon's diversity.

7. Consider both the social policy implications and cost and make recommendations to the legislature concerning:
 - a) an amendment to the Oregon Constitution to narrow the Oregon indigent defense requirements to those required by the U.S. Constitution.
 - b) restricting the availability of indigent defense services for appeals within constitutional requirements such as with a review board to screen appeals to eliminate frivolous or unreasonable appeals and some minimum required payment from the defendant.
 - c) further decriminalization.
 8. develop a means to account for the affect decisions made by the legislature, State Court Administrator, judges, district attorneys, defense attorneys, and local governments have on the demand for and cost of indigent defense services.
 9. work toward increasing public awareness of the interrelationship between indigent defense services and the criminal justice system.
- C. Local governments should expand the availability of diversion, drug and alcohol treatment programs, non-incarcerative alternatives and dispute resolution programs and establish and seek adequate funding of screening defendants for placement in appropriate programs.

Respectfully submitted,

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APPENDIX A

Persons Interviewed

Philip Abraham, Judge, Multnomah County Circuit Court
Gary Babcock, State Public Defender
Beth Baldwin, Chairperson, Defense of the Indigent Accused
Committee of the Oregon State Bar
Judy Bauman, State Representative
John Bradley, Multnomah County District Attorney's Office
Mike Burton, State Representative
Ann Christian, Director, Indigent Defense Services Division,
State Court administrator's Office
Jenny Cooke, Attorney
Linda Draper, Clackamas County Indigent Defense Director
Carol Edmo, Metropolitan Public Defender's Office
John Geil, Attorney
Laurel Gembel, St. Andrews Legal Clinic
Jim Hennings, Director, Metropolitan Public Defenders
Janet Hoffman, Chairperson, Multnomah Bar Association
Indigent Defense Committee
Darlene Hooley, Clackamas County Commissioner and former
State Representative
Edward Jones, Multnomah Defenders, Inc.
George Joseph, Chief Judge, Oregon Court of Appeals
Sidney Lezak, Dispute Resolution Council, former federal
prosecuter and former Indigent Defense Board
Administrator
Bill Linden, State Court Administrator
Edwin Peterson, Chief Justice, Oregon Supreme Court
Judy Phelan, Multnomah County District Attorney's Office
John Potter, Director, Oregon Criminal Defense Lawyers
Association
Joe Rieke, Attorney
George Rives, Attorney and former member of Indigent Defense
Board
Kris Olson Rogers, Attorney and former member of Indigent
Defense Board
Michael Rose, Attorney
William Savage, Attorney
Michael Schrunk, Multnomah County District Attorney
Jack Schwartz, Attorney
Bob Spangenberg, President, The Spangenberg Group
Dick Springer, State Senator
Mark Sussman, Attorney
Bill Taylor, Counsel, Legislative Judiciary Committee
Mike Thorne, State Senator
William Uhle, Attorney
Robert Wolfe, Attorney
Dan Wood, Director of Indigent Defense, Multnomah County

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 Steven Gallagher, Judge, Multnomah County Circuit Court
 Mike Hansen, former Administrator, Indigent Defense
 Board
 Jim Hennings, Director, Metropolitan Public Defenders
 John Hutchins, Attorney
 George Joseph, Chief Judge, Oregon Court of Appeals
 Bill Linden, State Court Administrator
 Chuck Paulson, Oregon State Bar Board of Governors
 Pat Smith, Spangenberg Group
 Steven Wax, Federal Public Defender

APPENDIX B
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